REASON PREVAILS...

Yes, mm-hm, I think this guy will definitely succeed as a truck driver. Yep. A trucking company sent a driver applicant for a pre-employment drug screen. The applicant left before undergoing the test, allegedly because he had "an aversion to being in small spaces with others." He also claimed to have bipolar disorder and an anxiety disorder. (How he planned to spend hours in the cab of a truck with these conditions was not explained.) The trucking company withdrew the offer of employment on the ground that the applicant had failed to comply with the drug test requirement. A federal court in the Western District of Kentucky assumed that the applicant was disabled within the meaning of the Americans with Disabilities Act Amendments Act but still granted summary judgment to the trucking company, dismissing the lawsuit.

Big trouble in Riverdale. Archie Comics Publications filed suit in New York City to enjoin its co-Chief Executive Officer from coming to work or attending a comics convention that took place in July, after an investigation showed that she threatened employees, referred to male executives as [male private parts], made explicit references to female employees' [female private parts], and generally engaged in other bizarre and highly inappropriate behavior, all of which is detailed in an attachment to the complaint. And we thought Veronica Lodge was mean!

AND REASON FLAILS...

Sure glad the ever-vigilant EEOC is looking out for us, aren't you? The EEOC has been all over employers who use applicant screening devices such as criminal background checks, credit checks, and who "discriminate" against applicants who are unemployed. In the past, the agency has also aggressively pursued the Hooters restaurant chain for "discriminating" against males in wait staff positions (Hooters eventually won) and is currently pursuing a "gentleman's club" for discriminating against stripper candidates whose ethnic background apparently is not what the clientele are looking for. (We kid you not.) In its latest, the agency is suing a Puerto Rican company for discriminating against men seeking management positions. The company sells makeup and beauty products. Our tax dollars at work.

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LABOR & EMPLOYMENT INSIGHTS

POST, TWEET & LINK: EMPLOYER LIABILITY IN THE SOCIAL MEDIA CONTEXT

Rob Bernstein & Susan Bassford Wilson

A recent study by the Pew Trust found that the majority of teenagers and very young adults rarely email or use instant messaging because texting, posting and tweeting are so much quicker and easier. (Also, the teens reported that their parents don't communicate this way, so using social media presumably helps them avoid scoldings about their acronyms, misspellings, and poor grammar.)

These teens will be in the workforce soon, if not already, and even the current workforce is becoming proficient in social media. So it's a good idea for employers to make sure that they understand their rights and responsibilities in this area.

Social Media 101: Basic Principles of Interpretation

Companies can certainly face liability for employees' misuse of social media, but employees face their own set of risks. Courts are increasingly permitting evidence from private social media accounts as evidence in discrimination, harassment and retaliation cases. Information gathered from social media accounts rarely hurts employers, but it often hurts employees.

That having been said, employers should be aware of the position of the National Labor Relations Board on disciplining or discharging employees who discuss working conditions using social media. The National Labor Relations Act protects "concerted activity," which includes employee actions that are undertaken for the benefit of others and that relate to conditions of employment. The NLRB is currently taking the position that bad-mouthing an employer or supervisor on social media may be protected concerted activity, and is going after employers who discipline or discharge employees for this type of communication. (There is an exception for concerted activity that is disloyal, reckless or maliciously untrue.)

Company Policies Regarding Employee Use of Company Property

Although the Supreme Court has not directly addressed the scope of employer liability for employee conduct on social media sites, its most recent opinion addressing employee rights suggests that a company's policy concerning computer, internet and phone usage may play an important role. In *City of Ontario v. Quon*, the issue was whether a public employer's search of a employee's steamy text messages on an employer-provided pager constituted an unreasonable search under the Fourth Amendment. The city had distributed a policy stating that it reserved the right to monitor and log all activity including e-mail and Internet use, with or without notice. The policy further stated that users should have no expectation of privacy or confidentiality when using city resources. The city then made it clear verbally that this policy also applied to pagers. Under these circumstances, the Court concluded that the search was not unreasonable. However, the Court also noted that these issues should be resolved on a case-by-case basis.

(continued on page 3)

from the
EDITOR'S DESK

DESE GUYS MEAN BUSINESS!

Since the issuance by the U.S. Equal Employment Opportunity Commission of regulations interpreting the Americans with Disabilities Act Amendments Act, many lawyers and employers are skeptical that anything has really changed.

If so, they should have quickly been disabused of their skepticism by the $20 million settlement between the EEOC and Verizon, the largest settlement in the EEOC's history and a discrimination case brought under the old, more "conservative," ADA.

