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## **Social Distortion: Social Networking and the Workplace**

*Facebook.com and MySpace.com, two of the most popular social networking websites, attract approximately 180 million monthly visitors, a number that mostly likely includes many of your employees. In fact, your employees may be accessing a social networking website right now, through their office computer or mobile phone, and documenting both the good and bad of their work-day for the entire world. Because this information is increasingly sought for purposes of litigation, it is important for employers to maintain consistent policies concerning social networking and their employees in order to avoid future legal consequences.*

### **The Prevalence of Employee Social Networking**

A search using the website Youropenbook.org, which searches “status updates” on Facebook, a short paragraph intended to inform others of what a user is doing, reveals how common it is for people to post about their workplace. A search for “at work” or “playing hooky” reveals a multitude of results.

As the popularity of social networking has grown, employers have increasingly utilized social networking as a tool to help manage their business. Human resource departments already often use social networks to screen job candidates. Many Idaho employers, from the J.R. Simplot Company to the University of Idaho also maintain a presence on social networks as a broader marketing strategy.

While social networks offer decided advantages to employers, many employers are finding that social networks also present potential pitfalls. For example, employees may access and create social networking content while at work, resulting in decreased productivity. Even when employees are not working, however, they may post information concerning an organization that could come back to haunt employers.

Employers should consider the possibility that employees may inadvertently post confidential or proprietary information online, make disparaging or harassing comments concerning their co-workers, supervisors, or their employer, post inappropriate photographs, and blog about problems at work. This information is not only accessible to your customers and competitors, but the entire world. Compounding matters, is that many employees see social networking as an intimate and informal form of communication, and confusion over privacy settings means that employees may inadvertently reveal private information.

Consider the case of an Israeli Soldier, which demonstrates that employees’ social media conduct can adversely impact employers. Israel’s Army Radio recently reported that a raid on suspected militants was called off by the country’s military because a soldier posted details of the operation on Facebook. The Israeli newspaper Haaretz explained that the soldier posted a status update telling friends that his unit was preparing to go to a West Bank village near Ramallah: “On Wednesday we clean up Qatanah, and on Thursday, god willing, we come home,” read the soldier’s status update. This cautionary tale reveals that it is important for employers to limit how its employees use social networking websites while on and off the job.

## **Social Networking Content and Litigation**

Despite the popularity of social networking, its effects are just starting to be felt in the courtroom. Social networking content can provide valuable evidence and information in a host of cases, including employment-related litigation. Courts are more often addressing the accessibility of social networking information in disputes between employers and employees. These disputes first materialize in the “discovery” phase of litigation. The discovery phase generally begins once a plaintiff files a lawsuit and the defendant files an answer. When conducting discovery, a party may submit questions, or interrogatories, to the opposing party, which must be answered under oath. A party may also request that the opposing party produce a broad range of documents related to the case. Through discovery, a party to the litigation may ask the opposing party to reveal all social networking websites at which the party maintains a profile, and to disclose all information contained in that profile. A party may then seek to take depositions (sworn statements under oath) to ask questions regarding a social networking profile.

In a sexual harassment suit brought by employees against an employer, one court elucidated a number of principles to provide meaningful direction to the parties to define the broad limits of social communications subject to discovery. The court first addressed whether social networking content that was “locked” or “private,” or otherwise not published to the general public was discoverable by the opposing litigant. The court determined that regardless of an employee’s expectation and intent that social networking communications be maintained as private, those communications are potentially subject to disclosure in discovery. In other words, even private social network communications may be used in litigation if the communications are relevant to a claim or defense in the litigation. The court also noted that at least two other courts that have addressed this issue have come to the same conclusion that merely locking a profile from public access does not prevent discovery of that private information.

The court also addressed which social network communications were subject to discovery. The court noted that the mere fact that an employee has engaged in social communications does not necessarily render the communications subject to discovery and use in the litigation. Generally, discoverable information in a lawsuit must relate to a claim or defense at issue in the case. In the sexual harassment suit, the court determined that the social networking communications of the employees may relate to the emotional and mental health damages claimed by the employees, and therefore, the information was discoverable. Accordingly, the Court ordered the employees to provide all social networking communications, private or otherwise, that related to or demonstrated their emotional health during the time period coextensive with the alleged harassment. For example, the court noted that if an employee sent a message to a friend indicating that she always looks forward to going to work, the person to whom she sent the message and the substance of the message would be relevant in the case. The court also indicated that the absence of any relevant communications may also be used by a defendant to cast doubt on an employee’s claims.

