Chapter 11

Employee Blogging and Social Media

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§ 11:1  Introduction

Social networking websites such as Facebook, YouTube, Twitter, LinkedIn, and Google+ have drastically increased the number of people participating in some mode of online forum. A social networking site is a website that provides a virtual community for people to interact for personal or business purposes, frequently featuring a profile that includes biographical data and functions that allow the user to upload pictures, videos, or other information while posting comments and thoughts. As of the end of 2014, Facebook had over 1.35 billion active users, and on August 24, 2015, over one billion people used Facebook in a single day. Similarly, there are over 982 million existing Twitter accounts, even if all accounts are not constantly


active. Twitter users “tweet” status updates and messages 500 million times per day.

Adding this to the population of people who use blogs shows that the overall online community is expanding exponentially. A blog (short for “weblog”) is a website featuring regular entries of commentary, descriptions of events, or multimedia. Most blogs are maintained by individuals, or a group of individuals, and they generally address specific topics or serve as personal diaries. There are more than 181 million identified blogs, with a new blog being created somewhere in the world every half a second.

While the percentage of bloggers under thirty years of age is dropping with the increasing popularity of social networking, Internet users are still blogging. In fact, 12 million people blog via social networks, and 6.7 million people blog on blogging sites. As of December 2013, 73% of online adults use social networking sites of some kind, and as of January 2015, 52% of online adults use two or more social media sites. Further, 71% of online adults use Facebook, and 58% of Facebook users say they are connected to work colleagues.

These forms of online activity raise a host of concerns for employers. Many employees discuss their jobs or careers and create posts about an


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employer that may be public and available for long periods of time before that employer discovers them. How, then, can an employer safeguard against dissemination of trade secrets, protect a clean public image, and monitor for defamatory, embarrassing, or potentially damaging statements? More importantly, what actions can an employer take when it discovers objectionable online content?

Unfortunately, the law is still developing in this area. State and federal employment statutes do not always explicitly regulate employees’ online activity, and the case law on the subject is not always consistent. Crafting a technology policy that addresses the challenges and potential issues presented by employee online activity is practically essential. Additionally, employers should stay apprised of further developments in this evolving area.

§ 11:2 General Concerns with Employee Blogging and Social Networking

Employees opine online about a range of topics, which may include their hobbies, travels, politics, and—not surprisingly—their jobs. For example, employees might use their blogs or social media to vent about their job assignments, their supervisors, or office policies and politics. The increase in employee online activity raises the following potential concerns:

1. reduced productivity if employees are blogging or using social media during company time (and using company resources);
2. leaking confidential information and/or trade secrets (either intentionally or inadvertently);
3. posting defamatory, offensive, or inappropriate comments that may subject an employer to liability; and
4. postings that may have a disparaging effect on a company and its products, services, goodwill, or overall image (sometimes known as “cybersmearing”).

Social media websites such as Facebook, YouTube, Twitter, LinkedIn, and Google+ present a host of unique problems for employers. For example, the convenience and ease of use that make a website like Twitter so attractive to its users also make the postings on the site very difficult for employers to monitor, much less to restrict. Employees may post throughout the workday on company time using their personal communication devices without the employer being aware of such activity. Furthermore, because users are able to post their messages immediately, their postings are often not carefully considered, are more likely to be based on emotion rather than reason, and do not receive the benefit of retraction. Indeed, once an employee shares his or her
message, an employer may find that it can do no more than mitigate the harm that may arise from the communication.\footnote{For example, Taco Bell encountered a public relations nightmare when a uniformed employee posted on the company’s Facebook webpage a photo of himself licking a stack of tacos in one of the chain restaurant’s kitchens. \textit{Taco Bell Worker Appears to Be Licking a Bunch of Taco Shells in This Facebook Picture}, HUFFINGTON POST (June 3, 2013, 9:43 AM), www.huffingtonpost.com/2013/06/03/taco-bell-worker-licking_n_3377709.html.} As the number of people using these social networking sites continues to explode, employers need to keep abreast of the rapidly changing technology and the employment challenges it creates.

\section{Ownership of Business-Related Blogs and Social Media Content}

One of the novel issues raised by the use of social media by businesses is ownership of content: Who owns the blog or social media—the employee or the employer?

For example, in a 2013 settled case in the Northern District of California, the company PhoneDog brought claims for misappropriation of trade secrets, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, and conversion against a former employee. PhoneDog v. Kravitz, 2011 U.S. Dist. LEXIS 129229 (N.D. Cal. Nov. 8, 2011). PhoneDog is an “interactive mobile news and reviews web resource” that “provides users with resources needed to research, compare prices, and shop from mobile carriers.” \textit{Id.} at *2. The employee worked for PhoneDog as a product reviewer and video blogger and used the Twitter account “@PhoneDog_Noah” for his employment with PhoneDog. The employee submitted written and video content to PhoneDog, which was available to users through various media including the Twitter account. The employee also used the Twitter account to share information and promote PhoneDog’s services.

According to PhoneDog, when the employee ended his employment, PhoneDog requested the employee relinquish use of the @PhoneDog_Noah Twitter account. Instead, the employee changed the account handle to “@noahkravitz” and continued using the account. The employee claimed that “the [a]ccount, as all Twitter accounts are, is the exclusive property of Twitter and its licensors.” \textit{Id.} at *8. PhoneDog disagreed, stating that it had an “ownership interest in the [a]ccount based on the license granted to it by Twitter to use and access the [a]ccount.” PhoneDog claimed that, even if the employee created the account, PhoneDog owns it because the employee did so at the
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request and for the benefit of PhoneDog and used the account in the scope of his employment with PhoneDog. PhoneDog argued it had an intangible property interest in the account because the list of the account's followers is "akin to a business customer list." Id. at *11. Ultimately, the case settled, so for now the questions about who owned the Twitter account remain unanswered.

A similar case in the Eastern District of Pennsylvania examined ownership of a LinkedIn account. Eagle v. Morgan, 2011 U.S. Dist. LEXIS 147247 (E.D. Pa. Dec. 22, 2011). Edcomm, Inc., which provides training to financial services companies, claimed that it had developed and maintained all connections and much of the content on the LinkedIn account through Edcomm personnel at its own expense and for its own benefit. Edcomm uses LinkedIn accounts to maintain connections and to contact instructors and specific personnel within its clients. Edcomm policy required employees to create and maintain LinkedIn accounts using their Edcomm email address, following a specific template chosen by the company, to include links to the company's website on the page as well as Edcomm's telephone number, and to use another Edcomm template to reply to individuals through the LinkedIn account. These accounts were monitored by Edcomm employees who corrected any violations of the policy and maintained the accounts of several employees for the benefit of Edcomm. Edcomm requested and retrieved Edcomm-related LinkedIn connections and content from departing employees' accounts. Dr. Linda Eagle, a former employee, claimed that the LinkedIn account belonged to her. However, Edcomm claimed ownership of the account because it was used for Edcomm business and Edcomm personnel developed and maintained all connections and much of the content on her account.

The court rejected Edcomm's claim that Dr. Eagle, by maintaining the LinkedIn account, had misappropriated Edcomm's trade secret, because the LinkedIn account's connections were either generally known in the wider business community or capable of being easily derived from public information. However, the court found Edcomm could state a claim for misappropriation of an idea (as opposed to a trade secret), which has a more lenient standard. In order to state a claim for misappropriation of an idea, Edcomm had to show that

1. it had “made substantial investment of time, effort, and money” into the LinkedIn account;
2. Dr. Eagle had appropriated the account at little or no cost such that she was benefiting from Edcomm's investment ("reaping where [she] has not sown"); and
3. Dr. Eagle had injured Edcomm through this misappropriation.
Id. at *36–37. The court held a bench trial on the remaining claims in late November 2012. In March 2013, the court issued its findings of facts and conclusions of law. The court found in favor of Dr. Eagle on her claims for unauthorized use of name, invasion of privacy, and misappropriation of publicity (but not on her claims for identity theft, conversion, tortious interference with contract, or civil conspiracy). The court, however, found that Dr. Eagle failed to specify damages with reasonable certainty and, therefore, awarded her $0.00 in compensatory damages and $0.00 in punitive damages. The court noted that Dr. Eagle failed to point to a single contract, client, prospect, or deal that she had lost during the time she was without access to her LinkedIn account.