In 2008, during the Bush Administration, the EEOC issued a Commissioner's charge against Verizon, claiming that the company's no-fault attendance policy, which applied to union employees of the telephone companies (not the wireless companies), violated the ADA because it did not provide for exceptions when the absences were caused by "disabilities." In addition to the Commissioner's charge, charges were filed by the Communication Workers of America and several individual employees.

Apparently, Verizon and the EEOC have been in negotiations ever since, which culminated in the filing of a lawsuit and the simultaneous filing of a consent decree settling the case for the $20 million.

Since the ADAAA went into effect, we have been warning employers to beware of "inflexible" application of leave of absence policies. They should be open to extending leaves if necessary, and also to making a final attempt at reasonable accommodation before terminating an employee at the end of an extended leave of absence.

But it's important to note that the Verizon case did not appear to be about this. The Verizon case involved application of a no-fault attendance policy to all absences, including those that were caused by ADA disabilities. (Only limited information is available.)

The Family and Medical Leave Act already prohibits application of no-fault attendance policies to absences caused by FMLA-qualifying reasons. If the EEOC is going to take the position that they also can't apply to absences caused by disabling conditions, as it appears to be doing, then I am beginning to question whether employers shouldn't return to old-fashioned "fault-based" attendance policies.

In any event, the Verizon settlement has certainly put a gust of wind in the EEOC's sails, and employers should take warning: these guys are serious, so employers had better be serious about complying with the "new, improved" ADA.

Robin Shea, Editor

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HR UNDERCOVER

(continued from page 5)

Employers should also consider limits – not only what type of intrusions are legally defensible, but also which ones make sense for the everyday activities of employees. More than one company has found that heavy-handed security measures can destroy the goodwill and trust that is often necessary to create a productive work environment. As a result, employers should have a far-reaching communications program with employees at all levels, and this is particularly true when considering the invasive and controversial measure of video surveillance.

State of the Union

Unionized companies face additional complications in considering this issue. The National Labor Relations Board has held that the video surveillance of any portion of the workplace is a condition of employment that must typically be negotiated with the union and agreed upon before implementation (an exception exists where the use of surveillance cameras has been addressed and waived in the management rights clause or other provision of the collective bargaining agreement). Even in that circumstance, communication with and buy-in from the union will go a long way toward helping to ensure the success of such a program.

The Board – as well as the U.S. Court of Appeals for the District of Columbia Circuit – addressed the issue of an employer's obligation to bargain with a union over covert workplace monitoring in *Brewers and Maltsters, Local Union No. 6 v. NLRB*. The employer, without notifying the union, had installed hidden video cameras in an area where employees often took breaks. As a result of the monitoring, the company discovered widespread misconduct, including use of illegal drugs. The offending employees were terminated.

The union challenged the terminations, and the D.C. Circuit agreed that the company had an obligation to provide the union with notice and an opportunity to bargain over the installation of the cameras.

Even employers without unions are at risk if they implement a surveillance system in the midst of a union organizing campaign. The issue often raised by organizers is that the cameras chill union activity by either actually monitoring private conduct during non-working time or giving the impression of doing so. Unless the employer can show that there has been some property destruction that is not *"de minimis,"* or break-ins or other security issues that increased after the organizing campaign began, it will probably be on the short end of an unfair labor practice charge contesting implementation of the measures. And worse yet, the employer may unwittingly help the union's campaign by creating a negative impression in the minds of workers.

Any employer considering the use of monitoring systems should ensure that the monitoring is narrowly tailored, that there is a legitimate business justification for it, and that no reasonable expectation of privacy exists among the employees. Any employer who decides to keep an eye on its employees should keep an eye on the law, as well.

Cliff Nelson is Co-Practice Head of Constangy's labor relations practice group. Leigh Tyson practices in the areas of labor relations, and employment litigation prevention and defense. Both are in Constangy's Atlanta, Georgia, office. This is a modified version of an article that appeared in the September 2010 edition of **HR Magazine** *published by the Society for Human Resources Management.*

"More than one company has found that heavy-handed security measures can destroy the goodwill and trust that is often necessary to create a productive work environment."

QQ ANSWER

(from Quarterly Quiz, page 5)

Maybe. If her psychiatrist extends her leave again, the company may be able to safely terminate Rhonda's employment under its policy. However, if her leave is not extended, or if the next doctor's note returns her to work with restrictions or is ambiguous about what Rhonda can and cannot do, it's probably a better idea for the company to go through the "interactive process" with Rhonda one more time to make sure that she isn't now able to return to work with a reasonable accommodation.

