

Navigating Social Media in the Workplace

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The Panelists



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Social Media Fails

- “Going to Africa. Hope I don’t get AIDS. Just kidding. I’m white!”
 - She was fired before her plane landed
- “Japan called me. They said 'maybe those jokes are a hit in the U.S., but over here, they're all sinking.' “Japan is really advanced. They don't go to the beach. The beach comes to them.”
 - He was terminated less than an hour after the post
- “Congrats to all the dirty Mexicans in San Antonio.”
 - Terminated
- “EVERYONE SHUT THE F— UP, I GOT ACCEPTED FOR A NASA INTERNSHIP.” “Suck my d— and balls I’m working at NASA.”
 - The “someone” was on the National Space Council, which oversees NASA

More Social Media Fails

- Temp worker calling the CEO a “complete tool”
 - Terminated
- "After today, I am thinking the beach sounds like a wonderful idea for my 5th graders! I HATE THEIR GUTS!"
 - Terminated (but somehow she got her job back)
- “Ok we got Bin Laden ... let's go get Kasich next. Who's with me?”
 - Terminated
- “I threw my boot at him, Jerry Springer style, and nailed him in the face. It broke his glasses and cut his face and bruised it up real good!”
 - Terminated

Agenda

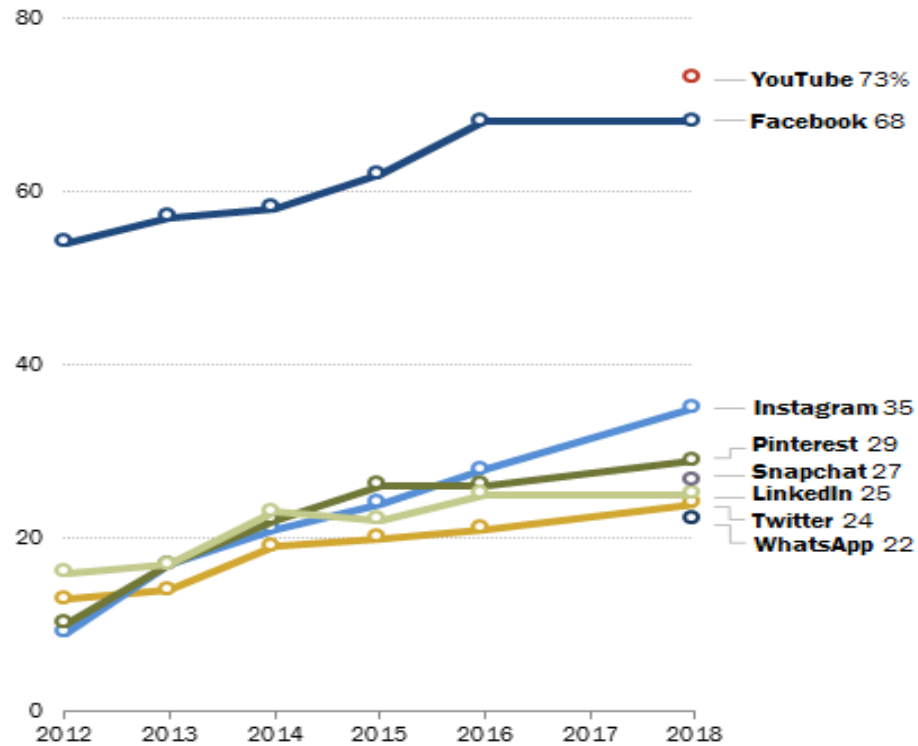
- Overview of “social media”
- Creation and implementation of policies
- Important provisions for policies
- Considerations
- Q & A

What's out there?



Majority of Americans now use Facebook, YouTube

% of U.S. adults who say they use the following social media sites online or on their cellphone



Note: Pre-2018 telephone poll data is not available for YouTube, Snapchat or WhatsApp.
Source: Survey conducted Jan. 3-10, 2018. Trend data from previous Pew Research Center surveys.