While questions of ownership of social media content await further guidance from the courts, employers can better protect themselves by addressing these issues in their social media policies and/or employee agreements, including who owns the account, its content, and the contacts and connections.

§ 11:4 Laws and Regulations Governing Employee and Employer Liability

While violations of company policy or breaches of loyalty often present clear cases, a number of statutes and legal theories may provide some protection to employees who use social media or blog on matters relating to their employment, as well as furnish defenses to employers in connection to such employee activity.

§ 11:4.1 National Labor Relations Act

[A] Scope of Protected “Concerted Activity”

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides:

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 activi-

12. See, e.g., Ardis Health, LLC v. Nankivell, 2011 U.S. Dist. LEXIS 120738 (S.D.N.Y. 2011) (ruling that a departing employee must turn over the log-in access information for several websites and blogs the employee had created and maintained for employer, because the employee had signed a social media policy stating all work created remained the property of the employer).
ties for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all 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].

Thus, section 7 of the NLRA affirms the right of employees to engage in "concerted activity," which is the ability of employees to discuss benefits, wages, and other terms and conditions of employment among themselves and bring them to the employer’s attention. These rights are protected both during work hours and while off duty. The language of section 7 applies to all non-supervisory employees in the workplace who are engaged in "concerted activity for mutual aid and protection," not just those who are already involved with unions. See NLRB v. Wash. Aluminum, 370 U.S. 9 (1962) (interpreting section 7 and applying the law in a nonunion context). Furthermore, section 8 of NLRA makes it an unfair labor practice for any private-sector employer to interfere with, restrain, or coerce employees in the exercise of their section 7 rights.

There are at least two types of situations where online communications intersect with the NLRA. First, if an employer fires or otherwise disciplines an employee for online comments that constitute "concerted activity" such as low wages, poor benefits, or long work hours, then that employee may have a viable claim against the employer under section 8 of the NLRA. Notably, however, employees’ social media posts that are unrelated to employment conditions are not protected by the NLRA. See NLRB v. Local Union 1229 (Jefferson Standard), 346 U.S. 464, 476–77 (1953) (refusing to extend protection to speech that attacked the quality of an employer’s product, without more). Second, if the employer has a social media policy that interferes with its employees’ section 7 rights, then the policy itself may be unlawful. However, policies that do not burden protected communications about terms and conditions of employment and where the employer has a legitimate basis to prohibit the workplace communication are lawful under the NLRA.

[B] Lawful Social Media Policies

Concerned employers may have an incentive to limit employee usage of social media where it relates to their employment. An employer, for example, may elect to establish a rule forbidding employees from accessing social media websites while on duty. Such a policy, however, often does not exist in isolation—it may likely include additional restrictions on the substance of social media communications. In turn, these constraints may unlawfully suppress
protected activity and inadvertently cause an employer to contravene section 7 of the NLRA. As a general matter:

- If the rule explicitly restricts Section 7 rights, it is unlawful. If it does not, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.


Although courts have not defined the contours of lawful and unlawful social media policies, the National Labor Relations Board (NLRB or the Board) and its Office of General Counsel have weighed in on this question over the past few years through agency decisions and various memoranda.

**Recent NLRB Decisions**

In September 2012, the Board issued its first pair of decisions on the scope of protected social media communications, Costco Wholesale Corp. & United Food & Commercial Workers Union, Local 371, 358 N.L.R.B. No. 106 (NLRB Sept. 7, 2012), and Karl Knauz Motors, Inc. & Becker, 358 N.L.R.B. No. 164 (NLRB Sept. 28, 2012). Though these decisions subsequently were vacated by the Supreme Court’s decision in NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (holding that President Obama’s recess appointments to the NLRB in January 2012 violated the U.S. Constitution’s recess appointments clause), the Board has continued to apply the rationale laid out in Costco and Karl Knauz.


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13. See Latino Express, Inc., Respondent, & Teamsters Local Union No. 777, Affiliated with Int’l Bhd. of Teamsters, AFL-CIO, 2015 WL 1205363, at *2 (Mar. 17, 2015) (adopting the legal rationale of Costco and several other cases vacated by the Noel Canning decision because, “Despite their lack of precedential value, I find the legal analyses of these voided decisions to be persuasive and I incorporate the rationale of each case to my analysis here”); see also Cy-Fair Volunteer Fire Dept’, 2015 NLRB LEXIS 778, at *12–15 (N.L.R.B. Oct. 22, 2015) (relying on Costco to find unlawful employer handbook provisions that, among other things, stated “The use
In *Costco*, a three-member panel of the Board found that the employer's electronic communications policy in its handbook violated the NLRA. Among the policy provisions reviewed, the Board analyzed Costco’s policy prohibiting employees from posting electronically statements that damage the company or any person’s reputation. The Board stated that the “appropriate inquiry” is whether the policy would “reasonably tend to chill employees in their exercise of their Section 7 rights[,]” which provides employees with the right to engage in concerted activity. The Board found that the policy’s broad prohibition on statements clearly encompassed concerted communications protesting Costco’s treatment of its employees. The Board also distinguished other lawful employer policies that were more tailored and prohibited clearly non-protectable communications such as malicious, abusive, or unlawful communications. Although the Board noted a previous decision that upheld a policy that prohibited “slanderous or detrimental” statements, the Board distinguished that policy because of its context: it included several other rules that prohibited egregious conduct such as “sabotage and sexual or racial harassment.” By contrast, the Board concluded that Costco’s overbroad policy had no such examples or context. Therefore, the Board found that the policy had a reasonable tendency to inhibit employees’ protected activity and thus violated the NLRA.


In *Karl Knauz*, a three-member panel of the Board affirmed the ALJ’s decision that an employer (a car dealership) may lawfully terminate an employee who posted pictures on Facebook of an auto accident at a Land Rover dealership also owned by the employer. However, a majority of the three-member panel found that the employer violated section 8 of the NLRA of embarrassing, insulting, demeaning or damaging info about the Employer, its products, customers or employees is expressly prohibited[,]” and prohibited activities “that have the effect of harming the goodwill and reputation of CFVFD among its partners, vendors or in the community at large.” (omitting citations and internal quotations); *UPMC*, 362 N.L.R.B. No. 191 (NLRB Aug. 27, 2015) (striking down policy that prohibited employees from, among other things, “independently establish[ing] (or otherwise participat[ing] in) websites, social networks (such as face book [sic], MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools [without employer’s permission] that: Describe any affiliation with UPMC; . . . []; Disparage or Misrepresent UPMC; Make false or misleading statements regarding UPMC; . . . []; Use UPMC’s logos or other copyrighted or trademarked materials”).
by maintaining a “courtesy” rule in its employee handbook. The courtesy rule stated:

    Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

Focusing on the last sentence, the Board found the courtesy rule unlawful because employees would reasonably construe its broad prohibition against “disrespectful” conduct and language to include employees’ protected statements about working conditions, protected statements seeking the support of others to improve working conditions, and criticism of the employer. See id. at *3. The Board also found that ambiguous employer rules should be construed against the employer in order to further the NLRA’s goals. See id. at *4–5.

One member of the panel dissented, stating that although the majority purported to use the correct standard, they failed to “faithfully apply it.” Id. at *17. The dissent criticized the majority for isolating the last sentence of the “courtesy” rule without giving the preceding sentences any weight. The dissent also criticized the majority’s decision to construe ambiguous rules against the employer; the dissent argued that such construction should be limited to cases where the employer commits an explicit violation of section 7 (for example, a rule prohibiting employees from distributing literature to each other). The dissent concluded that reasonable employees would feel capable of exercising their section 7 statutory rights within the employer’s courtesy rule which was merely common sense behavioral guidance. Id. at *21.


The NLRB upheld an ALJ ruling that found unlawful a social media rule that prohibited employees from “making disparaging or defamatory comments about the company, its employees, officers, directors, customers, partners, or its products and services.” The ALJ held that the satellite television services provider’s social media policy violated the NLRA based on the Board’s decision invalidating Costco’s social media policy, which stood for the proposition that social media policies are invalid if employees reasonably could interpret them to chill their rights to organize.

