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Social Media: Risky Business of Risk Aversion*

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Examples of Social Media



- Social Networking sites, such as Facebook and Yammer
- Video and photo-sharing websites, such as YouTube and Instagram
- Micro-blogging websites, such as Twitter
- Blogs, such as SHRM Blog and Huffington Post
- On line forums, such as Google groups

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Recruiting



- **Primary benefit-expands applicant pool**
  - Reaches passive applicants
  - Diversity benefits: Linked In affinity groups

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Recruiting



- **Cautions:**
  - Potential adverse impact if rely solely on social media
  - Timing of targeted “affinity recruiting” and “reverse discrimination”
- **Critical:**
  - EEO/AA tagline
  - Document retention

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Screening



- **Benefit—may learn information relative to applicant's suitability for job that you otherwise would not learn in the interview process**
- **Concern—access to information about protected status of applicant becomes known and may be seen as basis for adverse employment decisions**

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Screening



- **Risk management, not risk avoidance**
- **If you use social media to screen as part of decision making, following steps minimize (not eliminate) risk:**
  - Never ask for passwords
    - 18 state laws prohibit in employment context
    - Federal Stored Communications Act
      - Prohibits unauthorized access to stored messages
      - Creates risk in all 50 states—civil and criminal

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Screening



- **If you use social media to screen as part of decision making, following steps minimize (not eliminate) risk:**
  - End of process (part of background check, for example)
  - HR (not hiring manager) conducts review
  - Consider reviewing only select social media platforms
  - Consistency in position(s)
  - Print out and document social media content of concern

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Screening



- **If you use social media to screen as part of decision making, following steps minimize (do not eliminate) risk:**
  - Look only at public content only
  - Look at applicant's content only (not what others say about him or her)
  - Provide opportunity to explain (imposture blogs, for example)
  - Comply with FCRA if use 3rd party

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Sales and Marketing



- **FTC rule: must disclose employment or other affiliation (otherwise, material omission) if "promotional" posting**
  - Not limited to employer networks; applies to employees who use personal networks to post promotional content
  - Broad definitions of:
    - promotional content
    - promotional context
  - Address in policy; expand in training or FAQ

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Sales and Marketing



- **FLSA & Non-Exempt employees**
  - Risk: off-the-clock “promotions”
  - Establish time frames for compensable promotional activity
  - Admonition to managers:
    - Never recommend, require or encourage such promotional activities without setting parameters for payment
    - Report if discover unauthorized promotions

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Investigations



- **Potential benefit: evidence inconsistent with purported reason for absence**
  - Cautions
    - Do not ask for passwords
    - Be careful in how you ask for a copy of a private posting if not offered initially; frame to minimize argument that employee was coerced to provide

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- **Potential benefit: evidence inconsistent with purported reason for absence**
  - Cautions (continued)
    - Danger zone: looking at an employee's public profile whenever an employee is on FMLA or other protected leave without regard to suspected abuse

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Purely Personal Social Media



- Employees should make clear, where reasonably possible, personal and not on behalf of employer [Mitigate NLRB risk]
- Develop FAQ to provide examples of when and how to make clear personal (blog versus “like”)
- Make clear employer’s policies may apply to personal social media, discussed below

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References



- **Issue: Casual references on LinkedIn or other professional social media sites**
- **Material legal risk: Evidence of pretext in EEO claim**
- **Recommendation**
  - Make clear to managers the application of the "no reference" rule to social media
  - Potential exceptions, if any, must be approved by HR (and do not provide on social media)

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Endorsements



- Trade secret considerations—endorsement inconsistent with trade secret status of identity of customer or client
- Guidance to sales people: whether and how to seek endorsements (other legal issues, too, such as under FINRA)
- Monitor and take corrective action as appropriate

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Ownership



- **Who owns professional social media on behalf of the employer?**
- **Employer as a matter of copyright law**
  - Work for hire
  - But consider spelling out so no confusion on part of employees
- **Independent contractors: must address or they own**

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“Friending” Subordinates/Constituents



- **Benefit: engagement**
- **Risks:**
  - Obtain information about protected status of employee (which may be seen as basis for subsequent adverse action)
  - Evidence of perceived favoritism
  - Failure to investigate legal complaints that you “miss”

