

TMI: The Dos & Don'ts of Technology in the Workplace

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Overview: Technology and Social Media In the Workplace

- Social Media Generally
- How is Social Media Used by Employers?
 - Hiring and Screening Candidates
 - Employee Monitoring
- Legal Principles:
 - Constitutional
 - Common Law Claims
 - Statutory
 - NLRA
- Best Practices and Workplace Rules

Social Media

- What is Social Media?
- To name but a few:
 - YouTube, Facebook, Twitter, MySpace, Snapchat, Confide, Peek, Ansa, Kik, Skim, Gaggle, Yik Yak, Speakle, Secret, Meerkat, Periscope, Cucumbertown, ClusterFlunk, Tumblr, Yammer, LinkedIn, Pheed, Instagram, Pinterest, Vine, ZCast, Whatsapp, Wikipedia, Xpire, Whisper, Wickr, etc.
- What are the Dangers?



Development of Social Media

- How long has social media been around?
- Nielsen has conducted extensive research into social media and usage of related devices.
 - In 2011 users of social media over the age of 18 used social media a total of 18 hours, 18 minutes per month on mobile apps. In 2013 that number almost doubled, with users of social media over the age of 18 used social media a total of 30 hours, 15 minutes per month on mobile apps.
- What does this mean?

Social Media in the Workplace: Hiring and Screening Applicants

- Many employers are using social media as reference check to job applicant's resume.
- Employers look for applicants who demonstrate their ability to fit in to the "company culture".



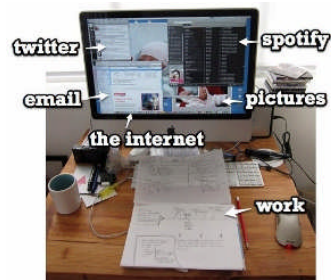
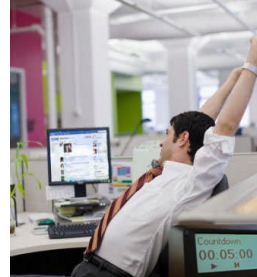
Social Media in the Workplace: Hiring and Screening Applicants

- **Best Practices:**
 - All legally protected information, such as age, race, religion, should be removed from documents before employer reviews for hiring purposes.
 - Employers: DO NOT rely solely on social media to review job applicants.
 - Employees: DO monitor social media to eliminate offensive materials and convey a professional image.

Social Media in the Workplace: Employee and Employer Relationship

How is social media used in the workplace?

- Employers use social media to **advertise and provide support** for services and products.
- Employees may be authorized to **act on behalf of the Employer** on social media.
- Employers may be **monitoring** employees for improper conduct.
- Employees may **get bored and surf** social media while the boss is not looking.



Public v. Private Sector

- **Public Sector**
 - Generally concerned with constitutional claims and certain statutory claims (PERA)
- **Private Sector**
 - Generally concerned with NLRA and certain statutory and constitutional claims.



Constitutional Claims

- First Amendment—Cannot retaliate against an employee's constitutionally protected speech.
- Fourth Amendment—Cannot conduct unreasonable searches and seizures:
 - Whether a reasonable expectation of privacy existed.
 - The employer had a reasonable work related need or suspicion to search
 - The scope of the search must not exceed the scope necessary to investigate the employers need or suspicions.
- Ninth and Fourteenth Amendment—Additional constitutional rights to privacy.

Statutory Claims - Discrimination and ADA

Discrimination

- African American women was able to continue her suit against her employer by demonstrating that the employer made the following statements: "prima donna", "disloyal, disrespectful", and "hellava bitch".
- The court argued that it was plausible that the emails were a demonstration of the discrimination against an "angry black woman".

ADA

- Cannot generally post regarding employee's injuries or illness.
- However, where decision is in response to employee's behavior rather than a disability an ADA claim will likely be unsuccessful.