Subsequent Board decisions have also struck down social media policies that contain broad restrictions on the disclosure of “confidential information,”
particularly where that term includes an employer’s policies or employee personal information because an employee “could reasonably interpret these restrictions as limiting their right to discuss terms and conditions of employment with others” in violation of section 8(a)(1) of the NLRA. Cy-Fair Volunteer Fire Dep’t, 2015 NLRB LEXIS 778, at *12–15 (NLRB Oct. 22, 2015). Policies that require employees to obtain permission from the employer in advance of disclosing information about working conditions are also unlawful. See A.W. Farrell & Son, Inc., 2015 NLRB LEXIS 514 (NLRB July 1, 2015) (“The Electronic Communication policy was illegitimate because it bars employees from ‘[r]eveling company private, confidential, copyrighted or employee information in external communication without the required approval.’”); Landry’s, Inc., 2015 NLRB LEXIS 281, at *9–10 (NLRB Apr. 16, 2015) (finding that the following social media policy was lawful: “While your free time is generally not subject to any restriction by the Company, the Company urges all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company’s business. This can be accomplished by always thinking before you post, being civil to others and their opinions, and not posting personal information about others unless you have received their permission.”).

[B][2] Guidance from the NLRB’s Office of the General Counsel

In an effort to provide additional guidance to employers with regard to the intersection of social media and the NLRA, the NLRB’s Office of the General Counsel (OGC) has issued several memoranda. NLRB, Office of Gen. Counsel, Report of Acting General Counsel Concerning Social Media Cases, Memorandum OM 11-74 (Aug. 18, 2011), Memorandum OM 12-31 (Jan. 24, 2012), Memorandum OM 12-59 (May 30, 2012). See http://apps.nlrb.gov/link/document.aspx/09031d4580a375cd; NLRB Office of Gen. Counsel Memorandum GC 15-04, Report of the General Counsel Concerning Employer Rules (Mar. 18, 2015), www.nlrb.gov/reports-guidance/general-counsel-memos. In each memorandum, the OGC discusses various employee scenarios and employers’ social media policies and ultimately opines whether it believes the employer’s acts and/or the employer’s social media policy to be lawful. As a general matter, if a social media communication is directed to co-workers, seeks assistance from other employees, seeks to engage co-workers in a discussion, or raises issues regarding the workplace, the more likely the communication is protected. See NLRB Office of Gen. Counsel, Report of Acting General Counsel Concerning Social Media Cases, Memorandum OM 11-74 (Aug. 18, 2011).
In its memoranda, the OGC includes examples of a social media policy deemed to be lawful. The OGC opined that the rules in this sample policy sufficiently clarified and restricted their scope by including examples of clearly illegal or unprotected conduct. For instance, the policy’s rule prohibited “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct.” The OGC stated that the rule was lawful since it “prohibits plainly egregious conduct, such as discrimination and threats of violence, and there is no evidence that the Employer has used the rule to discipline Section 7 activity.”

As another example, the OGC considered the employer’s rule that employees avoid posts that “could be viewed as malicious, obscene, threatening or intimidating.” The policy further explains that prohibited “harassment or bullying” would include “offensive posts meant to intentionally harm someone’s reputation” or “posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.” The OGC opined that these are legitimate bases to prohibit such workplace communications, and that the policy did so without burdening protected communications about terms and conditions of employment.

As yet another example, the OGC considered the employer’s rule that employees maintain the confidentiality of trade secrets and private and confidential information. The OGC reaffirmed that employees have no protected right to disclose employer trade secrets. Moreover, the OGC noted that the rule provides sufficient examples of prohibited disclosures (namely, information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures, or other internal business-related communications). To the OGC, the context and the examples were essential for employees to reasonably understand that the policy does not reach protected communications about working conditions.

On March 18, 2015, General Counsel Griffin issued a report summarizing recent NLRB enforcement action regarding many common employment policies, including social media policies. NLRB Office of Gen. Counsel Memorandum GC 15-04, Report of the General Counsel Concerning Employer Rules (Mar. 18, 2015), www.nlrb.gov/reports-guidance/general-counsel-memos. Similar to the prior OGC memoranda, this memorandum cites examples of social media rules that the OGC concludes are overbroad.

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and/or ambiguous and would thus be reasonably construed by employees to limit section 7 protected discussions with co-workers.

Some of the examples of unlawful social media rules include the following:

• “[D]on’t pick fights” online.

• Do not make “insulting, embarrassing, hurtful or abusive comments about other company employees online” and “avoid the use of offensive, derogatory, or prejudicial comments.”

• Do not “[e]mail, post, comment or blog anonymously. You may think it is anonymous, but it is most likely traceable to you and the [c]ompany.”

• Do not “[c]reate a blog or online group related to your job without the advance approval of the” legal and communications departments.

On the other hand, OGC concluded that the following social media rules were lawful:

• Do not make negative comments about our customers in any social media.

• You may not “[c]reate a blog or online group related to [the company] (not including blogs or discussions involving wages, benefits, or other terms and conditions of employment, or other protected activity) without the advance approval of the legal and communications department.”

• “Do Not Violate the Law and Related Company Policies: Be thoughtful in all your communications and dealings with others, including email and social media. Never harass (as defined by our anti-harassment policy), threaten, libel or defame fellow professionals, employees, clients, competitors or anyone else. In general, it is always wise to remember that what you say in social media can often be seen by anyone. Accordingly, harassing comments, obscenities or similar conduct that would violate [company] policies is discouraged in general and is never allowed while using [company] equipment or during your working time.”

In addition, it is important to highlight the OGC’s skepticism of “savings clauses” in employer social media policies. These clauses serve as disclaimers and typically inform employees that their workplace guidelines should not be construed or applied in a manner that interferes with their rights under the NLRA. The Board often finds these clauses insufficient to cure a policy’s ambiguities and to remove the chilling impact of those ambiguities upon section 7, at least in circumstances where they do not explicitly advise
employees that they retain their rights to self-organize, to bargain collectively, or to engage in other concerted activities, among other things.\footnote{For an example of an accepted savings clause, see Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel of the Office of the Gen. Counsel, to Daniel L. Hubbel, Reg’l Dir. Region 17 (Oct. 19, 2012) (savings clause helped to prevent an unreasonable interpretation of other ambiguous provisions where it provided that “[n]othing in Cox’s social media policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms and conditions of employment”). For an example of an unacceptable savings clause, see Three d LLC, 361 N.L.R.B. No. 31 (NLRB Aug. 22, 2014) (finding that clause that provided social media policy was “of no force or effect” if “state or federal law precludes [it]” did not save policy because company had terminated employees for engaging in protected activity on Facebook, signaling to other employees that the clause did not shield protected activity).}

Although these memoranda are not binding on employers, employers may want to consider the current views of the OGC, which has discretion to determine whether or not to bring a complaint against an employer. Moreover, the OGC appears to apply consistent principles in prosecuting a broad range of social media policies. For instance, in a 2012 advice memorandum released by the OGC pursuant to a Freedom of Information Act request, it was revealed that the OGC applied the same criteria to evaluate the legality of policies forbidding the use of an employer’s logo, trademark, or graphics as it did in evaluating the lawfulness of a policy prohibiting disclosure of confidential information.\footnote{Ben James, \textit{NLRB Finds Co.’s Ban on Workplace Photos, Videos Unlawful}, LAW360 (July 15, 2013), www.law360.com/articles/457304/nlrb-finds-co-s-ban-on-workplace-photos-videos-unlawful.} In one case, the OGC concluded that the employer’s ban on disclosing “nonpublic information” and “confidential information”—without further clarification of those phrases—was so vague that employees would reasonably construe it to bar discussion of working conditions or the terms or conditions of employment. Likewise, the OGC found that the blanket prohibition upon use of the employer’s logo or trademark would also be reasonably interpreted by employees to prohibit non-infringing, protected activities, such as producing leaflets or picket signs.\footnote{Nat’l Labor Relations Bd. Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel of Office of Gen. Counsel, to Dennis Walsh, Reg’l Dir. Region 4, Case 04-CA-094222 (Mar. 21, 2012).}

In light of this guidance from the NLRB and OGC, employers should draft social media policies narrowly. If the employer wants to prohibit employees from posting certain information on social media, then it should focus on illegal conduct and conduct prohibited by other legitimate company policies (for example, nondiscrimination and anti-harassment policies, policies
requiring compliance with federal/state regulations, etc.). Employers should also provide specific examples, definitions, and any other context to make clear that the employer is not prohibiting conduct permitted under the NLRA.

