

WE'RE NOT ON FACEBOOK ANYMORE, DOROTHY: NAVIGATING THE LATEST LEGAL ISSUES WITH EMPLOYEE USE OF SOCIAL MEDIA

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SOCIAL MEDIA ROADMAP

- Prevalence of social media
- Cyber screening
- Employee monitoring
- Social media misconduct
- Policies
- Social media posts in litigation

PREVALENCE OF SOCIAL MEDIA

Social Media Explained

www.theAdaptiveMarketer.com

 <p>I'm at the donut shop – again!</p>	 <p>Here is a vintage picture of a donut</p>	 <p>My donut recipe</p>
 <p>I like donuts</p>	 <p>Hey! I am eating a donut</p>	 <p>Listening to 'Donuts'</p>
 <p>This is how you eat a donut</p>	 <p>Click for the secret to stop overeating donuts</p>	 <p>I'm a Google employee and I like Donuts</p>
 <p>Funny donut eating videos</p>	 <p>I want to work at a donut shop</p>	 <p>Saw the donut? It's gone</p>
 <p>The sounds of eating a Donut</p>	 <p>Call me from the donut shop</p>	 <p>Who invented the donut?</p>
 <p>My donut photo collection</p>	 <p>Is it Donut or Doughnut?</p>	 <p>Join us for Donut Tuesdays!</p>

PREVALENCE OF SOCIAL MEDIA

By the Numbers

- 69% of U.S. adults are Facebook users, and 3/4 of those users access Facebook on a daily basis
 - 2 billion+ monthly active users
- Some Facebook users have taken steps to moderate their use of the site, such as deleting the Facebook app from their phone or taking a break from the platform but despite this, Facebook users as a whole are just as active on the site as they were in 2018
- 37% of U.S. adults use Instagram
 - Increase of 9% from 2016

PREVALENCE OF SOCIAL MEDIA

Employer Concerns

- Productivity
- Data/network security
- Reputation
- Trade secrets
- Confidentiality
- Harassment
- Privacy
- More

CYBER SCREENING



CYBER SCREENING

Can employers legally request social media log-in/account information of Employees/Applicants?

- 25+ states prohibit
- Some go beyond hiring; include public information, or information for an investigation
- National level legislation
- Could reveal access to protected characteristics of candidates
- Is it really a good idea?

CYBER SCREENING

Recruiting and Hiring

- Goals of hiring:
 - Identification/retention of quality employees
 - Avoid getting more than you bargained for
 - Avoid negligent hiring
- Do searches assist in pursuit of those goals?

CYBER SCREENING

Recruiting and Hiring (cont.)

- Employers suffer \$4 billion in annual embezzlement losses
- Average workplace violence award is more than \$1 million
- SHRM: More than 50% of resumes contain one material fabrication
- **Can you afford NOT to screen?**

CYBER SCREENING

Recruiting and Hiring (cont.)

- The law surrounding recruiting employees through social media is active and in flux
- Recently settled class actions against major companies, such as Amazon and T-Mobile, alleged age discrimination due to the targeting of Facebook job ads towards younger workers

CYBER SCREENING

Have you ever rejected a candidate because of what you saw about them on a social networking site?

