

Effectively Managing Social Media in the Workplace

Ninety-four percent of all businesses with a marketing department use social media, such as Facebook, Twitter and Google+, to increase brand awareness and to communicate with over one billion users on these sites. Technology is rapidly changing the way we conduct business, and social media has become the dominate form of communication.

The benefits of social media are obvious. Social media can act as a customer service tool allowing consumers to interact with businesses about their products. Social media marketing campaigns can be very inexpensive and, when successful, can increase brand awareness.

Yet despite this popularity, organizations struggle to keep pace with the evolving technology and employers find it increasingly difficult to balance the competing interests of an employee's privacy against the employer's security. Complicating matters, the law governing social media in the workplace is unsettled.

Few courts have addressed the legality of monitoring an employee's social media use on a company-owned communication device, such as a laptop or iPhone. Courts are forced to consult decades-old electronic communication laws, including the Stored Communications Act of 1986, for guidance on its treatment in litigation. Courts wrestle with whether postings, pictures and messages on social media sites are discoverable and whether this content is private and protected from disclosure.

Even when permitted, monitoring employees' use of social media can be daunting because communications are immediate—sometimes fleeting—and these sites are frequently hosted on outside servers not controlled by the organization. To minimize the legal risks associated with the use of social media in the workplace and to ensure that company-owned property is being used properly, employers should develop an effective and legal social media policy for their employee handbooks.

Although there are several concerns to balance, key points to consider when drafting a social media policy include:

- **Understand your employees' rights to use social media under the National Labor Relations Act (NLRA)**. The National Labor Relations Board (NLRB) says that employees have the right to discuss work conditions on social media sites

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without retribution from their employers. The NLRB has released a series of memoranda that address the general dos and don'ts for employers in regulating employee social media use. This guidance provides a good starting point for the creation and administration of social media policies.

- **Focus on restricting employee behavior that is not protected under the NLRA.** For example: instruct employees not to disclose trade secrets; forbid postings that contain offensive language; and instruct employees not to post harassing or disparaging comments about other employees that could lead to discrimination claims (such as comments related to sex, race, disability or religion).
- **Avoid drafting overbroad or ambiguous policies.** Poorly drafted policies could be construed as infringing on employees' rights under the NLRA. Social media policies should be drafted with specificity and include examples of the types of behavior that violate the policy.
- **Advise employees that all forms of communication on company-owned property may be monitored.** Notify employees in advance of this monitoring so there is no reasonable expectation of privacy in their use of company-owned equipment. Require employee signatures to acknowledge their receipt and understanding of the policy and retain these signed acknowledgments.
- **Include a provision that allows modification of the policy at any time.** Due to the amorphous nature of social media, it is imperative that a social media policy include a provision that allows it to be modified at any time and in the employer's sole discretion. Notify employees when there has been an update to the policy and require employees to familiarize themselves with the updated policy.
- **Train employees on the policy.** Clear communication from management is essential to the success of a social media policy. Employers should ensure that employees understand what the policy says and how it applies to their jobs. Employees also should understand the risks associated with social media as well as the benefits of appropriate use. Employers should conduct periodic re-training to update employees about policy modifications.
- **Enforce the policy.** The policy should create or incorporate disciplinary actions from other employment policies. Courts are likely to evaluate the policy's validity based on equal enforcement, so all activity should be treated equally. This may require collaboration among the human resources, IT and legal



departments.

- **Be prepared for discovery.** Employers must anticipate that content on social media sites will be relevant in employment litigation. A social media policy should address discovery issues associated with requesting content from these sites and counsel must be prepared to discuss these issues with opposing counsel.

If you would like to know more about how to create an efficient and enforceable social media policy to protect your company, we would be glad to help. Please contact your Reinhart attorney or any member of Reinhart's Litigation Department.

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