Additionally, current NLRB General Counsel Richard F. Griffin (sworn in on November 4, 2013) has offered some insight as to how the NLRB may act in the coming months and years. On February 25, 2014, Griffin issued a memorandum that outlines the general counsel’s prosecutorial priorities going forward. NLRB Office of Gen. Counsel Memorandum GC 14-01, Mandatory Submissions to Advice (Feb. 24, 2014), www.nlrb.gov/reports-guidance/general-counsel-memos. With a full complement of five Board members for the first time in a decade, it is likely that the NLRB will continue to have an impact on employee use of social media as well as on other section 7 issues involving technology. When asked at a presentation to the ABA in February 2014 if the agency would consider rulemaking with respect to employers’ social media policies, NLRB members said they are looking into the issue but suggested that guidance might come in the form of case-by-case adjudication. Carolina Bolado, NLRB Members Plan to Keep Up Rapid Pace of Decisions, LAW360 (Feb. 26, 2014), www.law360.com/articles/512653/nlrb-members-plan-to-keep-up-rapid-pace-of-decisions (subscription required).

[C] Lawful and Unlawful Discipline for Violations of Social Media Policies

Once an employer has drafted a social media policy, it may hold employees accountable for noncompliant conduct. However, an employer must be careful that the “noncompliant conduct” it seeks to discipline does not include protected “concerted activity” under the NLRA. To qualify as protected activity, employee action must be undertaken “for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. That is to say, complaints must be made on behalf of other employees or, at minimum, with the objective of inducing or preparing for collective action. Courts have begun to outline what qualifies as “concerted activity” in the social media context, and the NLRB has readily applied the phrase to a broad range of employee activities.

[C][1] Unlawful Discipline


A restaurant and bar’s former employee posted a status update to her Facebook page that stated: “Maybe someone should do the owners of Triple Play
a favor and buy it from them. They can’t even do the tax paperwork correctly!!! Now I OWE money... Wtf!!!!’’ *Id.* at *3. Several current employees and customers commented on the update, including Vincent Spinella, an employee who “liked” the status update, and Jillian Sanzone, another employee who commented “I owe too. Such an asshole.” *Id.* The restaurant terminated Spinella and Sanzone for making what it deemed “disparaging and defamatory comments.” Three D, LLC, 361 NLRB No. 31, at *3 (Aug. 22, 2014). The Board found that the restaurant had violated section 8(a)(1) of the NLRA, and the employer appealed. Affirming the Board’s decision, the Second Circuit agreed that the Facebook activity was “concerted” “because it involved four current employees and was part of an ongoing sequence of discussions that began in the workplace about [Triple Play’s] calculation of employees’ tax withholding[,]” and that the activity was also “protected” as a “discussion [that] concerned workplace complaints about tax liabilities . . . .” *Id.* at *4 (omitting internal quotations and citations). Furthermore, the Second Circuit rejected the employer’s arguments that the comments lost their protected status because they were disloyal and defamatory, or alternatively, because they contained obscenities that were viewed by customers. *Id.* at *5–6 (citing NLRB v. Starbucks, 679 F.3d 70 (2d Cir. 2012)) (remanding case to Board for reconsideration of proper standard to apply when analyzing employee’s utterance of obscenities in the presence of customers). The court found that the comments were not disloyal because they did not mention the employer’s products or services, and *Starbucks* was inapplicable because “[a]lthough customers happened to see the Facebook discussion at issue in this case, the discussion was not directed toward customers and did not reflect the employer’s brand. The Board’s decision that the Facebook activity at issue here did not lose the protection of the Act simply because it contained obscenities viewed by customers accords with the reality of modern day social media use.” *Id.* at *7.

**Pier Sixty LLC,** 362 NLRB No. 59 (NLRB Mar. 31, 2015).

The NLRB recently held that an employee’s Facebook post that used profanity in referring to his supervisor was not so egregious as to lose its protected status under the NLRA. In **Pier Sixty LLC,** a server at a catering company who was upset with what he viewed as disrespectful treatment of servers by a banquet manager posted a message on Facebook during a break: “Bob is such a NASTY MOTHER FUCKER don’t know how to talk to people!!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!” *Id.* at *2. The Board agreed with the administrative law judge that the employee’s comments were protected, concerted activity and union activity, and that the comments, although
“obscene and vulgar,” were not so egregious as to lose protection under the NLRA. Applying a “totality of the circumstances” analysis, the Board was persuaded by several facts, including the widespread use and tolerance of profanity in the workplace by employees and managers, the fact that the comments were made while the employee was alone and off-duty and evidence of the employer’s hostility toward employees’ union activity leading up to the election.

**N.Y. Party Shuttle, LLC & Pflantzer,** 359 N.L.R.B. No. 112 (May 2, 2013).

An employee tour guide was constructively discharged after he sent emails and posted messages in a Facebook group that criticized his employer’s practices and explained the advantages of union formation. It was undisputed that the employee sent his emails exclusively to former co-workers from a prior job and that he was unaware if any of his current co-workers had been members of the Facebook group in which he posted his criticisms. The Board nonetheless found that the employee had engaged in protected “concerted activity,” summarily applying an older decision’s holding that an employee who works alone in attempting to form, join, or assist a union is protected by section 7.


*Hispanics United* endorsed the view that merely agreeing with or “liking” a co-worker’s Facebook comment related to workplace issues is sufficient to convert an individual diatribe into “concerted activity.” Here, an employee expressed her displeasure at a co-worker’s repeated criticism by posting on Facebook that she “about had it!” and asking her “fellow coworkers[,] how do u feel?” After several other employees commented in agreement, they were all discharged for violating an office policy against bullying and harassment. One member of the Board sought to affirm their discharge, recognizing that their communications, viewed holistically, demonstrated no intent to engage in group action—it was “mere griping, which the [NLRA] does not protect.” *Id.* at *17.

Notwithstanding this observation, the other three members of the Board found the employees’ discharge unlawful under section 7, construing the initial posting as “soliciting [co-worker] views about [the] criticism” and the responsive commentary as “make[ing] common cause.” *Id.* at *8. In their view,
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the co-workers’ discussions were “indispensable steps along the way to possible group action.” *Id.* at *12.*


This case, involving two separate terminations, is of particular interest because the NLRB upheld an ALJ determination that one termination arising out of social media use was a violation of the NLRA and the other was not.

In *Butler Medical*, the employees were both emergency medical personnel terminated for posting comments on Facebook. Norvell (whose conduct was found to be protected) suggested to a former employee that she “think about getting a lawyer and taking them to court” and “contact the labor board too.” Rice, on the other hand, made a false statement about his ambulance breaking down. By advising his former co-worker to obtain legal counsel or contact the Board, the ALJ found that Norvell was communicating regarding a matter of concern to more than one employee and, thus, the post was protected regardless of whether it may have had an adverse effect on Butler’s business. The ALJ concluded that Rice’s Facebook update (“Hey everybody!!!!! Im fuckin broke down in the same shit I was broke in last week because they don’t wanna buy new shit!!!! Cha-Chinngggg chinnng-at Sheetz Convenience Store”) contained allegations that were “maliciously untrue and made with the knowledge that they were false” (testimony on both sides revealed that his ambulance had not broken down and that he was referring to a private vehicle) and, as such, were not protected. Butler had been distributing a bullet-point list to all newly hired employees since November 2011 stating that employees “will refrain from using social networking sights which could discredit Butler Medical Transport or damage its image.” Butler attempted to argue that the bullet-point list was not a policy, but the ALJ found that this was a “distinction without a difference.” According to the ALJ, the bullet-point list restricting social media activities was relied upon by Butler in terminating employees, and new employees were required to acknowledge receipt of the bullet points. Thus, employees would reasonably understand they would be subject to discipline if they did not conform to the bullet-point list. The ALJ found that the bullet-point list at issue was unlawful because employees would reasonably construe it to prohibit section 7 activity. In addi-

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tion, there was no evidence that Butler “effectively communicated a narrowed interpretation of its rules that would have clarified its scope and limited its application to non-protected distribution or posting of literature” and, according to the ALJ, “any rule that requires employees to secure permission from their employer before engaging in protected concerted or union activity at an appropriate time and place is unlawful.” *Id.*


The NLRB upheld an ALJ ruling that the termination of employees who posted comments about working late in an unsafe neighborhood and about a supervisor’s conduct violated employees’ section 7 rights under the NLRA. The Board concluded that these online communications were a continuation of earlier work discussions about the conditions of employment and agreed with the ALJ that the online communications were a protected concerted activity. However, the Board went one step further, finding that even without the earlier work discussions, the Facebook postings “would have constituted protected activity in and of themselves,” because they were “complaints among employees about . . . the terms and conditions of employment and about management’s refusal to address the employees’ concerns.”

