

SOCIAL MEDIA IN THE WORKPLACE

Kevin D. Allen
Allen & Vellone, P.C.
1600 Stout Street, Suite 1100
Denver, CO 80202
kallen@allen-vellone.com
(303) 534-4499
www.allen-vellone.com

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THE USE OF SOCIAL NETWORKING SITES IN THE EMPLOYMENT CONTEXT

WHAT IS “SOCIAL MEDIA”



FACEBOOK

- Launched in 2004. It is a social networking website where users can add friends, send them messages, and update their personal profiles to notify friends about themselves.
- By 2012, Facebook had over *1 billion* active users.
- More than 70 million active users currently access Facebook through mobile devices.
- 50% of active users log onto Facebook in any given day.
- Average Internet user spends more time on Facebook than on Google, Yahoo, YouTube, Microsoft, Wikipedia combined.
- Average age of user is 38.



LINKEDIN

- Launched in 2003. LinkedIn is a business-oriented social networking site mainly used for professional networking. The purpose of the site is to allow registered users to maintain a list of contact details of people they know and trust in business. The people in the list are called Connections. It is a virtual rolodex
- By 2012, LinkedIn had over 200 million active users.
- Average age of user is 44.





TWITTER

- Launched in 2006. Twitter is a free social networking and micro-blogging service that enables its users to send and read messages known as “tweets”. Tweets are text-based posts up to 140 characters displayed on the author’s profile page and delivered to the author’s subscribers who are known as followers.
- By 2012, over 500 million users signed up, with 200 million active users.
- Twitter results now turn up on the front page of Google.
- Average age of user is 39.
- SunMicrosystems CEO is the first to resign his position via Twitter in a Haiku: “Financial crisis/Stalled to many customers/CEO no more.”

YOUTUBE

- Launched in 2005. Bought by Google in 2006 for \$1.6 billion. YouTube is a video-sharing website on which users can upload, view and share videos.
- Cute puppies everywhere get their 15 minutes of fame.
- By 2012, over 4 billion videos watched daily.
- It is the number 2 search engine after Google.



RISKS IN BASING EMPLOYEES' USE OF SOCIAL NETWORKING SITES FOR EMPLOYMENT DECISIONS

National Labor Relations Act

- May protect both union and non-union employees who participate in “protected concerted activity.”
- Usually involves an employee acting with or on behalf of other employees to improve working conditions such as wages and benefits.
 - E.g. Employee blogs about unsafe working conditions and calls on co-workers to band together to change conditions.
- In the social media context – a blog or post to which others “reply”
- Can lose protection if unlawful or violent conduct

Examples of Protected Concerted Activity

- Posting photographs and making comments on Facebook expressing disappointment with the cheap manner in which management handled an all-day sales event, where the Facebook activity was a direct outgrowth of an earlier discussion amongst salespeople that followed a meeting with management.
- Facebook communications amongst five employees, in reaction to a co-worker's criticisms of the manner in which employees performed their jobs. Discharging these employees for Facebook postings was unlawful.
- Posting comments on other employees' Facebook pages so they could concertedly complain about the employer not having issued their paychecks on time.

Examples of What is Not Protected Concerted Activity

- Employee claimed employer discharged him for posting Facebook comments complaining about his supervisor's preferential treatment of colleagues. No evidence of concerted activity as employee made complaints solely on his own behalf and were not designed to advance any cause other than his own.
- Employer terminated employee for making inappropriate Facebook comments about mentally disabled clients. Post did not mention any terms or conditions of employment and was not discussed with any fellow employees
- Employee posted criticism of supervisor on Facebook page did not engage in protected activity because postings did not seek to initiate or induce coworkers to engage in group action and none of the coworkers responded to the postings with similar concerns.

EMPLOYER SCREENING OF JOB CANDIDATES

To Use Social Media In Hiring, Or Not to Use?

- 89% of recruiters and hiring managers use social media before initial interview
- 70% of recruiters reject people based on “online reputational information”
- Advantages:
 - ✓ Unlimited information
 - ✓ Behavior details
 - ✓ Information which may not come out in interview
- Disadvantages:
 - ✓ Unlimited information
 - ✓ Behavior details
 - ✓ Information which may not come out in interview

Social Media In Hiring: Risk Factors

- Information regarding age, race, religion, sex, disability or other protected characteristics. For example, a person's Facebook page may disclose their religion. Once an employer knows that information, that knowledge can be used in an employment discrimination suit.
- Checking social media or the Internet only on applicants of a certain race or gender.

Risk Factors (Cont.)

- Searching on all applicants, but using the same information differently against one particular type of applicants. For example, if all of your applicants had pictures of themselves drinking alcohol in public, but viewed that fact more negatively against women, that could be considered discrimination.
- Rejecting an applicant based on conduct protected by lawful off-duty conduct laws.

CAN EMPLOYERS DEMAND LOG- IN INFORMATION

State Laws

- Six states have officially made it illegal for employers to require an employee, student, or job applicant to disclose passwords to their social media accounts: CA, DE, IL, MD, MI, and NJ.
- Approximately 33 other states have introduced legislation in 2012 and 2013 relating to employer access to social media usernames and passwords.

