

Human Resources in the New Cyber-Landscape: The Implications of Social Networking on Employee Discipline and Termination

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Abstract

The age of social media has blanketed the globe with staggering speed and potency. Businesses have recognized the possibilities of such sites and have begun leveraging the power of the trend for an increased bottom-line, but with the dawning of this new era of “connectedness” comes a host of potential pitfalls for human resource managers that did not previously exist. Posts, tweets and uploads in social media outlets present a variety of possible complications that could lead to employee discipline or termination. Caution must be used when making such personnel decisions as these carry significant implications upon employee privacy, labor relations, and other personal rights issues.

This paper analyzes the most popular social media sites around the world, as well as explore the effects of these sites on human resource management. The paper provides especially an analysis of legal cases from around the globe dealing with personnel issues stemming from the use of such sites. Finally, the paper provides recommended strategies for preventing such issues and for administering appropriate disciplinary measures when a problem does arise. For purposes of this paper, the terms “social networks”, “social networking sites” and “social media” will be used interchangeably.

Keywords: Risk Issues, Social Media and Employment, Personnel Recruitment and Retention, E-Privacy Issues

Introduction

The impact of social media upon every facet of life and business across the world is unprecedented in scope. Boyd and Ellison (2007) define social networks as those internet-based sites on which individuals are able to construct and share profiles with individuals of their choosing, while also viewing the connections of others within that network. And while use of these sites often does result in the intersection of individuals who would not otherwise connect, such is often not the goal of the user, but rather a happenstance occurrence (Haythornthwaite, 2005). When connecting previously unrelated individuals, such new associations are usually premised “shared interests, political views, or activities” (Boyd & Ellison, 2007).

Many social networking sites are geared toward diverse portions of the population, such as Facebook and Twitter. Others are more narrowly tailored so as to attract those with specific common interests or backgrounds. Examples of such sites include Dogster (a community for dog lovers in which dogs themselves have profiles and friend lists), Couchsurfer (a networking tool to connect travelers with those willing to let them sleep on their

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couches), and The City and The Table Project (both Christian-specific social networks). Social networks may be designed for sharing of photos or videos, blogging or mobile connectivity. The technological features of each site are relatively similar, but their cultures and potential for impact vary widely (Boyd & Ellison, 2007).

Yet for all of the good that comes with ready access to people around our respective countries and around this globe, it is becoming increasingly apparent that social networking brings a host of potential problems for the HR professional. Since the dawning of the internet age, problems of productivity loss have been prevalent among those with access to a computer during the workday. But new issues have arisen that illuminate new areas of caution and concern for business owners, HR professionals and managers worldwide.

The issue is truly global in scope, as social networking is present and prevalent in some form in nearly every society on earth. The skillful HR professional, then, will do well to become versed in both the problems and the solutions, and to be proactive in crafting policies and procedures designed to protect both the employer and the employee.

This paper provides a global context for implications of social networks for the employment. It will, however, rely heavily on law and analysis from the United States, with elaboration on differences found in other jurisdictions, wherever available and appropriate.

The Landscape

It is hard to imagine a world without social media, but to do so one need only to look back a very few years. From a historical perspective, Facebook, which was founded in 2004 but not made available to the general public until 2006, could be viewed as still a relative infant. Yet with more than 1 billion active users on Facebook (Facebook Newsroom, 2012), the virtual "population" of the Facebook world is now greater than the actual population of any country on earth save for China and India. Of those Facebook users, 604 million access the site from their mobile devices, making it portable and accessible to the user at almost any time, in almost any place, and under almost any circumstance (Facebook Newsroom, 2012).

Facebook is the social media leader in most countries, except in a few isolated countries, such as Russia and China, where VKontakte, Renren are the leaders. Another exception to Facebook dominating the social media market is in Iran, due to censorship by the government (Stat Counter, 2012).

Twitter was launched in 2008 and it quickly added a new dimension to the social media scene. Today, with its more than 140 million users, Twitter blasts millions of 140-character "tweets" per day, translated into over 20 languages (Twitter, 2012).

