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## Social media present opportunity, pitfalls

The rapid move by businesses to exploit the potential of online social media, as well as the exploding use of



### GUEST COLUMN

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social media by employees, is creating a number of obvious (and not-so-obvious) potential legal and practical land mines for companies of all sizes.

Employers are increasingly using online social media for employee recruiting, screening and monitoring, as well as for developing and expanding networks, marketing products, and sharing information and ideas.

Of course, aside from a corporate entity's online presence, countless employees also conduct regular activity on online social platforms for personal as well as business use. And it has become increasingly apparent that the many advantages of online networking are not without an Achilles' heel. Here are a few pitfalls to be aware of:

#### ■ When small missteps have large consequences

During the course of a lawsuit, discovery of a business's records now often includes reasonable access to relevant electronically stored information, including old online postings made by its employees.

Individual claimants in employment lawsuits are also increasingly looking to obtain records of postings on online social media. Many of these online communications are made with little forethought and no expectation that they can or will be publicly viewed. But such offhand

postings may carry the unintended consequence of divulging trade secrets, revealing clients and disparaging co-workers, clients or competitors, any one of which can carry widespread reverberations.

Particularly in the employment law context, online social media is playing a greater role in wrongful termination, discrimination and sexual harassment claims. For instance, the nearly 50 percent of employers who screen applicants by viewing online media profiles should be cognizant that this media may be the source of "protected" information such as age, religious practice, sexual orientation, marital status or mental or physical health status. Access and use of such information in the course of hiring decisions may form the basis for discrimination claims.

#### ■ Avoiding pitfalls

Companies can avert potential disaster with careful planning. One way to think of it is that the cost of this protection can be but a "DIME" – in other words, Develop, Implement, Monitor and Enforce a policy.

##### Develop

A business first must decide whether to embrace or disallow online social networking in the workplace. It also must decide whether to allow for off-hours use of company-issued devices such as BlackBerries, cell phones or laptops.

If a company decides to allow online social networking, the policy should set parameters and define protocol for employee use of social media. One option is to allow access to certain sites but define param-

eters of what employees can do on such sites.

Any such policy should state that employees must use online social networking for legal purposes only. Also, include a prominent statement that an employee using online social networking while in the workplace has no expectation of privacy in those communications. Any such policy also should disclose that the employer retains and maintains the right to inspect and confiscate any company hardware.

##### Implement

When it comes to online social networking policies, a written policy is only as strong and effective as its implementation. Employers should train employees on the social media policy and make clear what will be acceptable conduct and what will be prohibited.

Employers should then identify a clear protocol for employees to report violations of the policies, and also identify disciplinary consequences for any such violations.

##### Monitor

Employers also need to periodically monitor employee use of online social media, being careful to balance its business interests against employees' rights to privacy and reasonable expectations of privacy. Privacy laws, and the scope of permissive monitoring, tend to vary from state to state.

Employers would be well served to be upfront about the nature and scope of such monitoring. In any event, an employee's knowledge of a monitoring policy, and the employ-

er's retention of a right to access and review certain electronic communications, has been viewed by courts as employee consent to the policy and to the monitoring.

##### Enforce

Companies also need to investigate suspected wrongdoing as well as specific complaints in a timely and thorough manner. Social media policies should be applied and enforced consistently and evenhandedly, and companies shouldn't delay following through on enforcement and discipline.

A noteworthy case highlights the importance of evenhanded enforcement. Ellen Simonetti, a former Delta Airlines flight attendant, was suspended and later terminated for posting photos of herself in her Delta uniform on her blog.

Simonetti sued Delta for alleged gender discrimination, claiming that, after the initial meeting to discuss her suspension, she went online and found a number of pictures of male Delta Air Lines employees in uniform. She then searched for a specific company policy prohibiting posting pictures on the Web or blogging, which she could not find.

Central to her claims was the lack of any clear policy pertaining to her conduct and the lack of disciplinary action against her male flight attendant counterparts.

The ultimate success of this case is a secondary issue. The lesson that may be taken from this scenario is how the lawsuit might just have been prevented with a "DIME." ■

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