69%

Yes

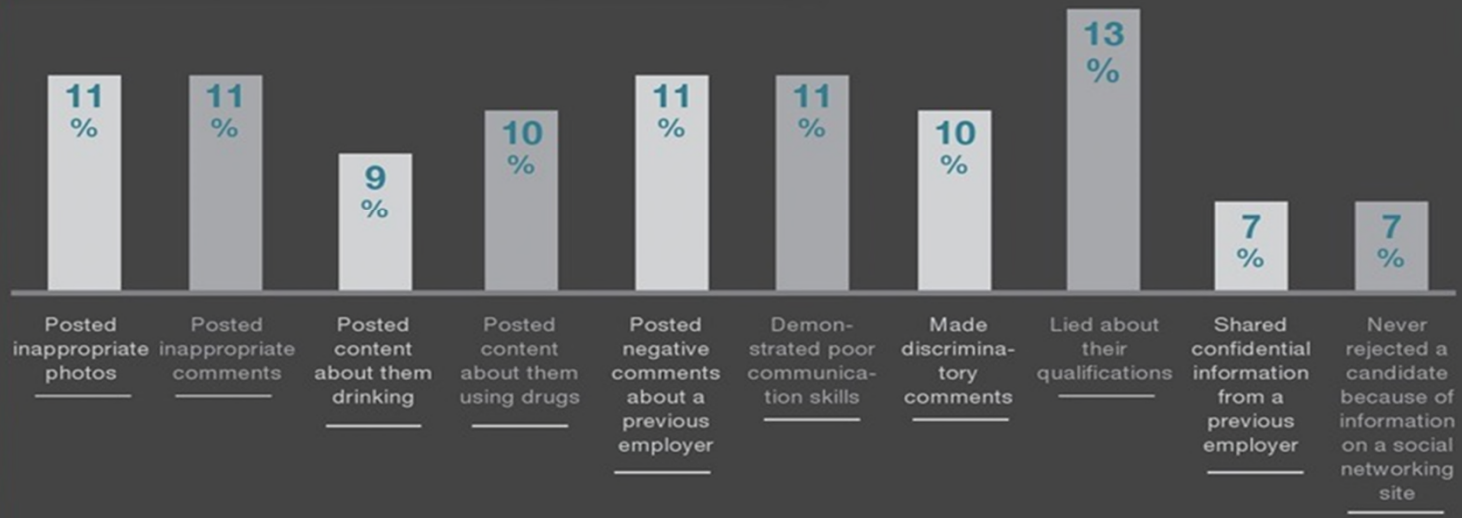
26%

No

5%

I don't use those sites to screen prospective employees

Why have you rejected those candidates?



CYBER SCREENING

Third-Party Screening

- Isolate protected characteristics (age, race, religion, etc.)
- Relation to job qualifications
- Consistency (sources, info, reasons, etc.)
- Do you homework on third-party providers
- Must comply with federal Fair Credit Reporting Action (FRCA)

EMPLOYEE MONITORING



EMPLOYEE MONITORING

Should you monitor?

- Time and resource intensive
- Will you really learn anything important?
- Negligent hiring/retention considerations
- Remember: Social media = widespread and rapid information dissemination

EMPLOYEE MONITORING

Stored Communication Act (18 U.S.C. 2701)

- Prohibits intentional, unauthorized access to electronic stored communications
- Includes exceeding authorized access
- Applies in most instances notwithstanding BYOD policies

EMPLOYEE MONITORING

Stored Communication Act (cont.)

- Covers private social media content (*Ehling v. Monmouth Ocean Hosp. Serv. Corp.*, D N.J. 2013)
- Covers access to social media account used by employee for employer benefit (*Maremont v. Susan Fredman Design*, N.D. Ill. 2014)
- Covers personal webmail account access, even from company device, while e-mails stored on employer server (*Lazette v. Verizon Wireless*, N.D. Ohio 2013)

EMPLOYEE MONITORING

If you are going to monitor...

- 1) Establishing formal process
- 2) Designate responsibility for process
- 3) Describe activities to be undertaken
- 4) Set up authorization/approval
- 5) Arrange for secure storage
- 6) Don't go too far

“Friending” of employees by managers increases likelihood of employment claims and “mandatory friending” is prohibited by 15 states

ONLINE MISCONDUCT

Employees don't really air out their employment gripes online, do they?



ONLINE MISCONDUCT



ONLINE MISCONDUCT



ONLINE MISCONDUCT



August 22

OMG I HATE MY JOB!! My boss is a total pervvy wanker always making me do shit stuff just to piss me off!! WANKER!

1 Like 1 Comment

likes this.

Oldest ▾



Hi [redacted], i guess you forgot about adding me on here? ...Firstly, don't flatter yourself. Secondly, you've worked here about 5 months and you didn't work out that i'm gay? I know i don't prance around the office like a queen, but it's not exacty a secret. Thirdly, that 'shit stuff' is called your 'job', you know, what i pay you to do. But the fact that you seem able to fuck-up the simplest of tasks might contribute to how you feel about it. And lastly, you also seem to have forgotten that you have 2 weeks left on your 6 month trial period. Don't bother coming in tomorrow. I'll pop your P45 in the post, and you can come in whenever you like to pick up any stuff you've left here. And yes, i'm serious.