Colorado Law

- March 19, 2013, legislation introduced in Colorado concerning employer access to personal information through electronic communication devices.
- Prohibits an employer from requiring an employee or applicant for employment to disclose a user name, password or other means for accessing a personal account or service through an electronic communications device.
- The bill also prohibits an employer from discharging, disciplining, penalizing or refusing to hire an employee or applicant who does not provide access to personal accounts or services.
- Allows employer to investigate an employee to ensure compliance with securities or financial law or for suspected unauthorized downloading of proprietary information

Federal Laws

- Social Networking Online Protection Act introduced April 27, 2012.
- SNOPA would prohibit employers from requiring a username, password or other access to online content. It would not allow employers to demand such access to discipline, discriminate or deny employment and would bar employers from disciplining individuals who refuse to volunteer such information.

Federal Laws (Cont.)

- Password Protection Act of 2012 introduced May 9, 2012.
- Amends the federal criminal code.
- PPA would make it illegal for an employer to compel or coerce access to any online information stored anywhere on the Internet if that information is secured against general public access by the user.
- PPA protects employer systems (where information is stored), NOT employer actions

LAWFUL OFF-DUTY CONDUCT IMPLICATIONS

Colorado Laws

- Colorado has a “lawful off-duty conduct” statute that makes it a “discriminatory and unfair employment practice for an employer to terminate the employment of any employee due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours.” C.R.S. § 24-34-402.5.
- C.R.S. § 8-2-108(1) prohibits employers from making, adopting or enforcing any rule, regulation or policy forbidding or preventing an employee from engaging or participating in politics.

DISCOVERY ISSUES IN LITIGATION

Overview

- Discovery: A process whereby a party has the opportunity to obtain information and documentation that may be relevant from other parties:
 - Written requests
 - Subpoenas
 - Deposition testimony

Overview (Cont.)

- Discoverable information includes:
 - ✓ All facts known by a party
 - ✓ Expert opinions offered by a party
 - ✓ Documentation
 - ✓ Paper and other “hard” versions
 - ✓ Electronic versions including underlying data
- A party must produce any Electronically Stored Information (“ESI”) that may be relevant to the lawsuit
- Expectation of privacy by the recipient of the discovery requests

Electronically Stored Information

- Rule 34(a)(1)(A) of the Federal Rules of Civil Procedure states that a party may request from the other party “any designated documents or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations – stored in any medium from which information can be obtained either directly, or, if necessary, after translation by the responding party into a reasonably usable form.”

How ESI Is Produced

- Produced as they are kept in the usual course of business
- If a request does not specify the form, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms
- A party need not produce the same ESI in more than one form.

Where Do You Find ESI?

- Laptops, desktops, smart phones
- Thumb drives and external hard drives
- Digital communications (network and online email, voice mail, instant messaging, text messaging, phone logs, social media posts, comments, updates)
- Images and Facsimile Files (.PDF, .TIFF, .JPG)
- Outlook (contacts, calendars)
- Yahoo!, Google, Gmail, Hotmail, Comcast email accounts
- Archival and Back-up Files
- Any social networking sites (LinkedIn, Facebook, YouTube, MySpace, Twitter, Instagram, Google+)
- Websites and databases

Attorney's Obligations

- Identify “Key Players”
- Issue “Litigation Hold” Notice
- Meet with “Key Players”
- Segregate and Preserve Potentially Relevant Information
- Monitor Preservation Practices

Client's Obligations

- In general, companies should already possess a document retention and destruction policy, backup protocols, tape rotation and recycling schedules, and other practices related to electronic data management
- For litigation, the duty to preserve documents attaches at the time when a company reasonably anticipates litigation
- Once a threat of litigation occurs, suspend routine document retention/destruction policy to ensure preservation and create back-up plans with the goal of making retrieval of desired information easier, faster, and cheaper during e-discovery
- A company must preserve documents of those employees likely to have relevant information – the 'key players' in the case

BEST PRACTICES AND POLICIES TO MINIMIZE EMPLOYER'S RISKS

The Employee Handbook

- Employers can combat risks of social networking in the workplace by implementing and enforcing information technology, code of conduct, harassment, and confidentiality policies that specifically reference social media
- Social media policy should encompass social networking sites, blogs, virtual worlds and video-sharing website.
- Social media policy should provide guidance to employees regarding the expectations of the employer, while not violating the rights of an employee to express concerns about working conditions with co-workers

The Employee Handbook: What to Include

- Definition of social media
- Explanation on whether you will allow the use of social media at work
- Explanation of improper social media use and how to avoid it
- Explanation that employees should not expect privacy when using company-owned facilities, computer equipment (including mobile phones) or networks
- Information about what use is appropriate or acceptable
- Limiting language that the policies do not restrict concerted activities

The Employee Handbook: What to Include (cont.)

- Disclaimers in personal blogs
- Privacy rights relating to clients
- What company information employees are permitted to disclose
- What company information is considered confidential and/or proprietary and not subject to disclosure
- Language regarding the use of company logos or trademarks in blogs or personal web sites, but be mindful of not going too far in violation of the NLRA.
- Advisement to consult with HR when in doubt

The Employee Handbook: What to Include (cont.)

- A prohibition on using company e-mail addresses to register for social media sites
- A reminder that anything posted on the Internet may not be private
- An advisement for the employees to respect the privacy rights of the company and other employees (other than wages and benefits)
- A reservation of the right to impose appropriate discipline up to and including termination for violations of the policy