**[C][2] Lawful Discipline**

In contrast to the decisions above, the National Labor Relations Board’s Division of Advice found in Tasker Healthcare Group d/b/a Skinsmart Dermatology, Case No. 04-CA-094222 (NLRB Div. of Advice May 8, 2013), that an employee’s private Facebook exchange with another employee did not constitute protected activity. In *Skinsmart*, the employee was fired after posting on Facebook profanities about the company and her supervisor and a comment that the employer could “FIRE ME . . . make my day.” The Division of Advice found this to be unprotected “boasting and griping” and not protected activity.

While posting on Facebook may be a protected activity for employees, employees can also lose their protection if the post is particularly outrageous and harmful to the employer. In Richmond District Neighborhood Center, 197 L.R.R.M. (BNA) 1577 (NLRB Div. of Judges Nov. 5, 2013), an ALJ held\(^{19}\) that two employees of a youth center had lost the protected nature of their online communications when they made comments that the employer

\(^{19}\) On October 28, 2014, the Board adopted the decision of the ALJ and dismissed the complaint.
believed may jeopardize the program’s funding and the youth the program served if the parents or funders saw the posts. Among the more outrageous posts were: “[when] they start losin’ kids I ain’t help’n HAHA,” and “Fuck em. Field trips all the time to wherever the fuck we want!”

§ 11:4.2 Federal Trade Commission Guidelines for Employee Reviews of Company Products

Under the Federal Trade Commission (FTC) guides regarding “endorsements and testimonials in advertising,” an employer may be liable when employees comment on their employer’s goods or services on social media without disclosing the employment relationship. FTC Guides Concerning the Use of Endorsement and Testimonials in Advertising, 16 C.F.R. § 255.5 (2009). See generally 16 C.F.R. § 255 (2009). However, the FTC appears to offer employers a safe harbor. If the employer has an appropriate policy governing social media participation by employees, clearly articulates that policy to its employees, and consistently enforces the policy, the employer may be protected from liability. The FTC claims it has brought enforcement actions against companies that fail to establish or maintain appropriate internal procedures, but has not brought action against a company for the actions of a single employee who violated established company policy that covered the conduct. 20 If company policy allows employees to blog or post on social networks, but requires the post to disclose the employment relationship, or that the statement is the employee’s and is not attributable to the employer, then the company appears to be shielded from liability potentially created by the online entry.

§ 11:4.3 Negligent Supervision Liability for Employee Online Activity

Employers should remain vigilant in responding to any employee complaints regarding improper employee conduct on the Internet, including blogs or social networks. In certain circumstances, an employer may have a duty to supervise and take corrective action against employees who engage in

unlawful or inappropriate activities at the workplace through their blogs or social networking sites. In an appalling set of circumstances, a New Jersey case addressed an employee who viewed child pornography, frequented adult-themed “Yahoo Groups,” and on several occasions exchanged illicit photos of his wife’s minor child with a pornography website while at work. The child and the mother sued the employer for negligent supervision, alleging that the employer should have monitored the employee’s Internet usage at work and had a duty to report him to the authorities. The Appellate Court of New Jersey held that because the employer was able to track the employee’s Internet usage (and indeed did so on a limited basis) and received credible complaints about the employee’s viewing pornography at work, it had a duty to investigate those actions and take prompt corrective action. Doe v. XYC Corp., 887 A.2d 1156 (N.J. Super. Ct. 2005).

§ 11:4.4 Whistleblowing, the First Amendment, and Retaliation

[A] Whistleblower and Retaliation Laws

As thoroughly discussed in chapter 10, dozens of federal laws protect whistleblowers and shield workers from retaliation. Additionally, a number of states, including New York and California, provide protection for employees who report wrongdoing, internally or externally. See chapter 10, supra, Whistleblowing and Other Retaliation Claims.

Blogging and social media impact whistleblowing and retaliation claims in at least two potential ways. First, the question exists whether posting information on a blog or social media site constitutes “blowing the whistle.” Generally, in order to invoke the protection of a whistleblower statute, the employee must first have made some report to an employer and/or a government agency. Similarly, anti-retaliation laws protect employees who report wrongdoing (such as discrimination and harassment) through internal channels. Blogging or posting about problems or violations of law, without more, may not be enough to be covered under this umbrella. Second, employees who blow the whistle may be undone by their own blogs or social media posts, undermining their credibility. 21

The Tenth Circuit affirmed these principles in Debord v. Mercy Health Sys. of Kan., Inc., 737 F.3d 642 (10th Cir. 2013). In that case, the plaintiff contended that shortly after being hired in 2004 as a hospital technician, her

supervisor began sexually harassing her by placing his hands on her body and making lewd comments or advances. The plaintiff, however, did not complain of her supervisor’s conduct until July of 2009 through a series of public messages on Facebook. In those postings, she called her supervisor a snake, exclaimed that he needed “to keep his creepy hands to himself,” and insinuated that he purposefully overpaid favored subordinates (herself, included). Id. at 648. That supervisor saw the plaintiff’s postings and reported them to human resources, which sparked an investigation of the plaintiff’s claims. The plaintiff initially denied writing the Facebook messages, but later acknowledged her authorship.

The investigation concluded that the plaintiff’s claims were unsubstantiated, but while it proceeded, the plaintiff sent messages to other employees accusing her supervisor of destroying the evidence of his alleged misconduct. This development, along with the plaintiff’s previous transgressions, forced the hospital to discharge the plaintiff for disruptive, inappropriate, and dishonest behavior. The plaintiff brought suit alleging various theories under Title VII, including retaliation. Although she agreed that her employer stated lawful grounds for her termination, the plaintiff asserted that they were mere pretext and that the hospital’s real motivation was to punish her for complaining of sexual harassment.

The district court granted summary judgment against the plaintiff’s claims, and the Tenth Circuit unanimously affirmed. As the panel explained, the hospital presented convincing reasons for terminating the plaintiff, and her myriad arguments on appeal failed to raise a genuine dispute of material fact. Most notably, the plaintiff cited Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011), a case in which the U.S. Supreme Court held that the Fair Labor Standard Act’s anti-retaliation provision is triggered by an employee’s oral complaints, to support her contention that her employer’s decision to discharge her for the Facebook postings was per se unlawful because it was her method of reporting sexual harassment. The Tenth Circuit pointed out that the hospital terminated the plaintiff based on her dishonesty about writing the postings—and not for the act of airing her grievances on Facebook—but only after it repudiated the plaintiff’s reliance on Kasten. As the panel clarified, the Court reversed summary judgment against the employee in Kasten because he had orally addressed unlawful practices in accordance with the employer’s internal grievance resolution procedure; the Court, moreover, specifically observed that an employer needs notice of a complaint to discriminate upon it. The plaintiff’s Facebook postings here, in contrast, neither complied with her employer’s flexible grievance procedure, nor by themselves reached the hospital and gave it notice of any purported sexual harassment. Those postings, thus, could not qualify as protected reports or complaints.
Employers must remain aware of whistleblowers who misuse online forums as a sounding board for workplace gripes and should maintain a policy about publication of company affairs on the Internet. If an employer must discipline an employee for violating such a policy, the Debord opinion may provide it comfort in knowing that by also maintaining a reasonable policy for reporting complaints, the employer can help insulate itself from subsequent claims of retaliation.

[B] The First Amendment and Retaliation Jurisprudence

In addition to the whistleblower and retaliation laws applicable to all employers, government employers are also subject to retaliation claims based on the First Amendment. See 42 U.S.C. § 1983. The breadth of online speech entitled to First Amendment protection has expanded significantly with the opinion of the U.S. Court of Appeals for the Fourth Circuit in Bland v. Roberts, 730 F.3d 368 (4th Cir. 2013). In Bland, the defendant sheriff of Hampton, Virginia, won his race for reelection in November 2009. During his new term, however, the sheriff declined to reappoint the six named plaintiffs as full-time employees. In 2011, these plaintiffs filed suit; several alleged that the sheriff decided not to reappoint them based on their support of the sheriff’s opponent in the 2009 election via Facebook “likes” and comments, thereby infringing their First Amendment right to free speech.