Twitter has expanded rapidly around the world, quickly establishing itself as the de facto micro-blogging network in almost every major country. Along with a handful of other contenders, Twitter is currently vying for second place in the social media world. The growth of twitter users around the

world is impressive, but the growth of the number of tweets has been astronomical in the last year. About 21% of Indonesians are on Twitter, making them the most Twitter-addicted nation. Predictably, more than 55% of Twitter users access the site via a mobile device (Nugraha, 2012).

New forms of social media are appearing almost constantly, making the world ever-more instantaneously connected. The implications of such interconnectedness are far-reaching for every aspect of life, but none more so than for the places where business and personal life intersect. Moreover, the very existence of such social network sites has created entirely new categories of issues that leave human resources professionals scrambling to adapt.

Problem for Analysis

In one regard, it is easy to see how social media, like every other sort of internet activity, has the potential to significantly impact employee's productivity. Nearly a decade ago it was already estimated that more than \$54 billion each year was being lost in the United States alone, due to reductions in employee's productivity attributable to internet abuse (Case, 2004). At that time such lost productivity was usually the result of workers visiting chat rooms, making online purchases, viewing pornography, playing games, and other such personal activities. Yet in the years since then, as social networking sites have risen to prominence, perhaps even to the point of obsession in many areas, it may now be assumed that the loss in productivity is even more extreme.

Although the problem of lost productivity is undoubtedly still significant, several new considerations have arisen, or new elements of old issues have emerged, that are directly resulting from employees' use of the various forms of social networks.

Discrimination

When employers recruit and select potential employment candidates, it is axiomatic that they utilize whatever means possible to make well-informed decisions, so long as such decisions are not discriminatory. Yet the prevalence of social networking sites is often responsible for a blurring of the line between responsible hiring practices and discriminatory limiting of hiring to those outside certain protected classes.

As social media has become increasingly common and easy to use, employers have begun with increasing frequency to use it in the practice of determining hiring and retention. One recent study found that more than 44 percent of potential employers screened recruits by using online social networking sites (R. Waring, 2010). While potentially effective as a recruiting and screening tool, such practice creates the hazard of potential discrimination claims.

Many social networking sites allow users to determine how accessible their profile will be to users with whom they are not associated. Because many users will either choose not to limit the openness of their pages, or will be ignorant as to the option to do so, users will not infrequently maintain social networking pages that are open to the general public (or at least some segment of the population that is extended beyond immediate friends). As

such, potential employers may have access to information that is beyond the scope of that to which they would normally be entitled.

Social networking sites, with their illusion of privacy, often house photographs and postings that reveal information about the user such as alcohol and tobacco use, sexual orientation, illness and disability, pregnancy and more. While viewing such information is not in itself prohibited (since the information would have been part of the public domain), the knowledge of the information creates that possibility that the candidate, if not hired or retained, may claim to have been a victim of discrimination.

Invasion of Privacy

Users of social networks often advance a claim that when information has been obtained or used from their social media pages without their express permission, this constitutes an invasion of privacy. Although social networks generally allow users to limit their contacts and to set their privacy settings, many users fail to consider that their postings and photos are easily copied and forwarded to users well outside their chosen scope. For this reason, information posted on social media will not generally be considered to be “private”, though it may in some instances still be “protected”.

In a recent Canadian case, for example, two employees were fired after posting degrading and defamatory comments about their boss on the Facebook walls. Among other claims, the pair asserted that the termination was a violation of their privacy rights regarding off-duty conversations. But the Canadian Labour Board determined that the workers did not have a legitimate expectation of privacy, especially since they were online “friends” with one of their supervisors (Teitel, 2012).

Meanwhile, American courts have not yet settled the matter of whether there is a reasonable expectation of privacy with regard to postings onto social media and to what extent such privacy may be circumvented by the explicitly stated policies of employers. Existing American jurisprudence has held that an employee has no right of privacy in text messages sent on company-owned electronics. (P. Abril, 2012). Whether and to what extent such rulings regarding privacy of electronic communications will extend to an expectation of privacy in material posted to online social media remains to be seen.