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“Friending” Subordinates/Constituents



- **Recommendations:**
  - Consider training/guidelines/restrictions on “friending” subordinates or others over whom institutional authority
  - Implications for HR/legal: scope of institutional authority relative to “constituents”
  - Guidance on how to “unfriend” and survive

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Linking In with or Following Colleagues



- **Substantial potential benefits for HR and other leaders**
- **Examples**
  - Mentoring tool—how is subordinate using social media
  - Retention tool—evidence of potential departures (individual or collective)
  - Early warning signs of potential bias (social media is form of social inclusion)
  - Influence barometer

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Internal Social Networking Site



- **Employer created forums for employees to post (electronic bulletin board)**
  - Example: Yammer
  - Benefits:
    - Employee engagement
    - Knowledge of discontent and opportunity to respond to same

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Internal Social Networking Site



- **Risks**
  - Forum for union activity or other collective activity
  - Monitoring?
    - No: EEO risk of "tolerating" offensive postings, such as racial slur
    - Yes:
      - NLRB surveillance
      - Duty to minimize alleged wrong doing of which you have actual or constructive knowledge
- **Recommendation: monitor but no targeted monitoring of protected activity**

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Internal Social Networking Site



- **Terms of Use**
  - Consider limiting use to defined purpose, such as quality improvement
  - On other hand, there are risks in limiting use to defined purpose
    - Loss of engagement
    - Practical benefit of knowledge (without unlawful surveillance)

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Limitations: When & Where of Personal SM



- **NLRB rules re: personal social media**
  - Can prohibit during working time (not work day)
  - Can you prohibit use of employer technology?
    - Intuitive—yes
    - But e-mail case (Purple Communications) may suggest "no" during non-working time
- **Importance of consistency in application**

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Employment Policies



- **Social Media policy should make clear the application of employment and other policies to social media (professional and personal)**
- **Examples only**
  - Confidentiality
  - Harassment

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- **NLRB risk**
  - May be seen as prohibiting or chilling protected concerted activity under NLRA
  - Reactions:
    - Under: ignore risk
    - Over: scrap rule

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Employment Policies



- **NLRB risk**
  - Contextual approach to mitigate risk with regard to stated policies
    - General rule: provide examples that have nothing to do with what is even arguably protected concerted activity
    - Examples
      - Confidentiality
      - Harassment

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Employment Policies



- **NLRB risk**
  - Unstated policies
  - NLRB v practical

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Non-Disparagement



- **Background**
  - Disparaging postings may be protected concerted activity under NLRA (broadly interpreted by NLRB)
  - Disparaging postings may be protected under other laws too, such as EEO laws

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Non-Disparagement



- **Alternative ways to address**
  - Bullish—general prohibition
  - Carve out(s)
    - How robust must the NLRB carve out be?
      - Necessary in proximity to each rule to which NLRB carve out may apply?
      - Carve out to carve out for supervisors and managers not protected by NLRA?
      - Other carve outs for other laws, such as EEO or whistleblower?

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Non-Disparagement



- **Alternatives**
  - Contextual—include among "list of horribles" (NLRB Costco case)
  - Silence
    - Lacks pristine notice
    - But sometimes pristine notice is bulls eye for litigation

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Non-Disparagement



- **Supervisory reporting procedure**
  - Supervisors and above should consult with HR if any postings of concern before taking any adverse action
  - HR, with guidance from legal, can help determine:
    - Whether posting is protected or unprotected
    - Whether duty to investigate and/or take corrective action

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Twitter as Source of Information



- **Follow—consider following**
  - HR professionals
    - Organizations, such as SHRM and US Chamber
    - Individuals, such as Sue Meisinger and Lisa Horn
  - Leadership mavens, such as TalentCulture
  - Legal authorities (both sides of employment aisle)

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Twitter as Source of Information



- **Follow—consider following**
  - Industry groups, such as American Hospital Association
  - Government agencies
    - Employment, such as EEOC
    - Others relevant to your business, such as SEC

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Twitter as Source of Information



- **Followed**
  - Check who is checking on you
  - Block feature

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Litigation Tool



- **Evidence in employment disputes**
- **Consider as part of litigation holds**
  - Defensive
  - Offensive

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