"Social Media Use in 2018"

PEW RESEARCH CENTER

twitter

- “Tweet” = post
- “Retweet” = copy someone else’s post and put on your own account/page
- Tweets can include photos, videos, and links
- Hashtags (#) categorize tweets
 - #ALFAWebinar

snapchat



- “Snap” = photo or video which are limited in length
- Viewable for ten seconds or less
- Can post “snap” to a public “story” that will disappear after 24 hours
- Texts between users will disappear after read

Instagram



- “Post” = photo or video
- Able to “like” others’ posts
- Can comment on others’ posts
- Can “tag” other users in posts
- Hashtags (#) categorize posts
 - #ALFAWebinar

Creation & Implementation

- Consider an opportune time to roll out a new policy
 - Beginning of new quarter or new year
 - When revamping Employee Handbook
 - When revising/adding other policies
- Include the Social Media policy in the Handbook
- Ensure employees have access to the policy
 - For example, employer document database or copies with supervisors
- Provide training for employees
- Be consistent

Creation & Implementation

- Include the social media policy in a broader technology policy
 - May include: computer use, internet use, email use, or other use of employer's electronics
- Make clear that employees do not have any expectation of privacy when using employer's internet or email
 - Even if employee is using personal email on employer computer/internet

Important Provisions

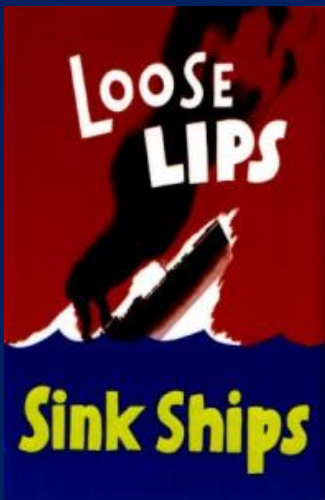
- Define “social media”
 - “Website or application that enables users to create and share content”
 - “Any form of electronic communication via websites or applications”
 - Give a list of examples of social media websites but do not limit to now-existing platforms
 - Ex: Has anyone ever heard of Qzone?

Important Provisions

- Code of Conduct
 - Provide expectations
 - Provide examples of unacceptable posts or conduct
 - Defamatory content
 - Discriminatory content
 - Harassing content
 - Confidential information
 - Be clear that employees do not have authority to create posts on behalf of their employer
 - Encourage employees to use their best judgment when posting
 - No use during work hours?

Important Provisions

- Define “Confidential”
 - Confidential information should be defined
 - Provide examples of what is considered confidential
 - Customer lists and customers’ information
 - Trade secrets/company property
 - Employee information



Important Provisions

- Reference and Incorporate Other Policies
 - Reference and incorporate other employer policies, such as anti-discrimination, anti-harassment, computer and electronic device use, and confidentiality policies

Sample Provisions

- No expectation of privacy

Employer reserves the right to monitor any and all use by Employee of his/her Email, Internet, and of computer equipment used to create, view, or access e-mail and Internet content. Employer has the right to inspect any and all files stored in private areas of the network or on individual computers or storage media in order to assure compliance with Company policies and state and federal laws. There is no expectation of privacy in any information or activity conducted, sent, performed, or viewed on or with Company equipment, Company-related applications, or Internet access on Company equipment.

Sample Provisions

- Other policies

Employees must adhere to Employer's anti-discrimination, anti-harassment, computer use, and confidentiality policies when using social media.

- Consequences

Subject to applicable law, after-hours online activity that violates this Social Media Policy or any other Employer policy may subject an employee to disciplinary action or termination.

Important Provisions

- Include Consequences
 - Consider using progressive discipline
 - First violation – oral warning
 - Second violation – written warning
 - Third violation – suspension
 - Fourth violation – termination
 - Be clear that consequences may not follow progressive discipline and termination may result from violations

Considerations

- Respect
 - Respect your employees' privacy rights
 - Do you want to monitor employees' social media accounts?
 - May lead to the discovery of an employee's protected characteristic
 - Are you monitoring everyone?
 - However, if you learn of a violation of the policy, promptly address the violation with the employee
 - Be consistent in enforcing the policy

Considerations

- National Labor Relations Act
 - Prohibits employers from enacting policies that stifle or prevent employees from engaging in “concerted activity” for “mutual aid and protection”
 - Employer policy cannot be so broad that it prohibits the kinds of activities protected by federal law
 - Ex: discussion of wages or working conditions
 - Employee’s comments on social media are generally not protected if they are “mere gripes” not made in relation to group activity among employees
 - NLRB really likes examples