The right to privacy is also an emerging area in European legal arenas, where the right to privacy is typically more broadly interpreted and guarded than in American tribunals (Newell, 2011). In France, for example, where invasion of privacy protection has been extended to e-mails and other information in electronic folders contained on work computers, it may be more likely that employees may be determined to hold a reasonable expectation of privacy in postings on social networks.

Interference with Protected Labor Activity

In America, Section 7 of the National Labor Relations Act (the “NLRA”) protects the rights of workers to engage in “concerted activities for the purpose of... mutual aid or protection” (Teitel, 2012). Under the protection of Section 7, employees are free to

engage in activity that is deemed to be in furtherance of a collective (not individual) right that relates to a term or condition of employment, and to do so without threat or fear of retaliation (Teitel, 2012). And although these provisions have most often been tested in conjunction with labor activities in the course of unionization, there has been a recent flourish in claims that employers are violating Section 7 in relation to worker termination or discipline over posts on social media.

Notably, the NLRB has recently issued two ground breaking decisions speaking succinctly to the issue of Section 7 protection of employee online social networking activity. In the first, the NLRB ruled that the social media policy of the employer, Costco Wholesale, was overly broad when it stated that employees were prohibited from posting damaging statements about the company on social media sites. But the NLRB ruled that this policy could have the effect, whether intentionally or not, of causing employees to believe that they were restricted from discussing the terms and conditions of their employment, or engaging in other concerted activity as protected by Section 7 of the NLRA (C. Kearns, 2012).

In the second, Karl Knauz Motors, the NLRB held that an employee’s Facebook posts criticizing the decisions of his employer (a luxury car dealership) to host what the employee considered to be a foolish and inferior event for the launch of a high-end luxury model car would be protected activity under Section 7. The employee had been terminated following those posts however, in this instance, the termination was upheld due to other postings on the employee’s page. The other offending posts, according to the NLRB, could not reasonably be deemed to be protected concerted activity since they related not to the terms and conditions of employment, but rather were sarcastic and mocking commentaries about an accident that had occurred during a customer test-drive of a company vehicle (Green, 2012).

To be sure, such decisions are particular to American jurisprudence and are the result of the specific protections of the NLRA. In other jurisdictions with similar protections, however, such determinations will undoubtedly be persuasive.

Recommendations

Accept the Reality of the Threat

With the myriad of situations that every HR professional deals with on a daily basis, it is easy to disregard all but the most pressing issues. Unfortunately, the threat posed by today’s social networking sites is far too substantial to be ignored. For example, The United States National Labor Relations Board (the “NLRB”) had already heard more than 129 cases related to social networking by August, 2011 (Eastman, 2011). This number has continued to grow with some significant determinations being made just this year. Likewise, courts of other lands are also seeing an influx of cases dealing with similar issues.

The breadth of the issues that may arise from employee posts, uploads, blogs and photos is so significant that their potential threat should never be underestimated. Defamation suits, invasion of privacy, cyber-bullying, and wrongful termination are all potential liabilities that threaten employers’ bottom lines. Thus, it is critical that businesses be proactive in recognizing the potential harms from social media abuse by employees, and plan in advance to avoid danger.

Know Existing Law

Twenty-first century business is a global enterprise. Thus, it is important for practitioners to remain abreast of relevant law not only in their own jurisdictions but also around the world. Despite the similarities of the incidents occurring thanks to social networking posts and uploads all around the world, the treatment such issues receive when these are brought before tribunals varies widely depending on the location in which suit is filed.

For example, as stated previously, American law seems to favor the notion that employees have no reasonable expectation of privacy in electronic transmissions via company-owned devices. Courts in France, on the other hand, appear to lean towards the opposite direction, giving great latitude to the expectation of privacy considered to be reasonable (P. Abril, 2012). Some tribunals seem to indicate that employers may protect themselves with a strict social media policy while others, like the American case of *Costco Wholesale* (discussed in the following section), seem to indicate that even a social media policy may sometimes not be enough.