ONLINE MISCONDUCT



My boss is a complete idiot. The company I work for is ridiculous. Truly. I can't even articulate the lack of professionalism & organization

← Reply ↻ Retweet ★ Favorite



I love when I can hear my boss talking on the phone at work. As long as I can hear her on the phone, I know it means she is not going to sneak up behind me and see how many web browsers I currently have open.

Like · Comment · 10 minutes ago · 🗨️

👍 3 people like this.



I love when my employees post things like this on facebook. I'll need to see you in my office at 4. - Your boss.

3 minutes ago · Like

ONLINE MISCONDUCT

Investigating

- Proliferation of technology makes it effortless to take a photo or video of work conditions, conduct, injuries, confidential information, etc. and not just share it with the world in a few taps
- See for yourself! Search #worksucks or #ihatemyjob on Instagram/twitter

ONLINE MISCONDUCT

Investigating

- 1) Act promptly, not rashly
- 2) Gather all relevant information
- 3) Assess the content objectively
- 4) Speak with the poster
- 5) Interview other relevant witnesses
- 6) Communicate any determination
- 7) Document your steps

ONLINE MISCONDUCT

National Labor Relations Act

- *Section 7*: Right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for collective bargaining or mutual aid/protection
- *Section 8*: No interference, restraint or coercion of employees exercising rights

ONLINE MISCONDUCT

National Labor Relations Act (cont.)

- Plain English: Employees can discuss their wages, hours, and terms and conditions of employment with each other for their possible mutual benefit
- Applies to both union and non-union Employers
- In cyberspace and social media, not just the water cooler

ONLINE MISCONDUCT

Hypotheticals



ONLINE MISCONDUCT: HYPO NO. 1

- Employee who is upset about a co-worker's promotion complains on Facebook, while at work, that she hasn't gotten a raise in three years
- A few of the 'Facebook friends' she works with respond, while at work, by complaining about mismanagement
- Can the original complainer be lawfully disciplined? How about the 'Facebook friends'?

ONLINE MISCONDUCT: HYPO NO. 2

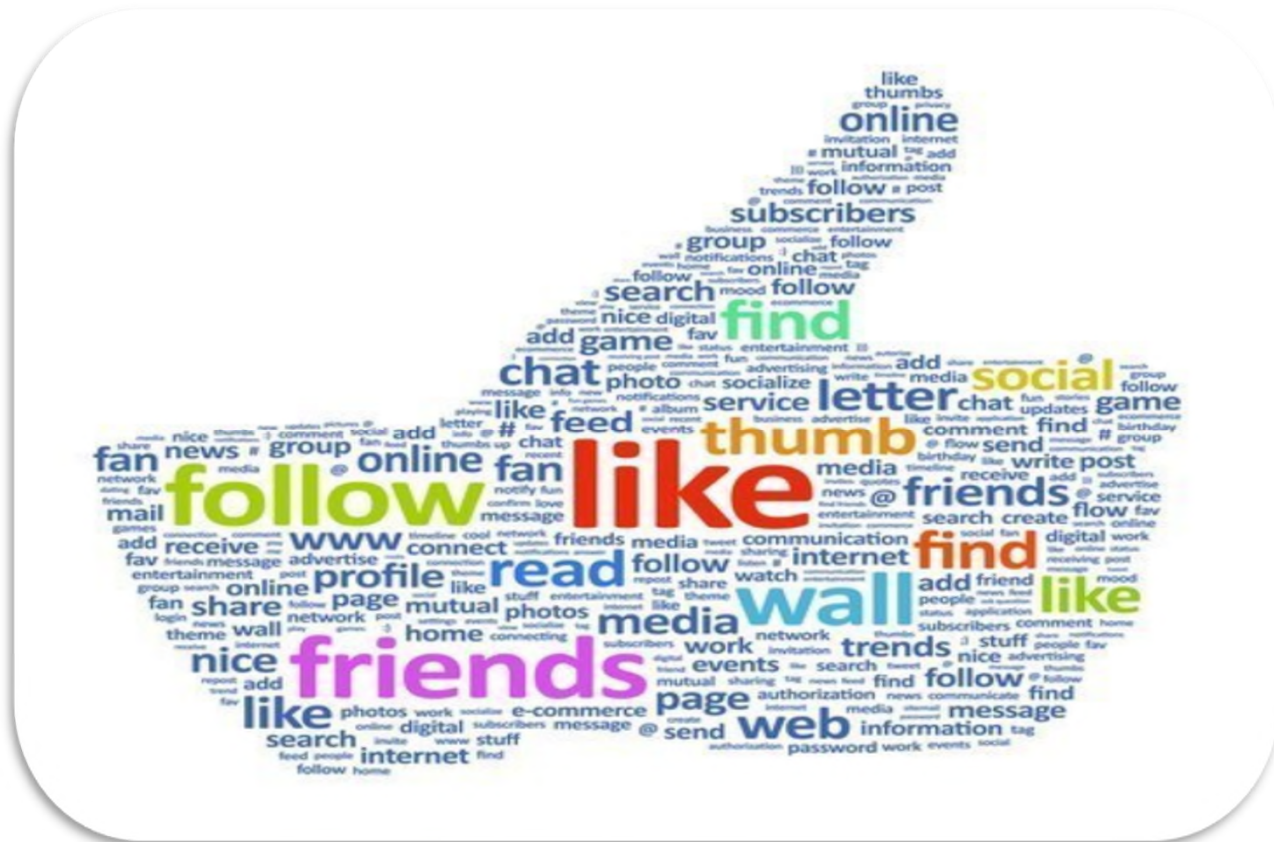
- Male manager yelled at employee and took arm to escort off of shop floor for failure to wear safety goggles
- That night, at home, employee posts: “Today, a man put his hands on me. . . I would [have] sliced his throat open if it didn’t happen at work. And had no remorse.”
- Can employee be disciplined? Does the post being published outside of work impact the analysis?