The court ultimately decided that the sheriff enjoyed immunities against the plaintiffs’ claims for monetary damages, but not before it addressed the merits of the plaintiffs’ First Amendment arguments and found that Facebook “likes” constitute protected speech. The circuit panel opined that:

On the most basic level, clicking on the “like” button literally causes to be published the statement that the User “likes” something, which is itself a substantive statement. In the context of a political campaign’s Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance.

Id. at 386.

The panel further held that “liking” a page also qualifies as symbolic expression. It reasoned that the thumbs-up symbol generated by one plaintiff’s “like” in association with the opponent’s campaign page conveyed the plaintiff’s support of the opponent’s candidacy as clearly as actual text would have. According to the court, “liking a political candidate’s campaign page commu-
nicates the user’s approval of the candidate and supports the campaign by associating the user with it. In this way, it is the internet equivalent of displaying a political sign on one’s front yard.” *Id.*

Notwithstanding this development, there is some support for employers who discipline employees for legitimate business reasons. For example, in the unpublished decision Richerson v. Beckon, 337 F. App’x 637 (9th Cir. 2009), the Ninth Circuit addressed the issue of employee blogging in the context of a First Amendment retaliation claim. In that case, Richerson, a school teacher, maintained a publicly available blog entitled “What It’s Like on the Inside,” which included several highly personal and critical comments about her employer, union representatives, and fellow teachers. After the blog was discovered, several teachers and other school employees complained to the school district’s human resources director about it. Thereafter, the school district’s director of human resources transferred Richerson from her position as a “curriculum specialist” and “instructional coach” to a classroom teaching position. Richerson sued the district, alleging that her duties were reassigned in retaliation for the exercise of her First Amendment free speech rights.

The Ninth Circuit affirmed summary judgment in favor of the school district and held that the reassignment did not violate Richerson’s constitutional rights. In so ruling, the court applied the balancing test set forth in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and weighed the administrative interests of the school district against Richerson’s right of free speech under the First Amendment. The court concluded that because Richerson’s blog postings undermined her ability to enter into trusting relationships as an instructional coach and injured the school’s legitimate interests, the balance tipped in favor of the school district.

22. At least two courts have dealt with a similar issue in the Facebook context. In the first case, a teacher expressed her frustration with her first-grade students on Facebook and suggested that they would benefit from a “scared straight program.” *In re Tenure Hearing of O’Brien*, 2013 N.J. Super. Unpub. LEXIS 28 (N.J. Super. App. Div. Jan. 11, 2013). The court rejected the teacher’s contention that her comments addressed a matter of public concern, and held that even if they did, the school district’s interest in maintaining the confidence of parents in the district’s teachers outweighed the teacher’s right to express her comments. The second case produced a different result despite nearly identical facts. The teacher in that matter, like the one in *O’Brien*, posted a comment on Facebook insinuating that she wanted her students to face a fate similar to one child who had drowned during a beach field trip. *Rubino v. City of New York*, 2012 N.Y. Misc. LEXIS 468 (Sup. Ct. Feb. 1, 2012). A hearing officer found the teacher’s posting as unbecoming behavior and recommended termination. The New York Supreme Court disagreed, however, holding that termination was disproportionate to the offense, particularly in light of the teacher’s unblemished fifteen-year employment with the city. The court also
The Eleventh Circuit recently extended this line of reasoning to Facebook activity in Gresham v. City of Atlanta, 542 F. App'x 817 (11th Cir. 2013).\(^{23}\) The plaintiff in that matter had criticized another police officer in her department for unethically interfering with an investigation. She posted those sentiments on Facebook, but the plaintiff’s action violated a rule in her department requiring that criticisms of fellow officers be directed through official department channels. The plaintiff was placed on disciplinary investigation as a result, rendering her ineligible for several open promotions. The plaintiff filed an action claiming that she was not promoted in retaliation for her First Amendment speech on Facebook.

The Eleventh Circuit disagreed, holding that the plaintiff’s speech failed the *Pickering* balancing test. The panel began its opinion by highlighting the government’s legitimate interest in maintaining discipline and good working relationships among employees, and noting that comments concerning officer performance and integrity can impact confidentiality and a department’s efficient operation. According to the court, those legitimate interests outweighed the plaintiff’s interest in expressing her frustrations on Facebook, particularly since it was not calculated to prompt public discussion about her concerns. Furthermore, because the department’s policy was a lawful means to promote

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\(^{23}\) See also Graziosi v. City of Greenville, 775 F.3d 731 (5th Cir. 2015). In a fact pattern similar to that at issue in *Gresham*, the Fifth Circuit determined the City of Greenville’s termination of a police officer who had publically criticized the city’s police chief on the mayor’s public Facebook page was justified because the officer caused a disruption. The police officer, Susan Graziosi, was upset about her department not sending officers to a neighboring city to attend the funeral of a police officer killed in the line of duty. She posted comments on her own Facebook page that “This is totally unacceptable. Dear Mayor, can we please get a leader that understands that a department sends officers [to] the funeral of an officer killed in the line of duty?” Graziosi then posted her statement onto the mayor’s Facebook page and added “If you don’t want to lead, can you just get the hell out of the way.” *Id.* at 734. The court reasoned that Graziosi was not writing about a matter of public concern, rather an internal employee-employer dispute. *Id.* at 738. Even if Graziosi spoke on a matter of public concern, the court indicated it would not overturn her termination because: (1) the city alleged her statements caused a disruption by changing the attitudes of some of the officers who reported to the police chief, and (2) Graziosi was unable to demonstrate that her interests outweighed those of the city of Greenville. *Id.* at 740.
its legitimate interests, the department had acted appropriately in response to the plaintiff's undisputed violation of that policy. Finally, the court laid to rest the plaintiff's argument that the department's failure to produce evidence of disruption tilted the Pickering analysis in her favor. The opinion noted that her public employer had no such burden to provide proof of actual disruption, and in fact, pronounced that "the reasonable possibility of adverse harm will generally be enough to invoke the full force of judicial solicitude for a police department's internal morale and discipline" (citing Waters v. Chaffin, 684 F.2d 833, 839 (11th Cir. 1982)).

A similar result was reached in another case where the court found that the government's interests outweighed the employee's First Amendment rights. In Shepherd v. McGee, 986 F. Supp. 2d 1211 (D. Or. 2013), the plaintiff was an Oregon Department of Human Services case worker who posted negative comments on her Facebook page about the recipients of public assistance. The court found that the employee's statements had harmed her ability to perform her job duties in that her credibility was damaged—for example, she would not be an effective witness where testifying in juvenile court hearings was part of her job duties. Id. at 1220. The court found that the government's interests outweighed any First Amendment right the employee would have in posting her Facebook comments.

§ 11:4.5 Equal Employment Opportunity Laws

Employees who blog or post on social media sites remain protected by EEO statutes (for example, Title VII of the Civil Rights Act, state fair employment laws, etc.). The risk with the increase of social networking and other online activity is that conduct giving rise to discrimination or harassment claims can now occur through many new forums.