Statutory Claims - Harassment and Age Discrimination, and Retaliation

- Harassment
 - Employers can be held liable for a hostile environment created by a supervisor through social media.
 - Presumed liable if harassment causes hiring, firing, reassignment or failing to promote.
 - Even harassment by non supervisors may cause liability.
 - If an employer knows or has reason to know of harassment on social media, there may be a hostile workplace claim.
 - Employer has duty to prevent this conduct.
- Age Discrimination
- Retaliation



Statutory Claims: Title II – Stored Communications Act (SCA)

- Employer cannot intentionally access stored electronic information of an employee without authorization.
- Generally, a device such as a cell phone or iPad does not fall under the SCA.
- Exceptions
 - Consent
 - Ordinary Course of Business.

Common Law Claims

- Common law torts offer claims against employers.
 - Unreasonable “intrusion upon another’s seclusion”
 - Public disclosure of private facts
 - Defamation



National Labor Relations Act

- Federal law (“Wagner Act”, 29 U.S.C. §§ 151-169)
- Enacted 1935
- Covers most **private sector** employers and employees
- Covers both **union** and **non-union** employees and employers
- Michigan public sector labor law (PERA) looks to NLRA precedent as guidance

National Labor Relations Act

- Employees guaranteed **broad** rights to:
 - Organize
 - Form, join, or assist labor organizations
 - Bargain collectively through representatives they choose regarding hours, wages, working conditions
 - Engage in “concerted activity for the purpose of mutual aid and protection”



NLRA Section 7

RIGHTS OF EMPLOYEES [29 U.S.C. § 157]

Sec. 7. Employees shall have the 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 the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

NLRA Section 8 (a)

UNFAIR LABOR PRACTICES [29 U.S.C. § 158]

Sec. 8. (a) It shall be an unfair labor practice for an employer--

(1) to ***interfere with, restrain, or coerce*** employees in the exercise of the rights guaranteed in section 7;

* * *

(3) ***by discrimination*** in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

What is “protected concerted activity”?

It is...

...an employee attempting to organize a union.

But it also is...

...an employee raising a concern on behalf of other employees about a term or condition of employment.

Who enforces the NLRA?

- Enforced by the National Labor Relations Board (NLRB)
 - Quasi-judicial federal agency
 - Highly partisan
- Board: 5 members appointed by President
 - Decides cases (Admin. Law Judge presides)
- General Counsel: 1 appointed by President
 - Investigates and prosecutes cases
 - Supervises NLRB “field offices”



NLRB allows Trump hotel employees to unionize



COMMENTS 94



By Tim Devaney - 07/28/16 05:09 PM EDT

Getty Images

The National Labor Relations Board (NLRB) dealt a blow to Republican presidential nominee **Donald Trump** on Thursday.

The NLRB

- The Process
 - Employee files charge with NLRB within 6 months of occurrence
 - Region 7 (Eastern U.P.); Region 18 (Western U.P.)
 - NLRB Regional Office investigates
 - Withdraw? Dismiss? Facilitate settlement?
 - Or issue Complaint and Notice of Hearing
 - Hearing before Administrative Law Judge (ALJ)
 - ALJ Order: Cease/desist + affirmative relief
- Remedies: reinstatement, back pay, fines

NLRB: New Focus on PCA

- Activism by Obama's NLRB...Trump's NLRB?
- Focus: Section 7 “**protected concerted activity**” violations in employer policies and actions
- **Non-union** employers involved more than ever before
- Enforcement efforts are on employer policies which might “**reasonably chill**” an employee's exercise of Section 7 rights
 - Mere presence of a “chill”-ing policy or handbook provision can trigger violation of the Act--*even if not enforced*

What is “concerted”?

- Activity that is engaged in by **two or more** employees together
- Activity by **one** employee with the authority of other employees (i.e., “spokesperson” for the “group”)
 - Individual activities that are the “logical outgrowth of concerns expressed by the employees collectively”
 - Individual seeking to initiate, induce, or prepare for group action
- Activity involving only a speaker and a listener if the content is for the purpose of commiserating or undertaking some action together, even if it is over the speaker’s personal concerns

What is “concerted”?