Under the Americans with Disabilities Act Amendments Act, which liberalizes the definition of who is "disabled," Rhonda's depression would probably qualify as a disability. The Equal Employment Opportunity Commission frowns upon employers who "automatically" terminate employees at the end of their leaves of absence without considering the possibility of reasonable accommodation, which can include adjustments to the employee's regular job, transfer to a different job, or reclassification from full-time to part-time status, as well as other options.

Opinion

FIVE CRITICAL LEGAL AND SOCIAL ISSUES TO TAKE TO YOUR CEO

Zan Blue

Here are five critical issues with legal and social implications that you may have been too busy to think about or do anything about but that will vitally affect companies. They are in no particular order.

1. Many states, with corporate pressure, have passed so-called "tort reform." Tort reform is nice, but it addresses the wrong issue. The problem, in most places, is not runaway jury awards. In the words of insurers, severity is a problem, but frequency is the real problem. The real problem is that plaintiffs' lawyers, government agencies and employees can file claims with absolutely no merit whatsoever, costing the employer thousands of dollars in time and money, with virtually no chance of any bad consequences. The real problem is not how big the jury verdict is—after all, 95 percent of all claims are settled—the problem is the volume. Sometimes you have to fight just to teach them they'll have to take it, we aren't giving it away.

2. Judges are elected by popular vote in many cases. This means the judges need campaign contributions and votes. The contributions, not surprisingly since corporations pretty much can't make contributions, come from the plaintiffs' lawyers, government employee unions, and special interest groups with powerful agendas. Folks in business usually don't pay much attention except in rare cases. Judges, especially in rural areas, know how to get votes from ordinary folks. Think about it. Electing judges, especially appellate court judges, is a terrible idea. With all its faults, the system of appointing judges under the federal constitution is a much better way to go.

3. The federal agency regulating union activity is doing everything in its power to promote unions, including many rules they are trying to slip through when folks are napping. The National Labor Relations Board is trying to promote quickie elections, trying to outlaw legal advice for employers concerning union campaigns, suing Boeing to intimidate smaller employers after Boeing invested tens of millions of dollars in a right to work state to create hundreds of jobs, and generally trying to everything in its considerable power to promote labor unions. A few employers are paying attention, and the U.S. Chamber of Commerce is doing all it can, but the Chamber needs a lot more voices crying out.

4. The federal agency enforcing the affirmative action obligations on government contractors is taking numerous positions contrary to the law. The Office of Federal Contract Compliance Programs collected millions of dollars in settlements from banks and financial institutions years back using a legally bogus theory called the DuBray Analysis. Now the agency is asserting employers should pay more than hundreds of thousands of dollars based on the agency's fatally flawed statistical methods. Employers should fight the agency's efforts.

5. For more than a decade the prevailing philosophy in high school education has been that all students should be prepared to go to college. This has failed. The dropout rate is more than 30 percent. The high school graduates who are not going to college have no marketable skills. No wonder kids drop out. Many states, like Tennessee, are starting to realize we have to teach kids the skills that they use to get jobs. Has anyone tried to hire a plumber or electrician lately? Support skills training in high schools, and support community colleges.

These are just five of the issues that thoughtful employers should ponder. It doesn't include many other issues, such as federal mandates concerning health insurance. Employers are clearly on the legal firing line right now, and it is more serious than ever.

Zan Blue is the head of Constangy's Nashville, Tennessee, office. Zan practices in the areas of employment litigation prevention and defense, employer audits, and labor relations.

SOCIAL MEDIA (continued from page 1)

Employer Involvement in Coworker Communications Away From Work

One of the most common Internet issues facing employers today is offensive communications between co-workers on social media sites. If an employee is on the clock or on employer-provided equipment, the question of whether harassing or discriminatory conduct constitutes a workplace incident is relatively simple when analyzed under traditional employment law principles. (Hint: Almost certainly yes.) However, does offensive online interaction that occurs between two employees who are Facebook "friends" constitute workplace harassment or discrimination when the conduct occurs off company time and on private computers?

There is a jurisdictional split as to whether conduct outside the workplace may be actionable in any context – regardless of whether social media involvement exists. Some courts have found that, generally, employers have no obligation to prevent off-duty conduct or harassment by a co-worker that occurs away from the workplace, while others have found such conduct actionable. The EEOC's guidance says that an employer can be liable for harassing conduct outside the workplace, if there is a link to the workplace.

The safest course is for the employer to treat "social media harassment" by co-workers the same way it would treat harassment that takes place at work . . . as soon as the employer learns of it, or reasonably should have known.