24. Another thorny situation of a government employee exercising his free speech arose when a deputy attorney general in Indiana tweeted that riot police in Wisconsin should "use live ammunition" to handle protesters at the state capitol. He also later stated, "[y]ou're damn right I advocate deadly force. Against thugs physically threatening legally-elected state legislators & governor?" The Office of the Indiana Attorney General reviewed the tweets and decided to terminate the employee in February 2011, justifying its actions by stating, "[w]e respect individuals’ First Amendment right to express their personal views on private online forums, but as public servants we are held by the public to a high standard, and we should strive for civility." As of March 2015, no lawsuit has been filed regarding this matter. See Ind. Official Who Urged “Use Live Ammunition” on Wis. Protesters Loses Job, NBC News (Feb. 23, 2011), www.msnbc.msn.com/id/41736625/ns/us-news-life/t/ind-official-who-urged-use-live-ammunition-wis-protesters-loses-job/.
Many employers now use Facebook, Twitter, LinkedIn, and other social networking sites as part of the vetting process for new hires. According to a 2014 survey, 43% of employers said they use social networking sites to research job candidates. Press Release, CareerBuilder, Number of Employers Passing on Applicants Due to Social Media Posts Continues to Rise, According to New CareerBuilder Survey (June 26, 2014), www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?sd=6%2F26%2F2014&id=pr829&ed=12%2F31%2F2014. Of those employers who research job candidates on social networking sites, 51% reported that they found content that caused them not to hire the candidate, while 33% of employers reported that they found content that made them more likely to hire a candidate. Id. Browsing these sites may allow employers to gather additional information about applicants and better understand whether they fit a company’s culture. Using these sites involves various risks, however, because they may inadvertently expose an employer to information about a potential hire’s protected characteristics. That mere knowledge could form the basis of a lawsuit. By way of example, if an employer learns of a candidate’s religious affiliations, it may find itself defending a Title VII claim for failure to hire even where no animus toward the applicant’s religion motivated the employer’s decision.

Furthermore, even if their social network screening procedures are proper, employers may be required to disclose any results from the search obtained or used in employment decisions under the Federal Fair Credit and Reporting Act (FCRA) or a state equivalent, if a third party is used to conduct the screening. See 15 U.S.C. § 1681 et seq.; see also California’s Investigative Consumer Reporting Agencies Act, CAL. CIV. CODE § 1786 et seq.; New York’s Fair Credit Reporting Act, N.Y. GEN. BUS. LAW § 380 et seq.

In fact, new online resources have expanded FCRA’s reach. For example, in 2012, the FTC filed a complaint alleging violations of FCRA against Spokeo, a data broker that compiles and sells detailed information profiles on consumers including information such as a consumer’s name, address, age range, email address, hobbies, ethnicity, religion, participation in social networking sites, and photos. Spokeo entered into a consent decree wherein it agreed to pay $800,000. Press Release, Fed. Trade Comm’n, Spokeo to Pay $800,000 to Settle FTC Charges Company Allegedly Marketed Information to Employers and Recruiters in Violation of FCRA (June 12, 2012), www.ftc.gov/news-events/press-releases/2012/06/spokeo-pay-800000-settle-ftc-charges-company-allegedly-marketed.

More recently, a 2014 class action filed in the Northern District of California alleges that LinkedIn’s “Reference Search” tool runs afoul of FCRA. Complaint, Sweet v. LinkedIn Corp., No. 5:14-cv-04531 (N.D. Cal. Oct. 9,
2014). The subscription-based service at issue provides prospective employers interested in learning more about a potential job candidate with a list of other LinkedIn members who have worked at the same company as the candidate during the same period of time (a “Reference Report”). A prospective employer may then contact those individuals, without notifying the candidate, to obtain information used in hiring and firing decisions. Plaintiffs claimed that the Reference Reports are consumer reports within the meaning of FCRA and that LinkedIn violated that statute by failing to comply with certification and disclosure requirements and failing to maintain reasonable procedures to limit use of the reports for permissible purposes and to ensure maximum possible accuracy, potentially harming job applicants who are evaluated based on that information.

The district court dismissed the complaint on several different grounds: First, the Reference Reports were not consumer reports within the meaning of the FCRA “because the information contained in these histories came solely from LinkedIn’s transactions or experiences with these same consumers[,]” which falls outside the definition of consumer reports. Sweet v. LinkedIn Corp., 2015 U.S. Dist. LEXIS 49767, at *12 (N.D. Cal. Apr. 14, 2015). Second, the plaintiffs failed to allege that LinkedIn acted as a consumer reporting agency in publishing the Reference Reports because the consumer-subjects of the reports had voluntarily provided their names and employment histories to LinkedIn, and the Reference Reports merely “carried out consumers’ information-sharing objectives.” Id. at *18–19. Fourth, the list of references did not bear on “the character, general reputation, mode of living and other relevant characteristics of the consumers who are the subjects of these searches.” Id. at *21 (omitting internal quotations). Fifth, because LinkedIn markets the Reference Reports as a “way for potential employers to locate people who can provide reliable feedback about job candidates and does not market the results themselves as a source of reliable feedback about job candidates[,]” plaintiffs failed “to establish that information communicated by the [Reference Search results], standing alone, could be used to make an employment-related decision.” Id. at *28–29.

One way for an employer to protect itself is to thoroughly document all hiring decisions, stating the reason for a particular decision at the time it is made. Another way to reduce the risk of discriminatory hiring claims is to have an employee with no authority to make hiring decisions, review the applicant’s online profile, and provide a summary to the hiring authority that has been filtered to redact or omit protected information about the candidate. In this way, the employer can use information on the social networking site, but will not be exposed to the protected characteristics. Another option is to engage a third party to review the online activity of potential employees. By outsourcing the checks, the third party will not only find the information the
employer seeks, but also filter out any protected class information. Before using a third party, however, employers should keep in mind that fair crediting reporting laws may apply if the third party falls within the definition of a “consumer reporting agency.” If so, then the third party may have certain licensing, training, and disclosure requirements. Leigh Kamping-Carder, Employers Get Tool to Limit Facebook Liability, LAW360 (July 6, 2011), http://law360.com/articles/254780/employers-get-tool-to-limit-facebook-liability.

Other suggestions to avoid legal claims when using social media in hiring include the following:

- Employers should screen applicants in a uniform manner by creating a list of the social media they will search for each applicant and the lawful information about each applicant desired from the social media search. If all applicants cannot be screened using the lawful criteria because an employer does not have the time, resources, or inclination to do so, employers must be consistent, objective, and nondiscriminatory in selecting subsets of applicants to screen.
- Employers’ representatives should not “friend” applicants in order to gain access to their nonpublic social networking profiles.
- Employers should consider conducting social media searches of candidates only after a contingent offer has been made.
- Employers that are considering making an employment decision based on information found in social media should consult with counsel prior to doing so.


[B] Discovery of Current Employees’ Protected Status or Protected Activity Through Social Media

As with hiring new employees, the practice of viewing personal information about current employees through social networks and blogs carries risks. Religious affiliations, political views, medical status, sexual orientation, and other protected information may all be accessible on an employee’s social network page. While employees generally cannot claim a reasonable expecta-

25. Related to this issue of “friending” applicants or even employees, several bar associations have discussed whether it is ethical for an attorney to access an adverse witness’s or party’s social network profile. See section 11:5.5, infra.
tion of privacy if they “friend” an employer who sees the information or publicly post the information, employers are still prohibited from making employment decisions based on this protected information even if it is widely available. For example, information about an employee’s criminal past, short of a conviction, or medical or financial problems that could potentially impact job performance are often shielded from any adverse employment decisions. Furthermore, the discovery by an employer of an employee’s medical condition (for example, on Facebook) may arguably put the employer on notice that the employee is protected under the Americans with Disabilities Act and should be offered reasonable accommodation.

The potential for a negative inference also exists where an employer learns of an employee’s protected activity before executing a lawful adverse employment action. For example, the court in Deneau v. Orkin, LLC, 2013 U.S. Dist. LEXIS 70933 (S.D. Ala. May 20, 2013), held that the plaintiff established a prima facie case of retaliation under Title VII where she was discharged only a few days after she posted a comment on her Facebook page asking, “anyone know a good EEOC lawyer? need one now,” and the employer’s managers were aware of the posting prior to her termination.26

[C] Obligation to Rectify Complaints of Unlawful Conduct

As mentioned above, employers may not have a strict obligation to monitor the online conduct of their employees, but they do have a duty to act when they know of or receive complaints of unlawful harassment or discrimination related to their workplace.

With regard to harassment, in an earlier case involving airline employees’ blogs, Blakey v. Cont’l Airlines, 751 A.2d 538 (N.J. 2000), the Supreme Court of New Jersey, overruling two lower New Jersey courts, found that the continuation of harassment through an online forum could be closely related to the workplace and lead to employer liability. In Blakey, a number of male pilots posted inflammatory, debasing, and derogatory comments about a female pilot on a computer forum maintained by Continental for all of its employees. The court held that although Continental did not have a duty to monitor private communications of its employees, Continental had a duty to

26. See also Gaskell v. Univ. of Ky., 2010 U.S. Dist. LEXIS 124572 (E.D. Ky. Nov. 23, 2010) (denying motion for summary judgment on plaintiff’s Title VII claim of religious discrimination where defendant’s discovery of plaintiff’s religious views through his personal website raised a triable issue as to whether those religious beliefs were a motivating factor in not hiring plaintiff).
take effective measures to stop co-employee harassment that it knew or had reason to know was occurring in a workplace-related setting. The court concluded that the employer-run online bulletin board was essentially the same as a bulletin board in an employee lounge or break room, and therefore, it was part of the workplace.

