

Morgan Lewis



# Managing the Global Workforce

webinar series

topic

Social Media and Employment

presenters

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# Overview of Social Media in the U.S.

- Social Media – The Scope
  - Definitions and corporate usage
- Social Media in the Workplace
  - Emerging issues:
    - *Password Protection legislation*
    - *Regulation*
    - *Discovery*
- Developing a Corporate Policy

# Social Media – Web 2.0

- Social Media

- Web-based technologies used to turn communication into interactive dialogue between organizations, communities, and individuals
- Highly accessible and scalable techniques for creating and disseminating user-generated content

- [http://en.wikipedia.org/wiki/Social\\_media](http://en.wikipedia.org/wiki/Social_media)

- Web 2.0

- Applications that facilitate interactive information sharing, interoperability, user-centered design and collaboration on the World Wide Web

- [http://en.wikipedia.org/wiki/Web\\_2.0](http://en.wikipedia.org/wiki/Web_2.0)



# Social Media – Corporate Usage

- Social media tools important in meeting company goals
  - Client facing
    - *Brand awareness and company reputation*
    - *Generating web traffic and leads*
    - *Customer support programs*
  - Internal
    - *Collaboration –information sharing*
    - *Productivity*
    - *Creativity*
- Associated Risks

# Social Media – Corporate Usage

- Ubiquitous
  - “Social media has penetrated parts of the business world at a tremendous speed”
    - *91% of the Inc. 500 are using social media to market their brands*
  - Broadening demographic
    - *Facebook users worldwide to exceed one billion this year*
- Shifting
  - Older tools are being shed in favor of newer, more nimble tools
    - *Increased use of platforms and tools such as Facebook, LinkedIn, Twitter, YouTube, texting, downloadable mobile apps, Foursquare*
    - *Reduction in blogging, message boards, podcasting, MySpace*

Source: <http://www.umassd.edu/cmr/studiesandresearch/2012inc500socialmediaupdate/>

# Social Media – Corporate Usage

- Evolving
  - Social media platforms designed to meet broader array of business needs
    - *Assess new technologies for legal/compliance implications before deployment*
      - e.g. CRM – customer relationships management platforms
- Global
  - Complex implications of social media in the workplace
    - *Activities subject to local labor and personal data protection/privacy laws and regulations*

# Emerging Issues: US Password Protection Legislation

## In the news:

- Initiatives to bar employers from demanding employee and job applicant personal social media account access credentials
  - National attention from high-profile cases, political activity, and anecdotal reports
  - Privacy concerns
- HR and legal risk
- Provisions for educational institutions regarding students



# Password Protection Legislation: Federal and State Initiatives

- State

- Maryland (effective October 2012):

- *Bars employers from discharging, disciplining, or otherwise penalizing employees for refusing to disclose covered password information, or from refusing to hire an applicant for such a refusal*
    - *Bars employees from downloading proprietary information or financial data; recognizes employer's right to investigate*

- Laws pending in other states:

- *California, Delaware, Illinois, Michigan, Minnesota, Missouri, New Jersey, New York, South Carolina, Washington ...*

# Passwords Legislation: Federal and State Initiatives

- Federal – Proposed Password Protection Act:
  - Bill (HR 5050) introduced in Congress April 2012
    - *Unlawful for employer to require or request that employees or job applicants provide “a user name, password, or any other means for accessing a private email account of the employee or applicant or the personal account of the employee or applicant on any social networking website”*
    - *Bars employers from discharging, disciplining, or discriminating against employees or job applicants who refuse to provide account access credentials*
    - *Proposed civil penalty of up to \$10,000*

# Emerging Issues: International Social Media

- Social media concerns are a focus in emerging privacy and data protection regimens around the world
  - EU:
    - *Social media data management in data protection reform proposals*
      - The “right to be forgotten”
      - Enhanced privacy requirements apply to non-EU data controllers
    - *National initiatives addressing employer use of social media data, e.g. in Germany*

# Emerging Issues: NLRB Social Media Treatment

- National Labor Relations Board (NLRB)
  - Office of GC January 24, 2012 Memorandum OM 12-31
    - *Outlines 14 recent cases presenting emerging issues in social media context*
      - Protected/concerted nature of employee social media postings
      - Lawfulness of employer social media policies and rules
    - *“Hot topic”*
      - Second report: follows OM 11-74 (August 8, 2011)

# Emerging Issues: NLRB Social Media Treatment

- Social media policy and rule restrictions found to have a chilling effect on employees' protected activity include:
  - Disparagement of the company/requiring appropriate language
  - Confidential information distribution
  - Use of company logos
  - Requiring prior approval

See “People May Talk: Does the NLRB “like” your social media policies?” -- Doreen S. Davis and Ann Marie Painter, Corporate Counsel April 1, 2012