Obviously, if a member of management behaves inappropriately in the social media theater, the risk of liability to the employer is much greater. In addition, statements made by members of management in social media can be used as evidence of a discriminatory or other unlawful motive.

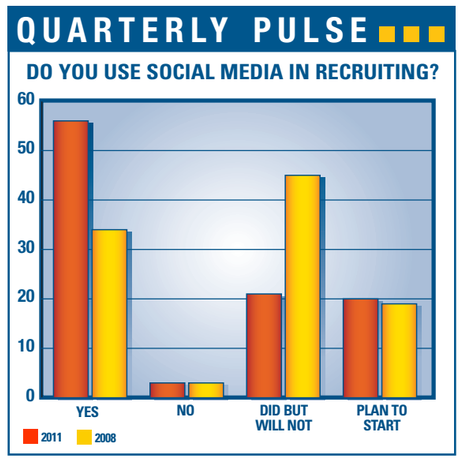
Policy Considerations

An effective social media policy should make clear that it exists for the protection of both employer and employee, and that the company respects individuals' rights to self-expression and to engage in concerted activity. The policy should prohibit use of social media that interferes with job performance; that harms the image and integrity of the company; that is discriminatory, harassing, retaliatory, or "bullying"; or that discloses the company's confidential and proprietary information. It should also prohibit employees from purporting to speak "on behalf of" the company. In light of the NLRB's position on concerted activity and social media, a disclaimer is also recommended.

Most importantly, in light of the Supreme Court decision in *Quon*, the policy should make clear that employees should not expect that their social media postings will be "private."

Rob Bernstein is the head of Constangy's offices in Princeton, New Jersey, and St. Louis, Missouri. He practices in the areas of labor relations, and employment litigation prevention and defense. Susan Bassford Wilson (St. Louis) practices in the area of employment litigation prevention and defense.

"There is a jurisdictional split as to whether conduct outisde the workplace may be actionable in any context... the safest course is for the employer to treat "social media harassment' by co-workers the same way it would treat harassment that takes place at work."



SOURCE: Society of Human Resources Management

GETTING TO KNOW US

JEWELL LIM ESPOSITO *(Fairfax, VA, employee benefits and ERISA)* received her bachelor's degree from the College of William and Mary and her law degree from the Brooklyn Law School. Jewell joined Constangy last year, but she has nearly 20 years of experience counseling clients on such matters as executive compensation, fiduciary compliance and tax qualifications for retirement plans. She is the author of "Avoiding 401K Disasters" in *Compensation and Benefits Review* and "Fiduciary Misrepresentation Claims" in *ERISA Fiduciary Review*. Jewell is a frequent speaker on all areas of benefit and tax issues. Jewell is director of the Oceans for Youth Foundation, and the National Association of Child Care Resource and Referral Agency. She enjoys playing board games and poker, and scuba diving with her family and friends.

PHILLIP LIPARI *(Princeton, NJ, employment litigation prevention and defense)* received his bachelor's degree *magna cum laude* in Honors Philosophy & Honors Communications from Boston College, and his law degree *cum laude* from Seton Hall University School of Law. During law school, Phillip was an editor of the *Law Journal* and was an intern with a local judge. Before coming to Constangy in 2010, Phillip worked as a public interest fellow with the New York State Attorney General's Office. Philip is also a Pop Warner football coach.

MARK TILKENS *(Madison, WI, wage and hour, labor relations, and employment litigation prevention and defense)* joined Constangy earlier this year as head of the firm's new office in Madison, Wisconsin. He received his law degree *magna cum laude* from Marquette University Law School. While at Marquette, he was a Zilber Scholar and a member of the law review. Before law school, Mark was a police officer, and was named "Top Cop of the Year," earned the "Teamwork Award," and was commended for outstanding performance in the line of duty. Mark has also served on a union executive board, which has given him insight into the inner workings of unions. Throughout his law career, Mark has tried more than 100 arbitration cases and has been named a Wisconsin Super Lawyer multiple times.

JEFF ROSIN *(Boston, MA, employment litigation prevention and defense)* received his bachelor's degree from the University of Pennsylvania and his law degree from New York University School of Law. Jeff assists Constangy's clients regarding all aspects of employment law, including non-compete/trade secret litigation and intracorporate disputes. Recently, Jeff has served as defense counsel in several class actions involving airlines, the cleaning franchise industry, a hospital system and a retailer. Jeff has written articles on such topics as confidentiality stipulations, hiring pitfalls, independent contractors, and social media policies. He is a frequent speaker on employment law topics and serves as a member of the Board of Directors for The New Workplace Institute. When Jeff is not working, he enjoys spending time with his wife and children. He also writes fiction in his spare time, and has one published novel, entitled *Lipstick's Legacy*.