Examples:

- Tweet or Facebook post with comments by co-workers or calls to action
- Calling OSHA about safety issues at the company
- Talking to the local TV station or newspaper about working conditions at the company
- Emailing a Congressman about substandard products being produced at the company
- Filing a civil rights charge about harassment at the company

What is “protected”?

The employee’s efforts “to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.”

Not all complaining by employees is “protected, concerted activity” under the NLRA. Depends on the facts.

“Gripping”—generally, an *individual* complaint expressed *in private*, with *no evidence* of having talked with co-workers or speaking “on behalf of” co-workers—is not protected.



The “test” of an employer policy

- NLRB enforcement efforts focus on employer policies it deems violate Section 7 of the NLRA.
- An employer policy (or an employer action based on that policy) violates Section 7 if:
 - The policy **explicitly prohibits** or restricts PCA
 - OR
 - An employee would **reasonably construe** the policy to prohibit Section 7 activity

Protected Concerted Activity on Social Media

Two issues:

- Do the employer’s policies unlawfully restrict what employees can say about work on social media?
 - Remember: even if not enforced, mere existence of a policy that reasonably “chills” PCA on social media can violate Section 7 of the NLRA
- Did the employer unlawfully discipline the employee for engaging in PCA on social media?
 - Individual gripe vs. “concerted activity”

Social Media - Policy

- NLRB General Counsel Memo GC 15-04, issued 3/18/15
- Example of Wendy's restaurant social media policy deemed "overly broad" with internal complaint mechanism that "chilled" Section 7 rights:

"Refrain from commenting on the company's business, financial performance, strategies, clients, policies, employees or competitors in any social media, without the advance approval of your supervisor, Human Resources and Communications Departments. Anything you say or post may be construed as representing the Company's opinion or point of view (when it does not), or it may reflect negatively on the Company. If you wish to make a complaint or report a complaint or troubling behavior, please follow the complaint procedure in the applicable Company policy (e.g., Speak Out)."

Bad Wendy's....



Social Media - Policy

- Excerpt of Wendy's restaurant social media policy, "corrected" by the NLRB:

"Use of social media on Company equipment during working time is permitted, if your use is for legitimate, preapproved Company business. Restrictions: YOU MAY NOT do any of the following: Due to the potential for issues such as invasion of privacy (employee and customer), sexual or other harassment (as defined by our harassment /discrimination policy), protection of proprietary recipes and preparation techniques, Crew Members may not take, distribute, or post pictures, videos, or audio recordings while on working time. Crew Members also may not take pictures or make recordings of work areas. An exception to the rule concerning pictures and recordings of work areas would be to engage in activity protected by the National Labor Relations Act including, for example, taking pictures of health, safety and/or working condition concerns or of strike, protest and work-related issues and/or other protected concerted activities."

Social Media - Policy

More examples -

- Unlawful: "It is important that employees practice caution and discretion when posting content on social media that could affect the employer's business operation or reputation"
- **Corrected: "Do not make negative comments about our customers in any social media"**
- Unlawful: "Do not use any company logos, trademarks, graphics, or advertising materials in social media"
- **Corrected: "Respect copyright, trademark, and similar laws when using social media"**

Protected?



Social Media - Discipline

- In general, the NLRB views employees as having broad protection to speak about terms and conditions of employment, even if in a public forum and even if disrespectful.
- Pure attacks or defamatory statements unrelated to workplace conditions lose protection of the Act. But line can be hard to draw...

Social Media - Discipline

- *Triple Play Sports Bar & Grille* (361 NLRB 31, 2014) – employee posts on Facebook about company's income tax withholding practices, including profanity ("I owe too. such an a**hole") and customer comments ("you owe them money, that's f**d up"). Employees terminated; NLRB rules comments were PCA under Section 7 and were not so "disloyal or defamatory" as to lose protection of the Act.
- *Pier Sixty, LLC* (2013 NLRB ALJ decision) – employee posts about manager during union organizing campaign: "Bob is such a NASTY M***F***R...What a LOSER!!! Vote YES for the UNION". NLRB ALJ rules PCA because comments made in context of encouraging union activity and opposing perceived rude treatment by the manager.