ONLINE MISCONDUCT

Factors to consider before discipline:

- 1) Was the subject matter wages, hours, or other terms/conditions of employment?
- 2) Who viewed/liked/commented on the post, and were they co-workers/family/others?
- 3) Viewed in context, was it intended to incite group activity, or merely a personal gripe?
- 4) Were responses just for emotional support?
- 5) If the post was not published while employee was at work, was post sufficiently connected to work?

SOCIAL MEDIA POLICIES



POLICIES

Primary Workplace Policies Implicated:

- Electronic communications
- Anti-harassment
- Retaliation
- Social media
- More

POLICIES

Social Media Policy Benefits:

- 1) Better managerial control
- 2) Protection of company name/info
- 3) Maximize productivity
- 4) Control employer technology
- 5) Avoid harassment/other liability

POLICIES

NLRB Scrutiny – *Quicken Loans v. NLRB* (D.C. Cir, 7/29/16):

“You will not publicly criticize, ridicule, disparage or defame the Company ... with or through any written or oral statement or image (including, but not limited to statements made via websites, blogs, postings to the internet ...)”

POLICIES

NLRB Scrutiny (cont.)

- Standard until December 2017: Does it directly interfere with, was it enforced to interfere with, or can it be “reasonably construed” as limiting protected activity under the NLRA?
- *Lutheran Heritage Village v. Livonia*, 343 NLRB 646 (2004)
- This same standard under Act applied for all social media work rules and policies

POLICIES

NLRB Scrutiny – *The Boeing Co.*, 365 NLRB No. 154 (2017):

- Overruled *Lutheran*
- Established “Reasonably Construe” Standard
- Significantly broadened the scope of rules, policies, and handbook provisions that lawfully may be maintained under the NLRB
- NLRB Memorandum GC 18-04 (June 6, 2018)

POLICIES

Social Media Policy Development

- Specific language (with examples & context)
- Disclaimers regarding Section 7
- Consistency with, and reference to, other policies
- Identify platforms + when/where it applies

POLICIES

Social Media Policy Development

- Remind employees of responsibility and impact/permanency of social media use
- Eliminate expectation of privacy in company technology
- Include disciplinary rights

POLICIES

Don't Forget

- Training on policy is critical
- Rank-and-file, as well as managers
- Special work settings

SOCIAL MEDIA POSTS IN LITIGATION



SOCIAL MEDIA POSTS IN LITIGATION

- Discoverability of Social Media
 - *Trail v. Lesko*, No. G.D. 10-017249 (C.P. Alleg. Co., July 3, 2012, Wettick, J.)
- Impeachment
- Work product doctrine and attorney-client privilege
- Social media use of jurors

QUESTIONS? FEEL FREE TO REACH OUT!



QUESTIONS?



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THANK YOU

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