Ultimately, the court was reluctant to require the employees to disclose their entire social networking profiles and communications. The court determined that the appropriate scope of discovery concerning social networking consisted of any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, and blog entries) and social network applications for the employees from the time the alleged harassment began until current, that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state. The court also required that the employees produce any communications to the employees from third-parties if those communications place the employees’ communications in context.

The court further ordered that any photographs or videos that reveal or relate to any emotion, feeling, or mental state was discoverable. For example, pictures of the employees taken during the relevant time period and posted on an employee’s profile would generally be discoverable because the context of the picture and the

employee's appearance may reveal the employee's emotional or mental status. The court noted that, in general, a picture or video depicting someone other than the claimant is unlikely to be discoverable in that case.

Finally, in weighing the privacy concern of the employees, the court noted that social networking websites are not used as a means by which account holders carry on monologues with themselves. The information sought during discovery was information that the employees had already shared with at least one other person through private messages or a larger number of people through postings. The Court also noted that the parties could enter into a non-disclosure agreement to further protect the privacy of the employees, if the parties felt such an agreement was warranted.

### **Social Networking Content and Employee Handbooks**

Social networking content can provide a treasure trove of information in employment related litigation, and general litigation concerning your organization. Additionally, social media has the power to blur the lines between personal voice and an organization's voice. Therefore, just as many companies have policies in place concerning employees' use of email correspondence, it is important for companies to set in place policies concerning employees' use of social networking. The most relevant inclusion for such a policy is the employee handbook. Ideally, the employee handbook should address two types of social networking users: (1) private users and (2) organization sanctioned users, or users that create social networking content on behalf of your organization.

### **Employee Handbooks and Employee's Private Use of Social Networking Websites**

Social networking has the potential to blur the lines between our professional and personal lives. It may be difficult for others to recognize when an employee is posting content to a social networking website "on behalf of your organization" or "about" your organization. Accordingly, your organization's employee handbook should address your expectations of your employees' personal behavior in online social networking when posting content that refers to your organization. These expectations should generally address the following categories.

***Disclosure of Confidential Information*** – Your employee handbook should make clear that employees are prohibited from disclosing confidential or proprietary information concerning your organization when using social networking. If your employees are generally subject to state or federal laws, or official organizational policies concerning the disclosure of certain information, then your employee handbook should remind employees that those policies and laws still govern their personal conduct online, even if they are not at work. For example, if your organization maintains a policy concerning insider trading, or if your organization is subject to the privacy requirements found in the Health Insurance Portability and Accountability Act of 1996 (HIPAA), then your employee handbook should specifically note that these policies and laws govern employee behavior regarding the disclosure of information.

***Responsibility for Personal Actions*** – Your employee handbook should make clear that employees are responsible for publishing content to a social networking site that could potentially tarnish your organization's image. Anything posted to the internet could potentially appear in a search engine for years to come. Therefore, if your employees participate in online social networking, urge them to exercise sound judgment and common sense.

***Business and Personal Personas*** – Personal and business lives are likely to intersect online. Employees must remember that customers and professional colleagues often have access to the online content they post. Your employee handbook should ask employees to keep this in mind when

publishing content online that relates, even tangentially, to your organization. You may also wish to ask employees to make clear to their readers, viewers, or listeners that the views expressed are theirs alone and that they do not necessarily reflect the views of your organization. To help reduce the potential for confusion, you could recommend that employees state on their website that: “The views expressed on this website are mine alone and do not necessarily reflect the views of my employer.” Your organization should also prohibit employees from using your organization’s logo or other proprietary images on their personal website or social networking profile.

***Be Respectful of Others*** – Your employee handbook should instruct employees to be mindful when publishing content that is shielded from the general public and is intended only for friends and family members. Information originally intended for just friends and family can easily be forwarded on to others. This “private” information can also find its way into legal disputes concerning your organization or litigation involving the employee. You may also wish to remind employees that conflict may arise when employees take public positions online that are adverse to your organization’s interests. Employees should also be discouraged from posting negative comments concerning your organization, employees, clients, and competitors.