Social Media – Compliance Tips

- Social Media policy:
 - Watch out for overly broad prohibitions
 - Company policy must specifically tie prohibitions to company's interests that do not involve employment-related complaints (e.g., intellectual property concerns, customer treatment and privacy)
 - Review NLRB General Counsel Memo GC 15-04
- Social Media-related discipline:
 - An individual gripe, or attempt to raise awareness or solicit group action?
 - Examine context: is the post about wages, hours, bosses, company practices, working conditions?
 - Profanity or nastiness doesn't mean it's not PCA
 - Develop thick skin: will it matter among billions of internet posts?

Email at work

- Old rule: Employees have no right to use company email system for Section 7 purposes, so company policy prohibiting use of email for “non-job-related solicitations” was lawful. (*Register Guard*, 351 NLRB 1110, 2007.)
- NEW RULE (12-11-2014): Employees have a **presumptive right** to use company email system for Section 7 purposes if they otherwise use company email system for business purposes. (*Purple Communications*, 361 NLRB 126, 2014.)

Email at work – Compliance Tips

- Email policies and email-related discipline
 - Employers: Watch out for overly broad prohibitions on use of workplace email and on workplace solicitations
 - Review NLRB General Counsel Memo GC 15-04

Examples of company email policies the NLRB says are unlawful:

- “Do not send unwanted, offensive, or inappropriate emails”
- “You may not email, post, comment, or blog anonymously”
- “Do not retaliate: If you discover negative statements, emails or posts about you or the Company, do not respond. First seek help from the Legal and Communications Departments, who will guide response”
- “It is our policy to prohibit solicitation during employees’ work time...these guidelines also apply to solicitation and/or distribution by electronic means”

Workplace rules and policies

- Your company probably uses policies right now that NLRB decisions have deemed unlawful under Section 7
- See NLRB General Counsel Memo GC 15-04

Can you spot the unlawful policies?

Workplace rules and policies

QUESTION: Lawful or unlawful? Employer policies...

- Prohibited employees from making “negative comments about our fellow team members,” including coworkers and managers
- Required employees to represent the employer “in the community in a positive and professional manner in every opportunity”
- Prohibited employees from engaging or listening to “negativity or gossip”

Workplace rules and policies

ANSWER: NLRB says ALL UNLAWFUL because the policies could be reasonably viewed by an employee as “chilling” their Section 7 rights

(Hills and Dales General Hospital, April 1, 2014)

Workplace rules and policies

QUESTION: Lawful or unlawful? Employer policies...

- Prohibited disclosure of “any company information”, including wage and benefit information
- Prohibited statements about work-related accidents to anyone but policy or management
- Prohibited “false statements” about the company
- Prohibited participation in activities that would be “detrimental” to the company’s image

Workplace rules and policies

ANSWER: NLRB says ALL UNLAWFUL because the policies could be reasonably viewed by an employee as “chilling” their Section 7 rights

(First Transit Inc., April 2, 2014)

Workplace rules and policies

QUESTION: Lawful or unlawful? Employer policy...

- Required employees who published “work-related information” online and identified themselves as company employees to include a disclaimer, stating: “the postings on this site are my own and do not necessarily represent...the opinion of the Kroger Co. family of stores”

Workplace rules and policies

ANSWER: NLRB says UNLAWFUL because the policy could be reasonably viewed by an employee as “chilling” their Section 7 rights.

Policy was too broad and lacked significant justification.

(The Kroger Co., April 22, 2014)

Workplace rules and policies

NLRB General Counsel Memo GC 15-04 (3-18-2015) identifies additional common workplace policies that may interfere with Section 7 rights:

- Confidentiality (particularly with internal investigations)
- Employee conduct toward company and supervisors
- Employee conduct toward co-workers
- Communication with media and other third parties
- Use of employer trademarks, logos, copyrights
- Photography and recording on cell phones at work
- Employees leaving work
- Conflicts of Interest

Questions & Answers

THANK YOU

NOTE: This presentation is for informational purposes only, and should not be construed as legal advice. Consult your own legal counsel for specific advice on how the law described in this presentation applies to your situation.