

# EMPLOYMENT LAW ALERT

December 2009

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## Social Networking: Marketing Tool or Legal Minefield?

By: Jeffrey M. Schlossberg and Kimberly B. Malerba



Given the ever-increasing impact of social networking web sites on today's businesses and individuals' lives, it is more prudent than ever to remember that if no one is "tweeting" about your business yet, they may be soon.



As outlined below, whether in favor of it or not, you may be unable to prevent your company's name from appearing on social networking sites. However, it is imperative to remain ahead of the curve by making sure that you have appropriate policies in

place that address email, social networking, blogging and general Internet use by your employees.

Many companies permit and even encourage use of social networking in a positive way to promote their businesses. Whether it's Facebook, Twitter or LinkedIn, online networking is here to stay and often helps a company get the word out about its product or service. But a company must still take caution to prevent the disclosure of confidential information or trade secrets, as well as unlawful harassment of employees or other users in general.

Accordingly, employers should have a policy prohibiting conduct on the Internet that would disclose, or threaten to disclose, the company's proprietary information, trade secrets or other confidential information. This will protect the company if a third party claims the company waived its right to the confidential information because it appeared on the web. Additionally, your company's workplace harassment policy must also be made applicable to employees' Internet use. An effective Internet or social networking policy should include:

- A prohibition on disclosure of any sensitive, confidential, proprietary or financial information.

## **Previous Alerts**

**November 2009**

**October 2009**

**September 2009**

**August 2009**

**July 2009**

- A directive barring posting of any material that is obscene, defamatory, profane, libelous, threatening, harassing, abusive, or embarrassing to any person or entity.
- A requirement that a disclaimer be posted stating that the content is not associated with, or approved by, the company.
- A requirement that any employee who believes that web content is resulting in unlawful harassment be required to follow the complaint procedure set forth in the company's Workplace Harassment policy.

Employers must also keep in mind that New York law generally prohibits an employer from discriminating against an employee because of, among other things, an employee's legal recreational activities outside of work hours, off the employer's premises and without use of the employer's equipment or other property. The law defines "discriminate" to include a refusal to hire, employ or license a person, or the termination of a current employee for unlawful reasons. The law also prohibits an employee's use of these legal recreational activities to negatively impact the employee's compensation, promotion or terms, conditions or privileges of employment. Thus, it is difficult for an employer to interfere with its employees' lawful use of the Internet outside of working hours where such use does not take place on the employer's premises.

However, the law does not protect an employee who engages in an activity that creates a material conflict of interest related to the employer's trade secrets or proprietary information or violates company rules by engaging in unlawful harassment of other employees. Therefore, while the off-premises activity may not be prohibited, with a properly drafted policy, an employer can impose discipline or termination for violation of that policy.

While these steps may not prevent your company from being written about online by employees and others, they should assist in protecting the company from any claims that it voluntarily disclosed confidential information through an employee's disclosure on the web. Further, a policy will enable employee's to raise harassment claims where necessary so the company can promptly and effectively address and eliminate any allegedly harassing conduct.

## **An Ounce of Prevention: Averting Holiday Party Liability**

Despite the down economy in 2009, according to the Society for Human Resource Management, 70 percent of companies are planning some form of holiday celebration, even if scaled down from previous years. It is, therefore, appropriate to take this opportunity to outline certain steps employers can take to minimize liability arising out of company-sponsored holiday parties.

- Restrict alcohol consumption. For example, distribute a limited amount of drink tickets to employees and prohibit "shots."

- Hire professional bartenders (not company employees) and instruct them to report anyone who they feel has had too much to drink.
- If serving alcohol, serve an appropriate amount of food as well as sufficient non-alcoholic beverage options.
- Instruct managers that they are "on duty" at the party and to keep an eye on subordinates.
- Pre-order a sufficient number of taxis or arrange a car service to take employees home who request it at no cost to them and with "no questions asked."
- In advance of the party, remind employees that while the company encourages everyone to have a good time, the company's code of conduct, anti-discrimination and anti-harassment policies remain in effect during the party.

These small steps can go a long way in preventing and/or minimizing company liability. Even with an ounce of prevention, everyone can still have a great time.

Happy Holidays and Happy New Year to all of our clients and friends.



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