***Posting Personal Content While at Work*** – Your organization may want to prohibit employees from posting personal content while at work, or limit the time employees may post to certain time periods, like during lunch breaks. Because many employees may be able to access their social media websites through their personal mobile devices, simply blocking an organization’s computers from accessing certain social networking websites may not prevent employees from posting content during working hours.

***Obey the Terms of Service*** – Your employee handbook should remind your employees to always obey the terms of service of any social networking site they use.

***Videos, Podcasts, and Photographs*** – Your employee handbook should make clear that it applies to all content published online by your employees, and not just written content. The above policies should apply to any video, podcast, and photograph published by an employee to any website or blog.

## **Employee Handbooks and Employees’ Sanctioned Use of Social Networking Websites**

Your organization may also choose to designate certain employees as organization spokespersons who are responsible for maintaining and creating content published by the organization to blogs or social media websites. Through these spokespeople, your organization has the opportunity to effectively manage its reputation online. Your organization’s employee handbook should address the following areas when your spokespeople represent your organization online and speak “on behalf of your organization.”

***Required Training*** – You should strongly consider requiring employees who wish to officially represent your organization online to complete a brief training program concerning appropriate posting of information prior to publishing social networking content.

***Disclosure of Confidential Information*** – Just as with an employee’s private use of social networking, your employee handbook should make clear that employees are prohibited from disclosing confidential or proprietary information concerning your organization and are subject to certain laws or policies concerning the disclosure of certain information.

***Respectfully Represent the Organization*** – As a representative of your organization, it is important that all content published online adhere to the same professional standards that govern all of your

organization's communications. All content should be respectful of all individuals, races, religions, and cultures.

***Fully Disclose Affiliation with the Organization*** – Your organization should require all spokespersons who communicate on behalf of it to disclose their name and affiliation. Your organization should not permit employees to use aliases or deceive people.

***Keep Records*** – Your organization should keep records of all social media interactions and content and monitor the activities of your spokesperson employees. Statements made online on behalf of your organization can be held to the same legal standards as traditional communications by your organization.

***Responsibility for Personal Actions*** – Your employee handbook should make clear that employees are personally responsible for content they publish on behalf of your organization. Employees must ensure the content they post is accurate and not misleading, and that they do not reveal confidential or proprietary information.

***Respect the Intellectual Property of Others*** – Your employee handbook should instruct employees not to violate any copyright, trademark, publicity right (images of famous people), or other intellectual property right of a third-person without permission.

***Published Information Cannot be “Undone”*** – Remind employees that once information is published to the internet, it is difficult if not impossible to “delete,” even if the content is removed from the social networking website. Content may survive in the “cache” of an internet search company for years, and certain websites permit users to access previous versions of websites or to visit websites that no longer exist.

## **Public Employers and Freedom of Speech**

Generally, an employee cannot bring a lawsuit against a private sector employer who terminates the employee because of the exercise of the employee's constitutional right of free speech guaranteed by the U.S. Constitution or the Idaho State Constitution. Consequently, private sector employees may be disciplined or terminated for violating policies limiting an employee's speech. Private sector employers may want to consider whether policies that severely curtail employee speech are necessary, however, as these policies may shape the image that customers, potential employees, and others have of your organization.

Public sector employers in Idaho, however, may be subject to a lawsuit for restricting an employee's constitutional right of free speech. Penalties imposed upon public employees on the basis of their speech are generally governed by a test that balances the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. Generally, only speech that concerns a “matter of public concern” is protected. Public sector employees should be mindful that speech concerning the employer's public policies, political speech, and speech concerning government policies unrelated to the employee's responsibilities may be considered a matter of public concern. In addition, Idaho's “whistleblower” laws may protect employees from adverse action by the employer as to certain types of statements—regardless of the forum in which they are made. Public sector employers should be mindful of such restrictions when implementing any social networking policy concerning its employees.

## **Conclusion**

Social networking can be a valuable tool for organizations. Social networking is not without its pitfalls, however. Employers can seek to limit their liability by crafting appropriate policies concerning the use of social networking by their employees. Such policies can limit an employers' exposure to lawsuits by third-parties for activities such as infringement of intellectual property or misrepresentation, and lawsuits concerning employee disputes where employees post negative or inappropriate comments concerning their peers.