Considerations

- Unlawful social media policies pursuant to the NLRB:
 - A company policy that prohibited employees from disclosing or communicating information of a confidential, sensitive, or non-public nature using company resources to those outside the company was unlawful
 - A work rule prohibiting “inappropriate conversation,” whether in person or online, was unlawful when it provided no guidance on what constituted the prohibited “inappropriate conversation” when it failed to give examples of such violations
 - A social media policy that provided no guidance on what constituted the prohibited “inappropriate postings” on social media sites. The NLRB felt that this allowed employees to reasonably interpret the rule to prohibit protected concerted activities

Considerations

- National Labor Relations Act – protected or unprotected activity?
 - Social media “liking” and a Facebook discussion by two employees related to claims that employees unexpectedly owed additional State income taxes because of the Respondent’s withholding mistakes

Considerations

- National Labor Relations Act – protected or unprotected activity?
 - Two employees of an afterschool program engaged in a Facebook discussion where they complained about management and their plans for the program
 - Employer rescinded the employees' re-hire offers

Considerations

- Stored Communications Act
 - Prohibits intentional access of electronic communications services without authorization, applies equally in the social media context
 - *Pietrylo v. Hillstone Restaurant Group* (D.N.J. 2009): employer found liable under the SCA for coercing an employee to give it the password to a private MySpace page used by employees to complain about work conditions and then firing the page's creator

Considerations

- State law
 - Many states have laws prohibiting employers from intruding onto an employee's social media
 - Examples:
 - Arkansas – prohibits employers from suggesting that an employee should disclose his/her social media name and password
 - California – prohibits employers from requiring or requesting employees or applicants to disclose their username or password for their social media account, and also prohibits employers from requiring the employee or applicant access to his or her social media account in the presence of the employer
 - Illinois – bars employers from demanding employees or applicants reveal their usernames or passwords linked to social networking sites; also prohibits employers from forcing employees to display their social networking profiles for review

Considerations

- Off-duty conduct
 - Some states prohibit employers from discharging employees for lawful conduct occurring while employee is off-duty
 - Ex: California, Colorado, New York, North Dakota
 - Employer may terminate the employee for off-duty conduct if it **directly conflicts** with some other duty
 - Ex: employee demonstrates through Facebook that she is not entitled to FMLA leave and termination was justified
 - Off-the-clock harassment can create a hostile work environment

Considerations

- When should social media be used by the employer?
 - Advertising and marketing?
 - Yes
 - Advertising job openings/recruiting?
 - Be careful on using as sole method of recruiting
 - New age discrimination claims being made due to employers advertising on social media where certain age group is targeted
 - Public relations?
 - Yes

Considerations

- When should social media be used by the employer?
 - Potential employee screening?
 - Probably not
 - May learn something (i.e. individual is a member of a protected class) that you didn't know
 - Case where employer lost summary judgment because the employer *may* have learned about a top candidate's religious beliefs via the candidate's social media account
 - Case where motion to dismiss denied because evidence that employer learned of candidate's age via social media.
 - Employee monitoring?
 - Maybe, but consider the implications
 - Must monitor and enforce uniformly
 - Must respond to complaints of harassment or discrimination

Considerations

- Social Media Policy Cannot:
 - Be overbroad and limit employees' use of social media entirely
 - Blanket prohibitions, such as, "damage to employer's reputation" are unlawful
 - Interfere with employees ability to discuss wages or working conditions.
 - Include blanket "non-disparagement language"

Considerations

- Be cautious if:
 - Post involves workplace conditions
 - Co-workers responded to the post, including “liking”
 - Post related to an event that happened to a group at work
 - Post suggests harassment after work hours

Final Thoughts

- Ingredients of an effective social media policy:
 - No expectation of privacy for social media use on employer equipment or internet
 - Separates work and personal use
 - Addresses confidential information
 - Incorporates other relevant policies, including code of conduct
 - No authority for employees to post on behalf of employer

Questions?



Thank you!