MARCIA McSHANE WATSON *(Nashville, TN, workers' compensation and, employment litigation prevention and defense)* received her bachelor's degree from Florida State University and her law degree from Cumberland School of Law at Samford University. At Samford, she was a member of the Cumberland Trial Advocacy Board and received an award of merit in recognition of outstanding performance on the American Trial Lawyers Association National Trial Team. Since becoming an attorney, Marcia has argued in front of the Tennessee Supreme Court as well as the Tennessee Special Workers' Compensation Panel, and has been elected to the Bench & Bar Committee for the Tennessee Defense Lawyers' Association. Marcia is a frequent speaker on labor and employment law topics. She is also a member of the Lawyers' Association for Women and the Brentwood/Cool Springs Chamber of Commerce. When she is not practicing law, Marcia enjoys spending time with her husband, Glen.

HR UNDERCOVER: SURVEILLANCE IN THE WORKPLACE

Cliff Nelson & Leigh Tyson

Every week, we hear new stories about violence in the workplace. Drug use and the sale of controlled substances are on the mind of every employer, as are concerns regarding theft, lowered productivity, and on-the-job injuries. These issues, coupled with the ever-increasing costs of litigation, trouble both large and small employers, who must struggle to find an appropriate way to minimize risks and recognize vulnerabilities before they result in loss, litigation or injury. And, for an increasing number of companies, the solution to the problem lies in surveillance.

Employers are increasingly turning to the use of video surveillance cameras and similar high-tech security measures in an effort to monitor employees and prevent injuries, misconduct, and other types of loss. According to the 2007 Electronic Monitoring and Surveillance Survey, conducted by the American Management Association and the ePolicy Institute, 48 percent of the companies surveyed used some form of video monitoring in the workplace, while 66 percent admitted to monitoring their workers' internet usage. What's more, of the surveyed companies, 30 percent reported having terminated employees based on internet monitoring, and 28 percent had terminated employees for misuse of e-mails. If done properly, monitoring can increase productivity and curb misconduct; however, from a legal and human resources perspective, the implementation of a monitoring system in the workplace brings its own set of problems.

To tell, or not to tell?

In implementing a workplace surveillance program, the first issue that must be addressed is a practical one – namely, whether to tell the employees that they're being watched. On one hand, some employers believe that this type of security response should be implemented in secret so as to increase the effectiveness of the surveillance; by contrast, others feel that simply notifying employees of the monitoring may be sufficient to curb misconduct, and that the mere existence of surveillance can serve as a deterrent to problematic behavior. And, even more importantly, many employers have recognized that telling employees that they are being monitored gives them some degree of "fair warning," which may come into play if the situation develops into litigation.

From a legal perspective, disclosing surveillance activities is the best course. Letting employees know that they will be monitored removes their reasonable expectation of privacy – the element that often forms the basis for invasion of privacy lawsuits arising under common law. Although only a handful of states have enacted legislation to require the disclosure of workplace monitoring, or to create a private cause of action for invasion of privacy (Delaware, Connnecticut, California and Massachusetts, for example), the increased public focus on workplace privacy will probably result in additional legislation and litigation in more jurisdictions.

Most employers ultimately opt for disclosure, probably for this very reason – in the 2007 AMA Study, for example, 83 percent of the companies surveyed had notified employees that they would be monitoring their internet usage.

"Big Brother" backlash

Another consideration is employee morale. Employers who conduct surveillance risk the resentment of employees, who may think that their employer looks less approachable and more like "Big Brother." Disclosure of the surveillance can help, and probably even more helpful is a shared understanding of the problems facing the employer, and a recognition of the lack of other reasonable alternatives for addressing the issue.

(continued on page 7)

QQ QUARTERLY QUIZ

Rhonda's employer has a generous leave of absence policy that provides up to 12 consecutive months of medical leave. If the employee does not return before the end of the 12-month period, the employee is subject to "no-fault" termination.

Rhonda went out of work in August 2010 for depression after her supervisor told her that she needed to work harder. She qualified for short-term disability for the first six months, and then submitted a note from a psychiatrist certifying that she could not continue to work in her position for six additional months. It is now August 2011, and by the terms of the policy, Rhonda should be terminated.

The Human Resources Manager plans to send Rhonda a certified letter saying that, as of the one-year anniversary of her leave, she will be administratively terminated from the company. Is there any problem with doing this?

(answer on page 6)