In some jurisdictions vulgar or offensive comments are given little protection and not treated as gross misconduct. In Northern Ireland, for example, the case of *Teggart v. TeleTech Limited* held that an employee was appropriately dismissed for obscene comments he posted about a female coworker. The court determined such postings, while not bringing disrepute to the company, constituted serious misconduct and were grounds for termination (Jackson, 2012). Conversely, an Australian court found that an employee had been unfairly dismissed for highly offensive postings on his Facebook page. That case, *Glen Stutsel v Linfox Australia Pty Ltd.*, dealt with an employee who posted, among other things, that his Muslim coworker was a “bacon hater”, and that he admired any “creature that has the capacity to rip Nina and Assaf heads off, [expletive] down their throats and chew up and spit out their lifeless body” (referring to his coworkers, one of whom was the previously mentioned Muslim) (B. Feltham, 2012).

Clearly, treatment of issues surrounding employee use and abuse of social networking sites varies widely from jurisdiction to jurisdiction. It is critical that those involved in human resource management take all necessary and prudent steps to become well-versed in the relevant and applicable laws.

Clearly Convey Expectations

Social media usage will almost undoubtedly continue to grow and expand in the years to come as new and different technologies and sites emerge. As such, it is critical that employers become proactive with their technology and social media policies well before an issue arises. Although social media cases are quickly rising to the forefront of human resources disputes, nearly 75% of employers globally have no social media policy (Teitel, 2012).

It is clear that having a social media policy should be the first line of defense for employers. Yet simply having such a policy may not be enough. Consider the policy of *Costco Wholesale Corp.*, for example, which was determined by the United States NLRB

to be overly broad when it admonished workers to “be aware that statements posted electronically... that damage the company, defame any individual or damage any persons reputation or violate the policies outlined in the *Costco Employee Agreement* may be subject to discipline, up to and including termination of employment” (Belicove, 2012). But the *Costco* policy was deemed by the NLRB to have failed to exclude from the offending statements those communications specifically protected by the NLRA as concerted activities.

What then should prudent employers do to protect themselves? A social media policy is a must and such policies should be clearly drafted to clearly state, among other things, what is meant by and included in the term social media. Moreover, social media policies should set forth what behaviors will constitute misconduct and the consequences for such misconduct should it occur. Behaviors that will be prohibited could include defamation of coworkers, bullying, public disclosure of confidential information and behaviors that would constitute discrimination or harassment—sexual or otherwise. Great caution should be taken, however, to be sure that such policies are not overly broad and do not create the perception that employees will be subject to discipline for discussing terms and conditions of their work or their workplace, or other any other protected labor activity.

Not only should employers create a clear policy statement regarding social networking for employees, but they should take great care to train employees accordingly regarding their expectations. To simply have a policy in a manual on a shelf will not be enough. Policies should be drafted, then thoroughly explained and revisited frequently. Employees should be asked to sign a copy of the policy, evidencing their understanding of and acquiescence to the expectations contained therein. Moreover, managers and executives should model the behavior they require of their employees and under no circumstance should any supervisory employee be allowed to exhibit behavior that is inconsistent with those expected of employees.

Conclusion

The internet is powerful, and social media is an increasingly potent instrument for wielding that power. Yet social networks have grown exponentially and with such astonishing speed that many businesses are struggling to stay ahead of the curve.

Social media is a great help in a multitude of ways to managers, business owners and human resource professionals. From locating and recruiting talent to marketing to planning and awareness, businesses around the globe are seizing up the potential that is afforded by maintaining a presence on social media.

As with any powerful instrument, however, there is potential for harm should the instrument be misused. For this reason, business professionals must be diligent about recognizing the implications of social networking that goes awry. It is no stretch of imagination to say that such issues will be at the forefront of the human resources legal landscape for years to come. A sound proactive approach is truly the only option for protecting both employee and employer.

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