# Emerging Issues: Social Media Regulation

- Financial Sector Securities Laws & Regulations:
  - Financial Industry Regulatory Authority (FINRA) issued guidance applicable to securities firms and their registered representatives
    - *FINRA Regulatory Notices 10-06 and 11-39*
  - Books and records requirements
  - Disclosure of non-public information
  - Disciplinary actions: misuse of social media for client communications

# Emerging Issues: Social Media Regulation

- Federal Trade Commission (FTC) Guides for Websites and Blogger Testimonials and Endorsements
  - 16 C.F.R. Part 255 (effective December 1, 2009)
- Food and Drug Administration (FDA):
  - Considering whether new regulations are necessary and how its existing regulations apply to social media

# Emerging Issues: Social Media in Discovery

- *EEOC v. Simply Storage Management, LLC* (S.D. Ind., May 11, 2010)
  - Court granted discovery of content from plaintiffs' personal social media accounts reflecting emotional distress related to alleged sexual harassment
  - Account privacy settings not a basis for shielding potential relevant content
  - Protective order addressed privacy concerns



# Developing a Corporate Social Media Policy

- Fast moving technology
  - Rapid adoption of social media platforms, functions
  - Developing social media data management tools
- Rapidly evolving legal and regulatory landscape

# Developing a Corporate Social Media Policy

- Applying the Lessons – Best Practices
  - Create or review existing policies in light of recent rulings
    - *Consider policy language found acceptable by NLRB*
    - *Define identified behaviors and activities*
    - *Give concrete examples*
    - *Harmonize social media with other policies*
    - *Use of disclaimers*
    - *Regularly review and refresh policies and rules*
    - *Training*

# Now Available! 2012 Morgan Lewis Resources Workplace Training Course Catalog

Featuring 17 training courses, including the new course “**Getting Online: Social Media and the Workplace**” and other updated courses that include expanded social media focused curriculum.

For a copy of the new catalog, please select “yes” in the polling question on the right.



# Social Media Statistics for the UK

- 30 million UK Facebook users – approximately half of the population
- 10 million UK Twitter users – approximately 1 in 6 people
- 9 million UK LinkedIn members

# Social Media and Employment Concerns Overview

- Reputational concerns
- Protection of confidential information
- Dismissal of employees for misuse of social media
- Liability for the online harassment of colleagues by employees
- Monitoring employees' use of social media

# Reputational Concerns

- Clear policies and procedures
  - Communicate to employees
- Contractual obligations
- Additional considerations for regulated employers
- Company's presence on social media sites
  - Only by authorized persons
  - Procedures and checks

# Protection of Confidential Information

- During Employment
  - Contractual obligations
  - Clear policies
- Post-employment
  - Post-termination restrictive covenants and other contractual obligations
  - Consider company policy on LinkedIn contacts
  - Request that current employees remove ex-employees as LinkedIn contacts

# Dismissal of Employees for Misuse of Social Media

- Increasing case law in the UK on this issue
- Statutory protection against unfair dismissal
  - Fair reason and fair procedure
  - Qualifying period (1 or 2 years) and capped compensation
- Clear policies
  - Social media and/or internet policies
  - Disciplinary policy



# Polling Question

- Would you like us to follow up with you directly after the webinar today?

# Recent Case Law

## *Whitham v Club 24 Ltd t/a Ventura*

- Employee with clean disciplinary record
- Posted derogatory comments about colleagues on Facebook. Colleagues reported posts to management.
- Policy: “posting information about your job on the internet (for example...on Facebook)” might lead to disciplinary action
- Dismissed: comments put the company’s reputation at risk
- UK Court: dismissal was unfair and not a reasonable response

# Recent Case Law

## *Preece v JD Wetherspoon Plc*

- Employee verbally abused by two customers and later by their daughter
- Employee posted derogatory comments about customers on Facebook
- Other daughter complained to the pub's customer services department
- Policy: do not write on Facebook “content [that] lowers the reputation of the organization, staff or customers”
- Dismissed: failed to comply with policy and lowered the reputation of the organization
- UK Court: dismissal was fair

# Liability for the Online Harassment of Colleagues By Employees

- Employers can be vicariously liable for online harassment or other online discrimination
- Social media policy
- Disciplinary policy
- Apply disciplinary procedures fairly and consistently
- Training for employees and clear communication of policies

# Monitoring Employees' Use of Social Media

- Helpful to catch employees who are misusing social media
- Pre-employment background checks
- Data Protection Act 1998
  - Processing personal data
  - Cross border transfers of personal data
- Most social media is in the public domain
- Clear policies on monitoring social media use

# Practical Steps

- Review Policies
  - Social media and/or internet and email policy
  - Disciplinary policy
  - Data protection policy
  - Anti-harassment policy
- Review Employment Contracts
- Training
  - Employees and managers

# Q&A