Courts have been inclined to require similar action by employers for complaints of harassment or discrimination arising from social media forums, despite the employer’s lack of control in these situations. In Amira-Jabbar v. Travel Servs., Inc., 726 F. Supp. 2d 77 (D.P.R. 2010), a former employee recited an incident on Facebook to support a hostile work environment cause of action. After a company outing, the plaintiff’s co-worker posted a photo on the social network that precipitated an allegedly racist remark in the comments section. The court granted the employer’s motion for summary judgment. The court first held that the isolated instances of harassment cited by plaintiff, including the Facebook comment, simply could not sustain a hostile work environment claim. The court further held that the employer could not be liable for the actions of plaintiff’s co-workers because it had satisfied its duty upon receiving the plaintiff’s complaint: The employer conducted an investigation of the wrongful acts, reviewed anti-harassment policies with employees, and blocked every work computer’s access to Facebook.27

[D] Nondiscriminatory Investigation and Enforcement of Social Media Policies

In addition to the above, employers who investigate and reprimand employees for personal blogs or social networking sites must be sure to conduct such investigations and take responsive actions in a nondiscriminatory manner to avoid discriminatory enforcement claims. For example, Delta Air Lines terminated an employee for posting sexually suggestive photographs of herself in a Delta uniform on her blog, entitled “Queen of the Sky.” The employee then filed a sex-discrimination complaint with the Equal Employment Opportunity Commission and a multi-million-dollar lawsuit against Delta. Although the employer contended that the termination was due to the

27. By contrast, the court in Montone v. City of Jersey City, 2013 N.J. Super. Unpub. LEXIS 3021 (N.J. Super. App. Div. Dec. 10, 2013), reinstated plaintiff’s hostile work environment claim, which was based, in part, on offensive comments made on a website that her employer did not control. That court reasoned that although the “defendants lacked authority to regulate the [ ] website itself, they may still have had a responsibility under their own standards to determine whether the posting constituted off-site or off-duty disrespect or harassment of a fellow officer, which the Department’s manual prohibited.” Id. at *41.
employee's misuse of the company's uniform, the plaintiff alleged that other employees, primarily men, posted photographs of themselves in uniform on the Internet without incident. Simonetti v. Delta Airlines, Inc., No. 05-2321 (N.D. Ga. filed Sept. 7, 2005). Ultimately, the case was dismissed for administrative reasons.

§ 11:4.6 Restrictive Covenants

Another legal question related to the use of social media in hiring and recruiting is whether contact through social networks violates non-competition agreements and other restrictive covenants. This is another example of the intersection between new technology and traditional legal theories that the courts are just beginning to address. In TEKsystems, Inc. v. Hammernick et al., No 0:10-cv-00819 (D. Minn. Mar. 16, 2010), a company brought an action against its former employee in the U.S. District Court for the District of Minnesota regarding whether a former recruiter for TEKsystems violated her post-employment non-competition agreement by contacting contract employees she recruited to TEKsystems about potentially working for her new employer, Horizon Integration. The case settled in 2010 prior to any decision.

The Eastern District of Michigan has also addressed non-compete agreements. In Kelly Servs., Inc. v. Marzullo, 591 F. Supp. 2d 924 (E.D. Mich. 2008), Kelly Services found out, by reading the LinkedIn profile of former employee Marzullo, that Marzullo had violated his non-competition agreement by working for a competitor in the Texas market. However, unlike TEKsystems, there was no evidence of contact with customers or sharing of trade secrets. As a result, the court did not find that the confidentiality and non-solicitation agreements were violated.

Two years later, the U.S. District Court for the Eastern District of Michigan examined whether individuals who were part of a network of hundreds of thousands of independent business owners (IBOs) and sold products for Amway Corporation had violated a non-solicitation rule by encouraging other IBOs to compete with Amway. Amway Glob. v. Woodward, 744 F. Supp. 2d 657 (E.D. Mich. 2010). The court upheld an arbitrator’s decision that the defendant IBOs did solicit other IBOs to join a competitor, most notably through a blog entry describing one IBO’s reasons for making the switch and stating, “[i]f you knew what I knew, you would do what I do.” In finding that this conduct violated the non-solicitation agreement between the IBOs and Amway, the court found that the substance of the message and the medium through which it was transmitted were determinative of whether the communication was a solicitation. The court further reasoned that communications qualifying as solicitations do not lose that status merely because they
are made on the Internet. Further, the possibility that no one would actually read the online solicitation does not affect its status as a solicitation.

§ 11:4.7 State Laws Pertaining to Off-Duty Conduct

Some states, notably New York and California, have off-duty conduct statutes. CAL. LAB. CODE §§ 96(k), 98.6; N.Y. LAB. LAW § 201-d. In addition to New York and California, similar statutes have been enacted in Colorado and North Dakota. COLO. REV. STAT. § 24-34-402.5(1); N.D. CENT. CODE § 14-02.4-03. These laws limit the ability of an employer to deny employment to, or discipline or terminate, an employee for engaging in lawful, off-duty political or recreational activity that does not present a conflict with the employer’s business. The case law interpreting these statutes is limited, but blogging could conceivably fall under the umbrella of protected activities under certain circumstances.

[A] New York Labor Law

New York Labor Law prohibits discrimination against an employee for his or her participation in “legal recreational activities outside work hours.” N.Y. LAB. LAW § 201-d(2)(c). The statute defines “recreational activities” as “any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material.” N.Y. LAB. LAW § 201-d(1)(b). These recreational activities must take place outside of working hours, off the employer’s premises, and without use of the employer’s property to qualify for protection. N.Y. LAB. LAW § 201-d(2)(c). The statute also protects an employee’s right to engage in legal political activities on the employee’s own time and without use of company property. N.Y. LAB. LAW § 201-d(2)(a).

However, an employer may refuse to hire, discipline, or terminate an employee if the activity “creates a material conflict of interest related to the employer’s trade secrets, proprietary information or other proprietary or business interest.” N.Y. LAB. LAW § 201-d(3)(a). The statute plainly leaves room for employers to argue that they can discipline an employee whose online activity contains material that reveals trade secrets or otherwise disparages the employer. The more difficult question is whether an employer can take action against an employee whose blog or social networking page contains embarrassing material that is facially unrelated to the company. For example, could an employee rely on the labor law’s off-duty protection if the employee is fired due to sexually explicit material on the employee’s blog? An employer may argue that this embarrassing material undermines some business interest,
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whether financial or something less tangible, such as the company’s goodwill or reputation.


Given the narrow scope of the statute, it is unclear whether blogging or social networking without more would be protected under the statute as a recreational activity. Therefore, whether such online content falls under the labor law exception is likely to be evaluated on a case-by-case basis based on the specific factual circumstances.

[B] California Labor Law

California has a similar off-duty conduct statute. The law prohibits discharge or discrimination in employment based on “lawful conduct occurring during nonworking hours away from the employer’s premises” and allows California’s Labor Commissioner to pursue these claims on an employee’s behalf. CAL. LAB. CODE §§ 96(k), 98.6.

Although the language of section 96(k) appears broad, it has been applied narrowly by the courts. Indeed, California appellate courts have held that the statute creates no substantive rights, but instead allows the commissioner to pursue violations of existing civil rights. In order to state a claim under section 96(k) for termination or discrimination in violation of public policy, the employee must allege violations of “recognized constitutional rights.” Barbee v. Household Auto. Fin. Corp., 6 Cal. Rptr. 3d 406, 411–13 (Ct. App. 2003); see also Grinzi v. San Diego Hospice Corp., 14 Cal. Rptr. 3d 893 (Ct. App. 2004) (“to establish a tortious discharge claim under [section] 98.6, [plaintiff must allege the] discharge occurred because she asserted a recognized constitutional right”) (citing Barbee).

Whether or not blogging and social networking are protected under California’s “lawful conduct” statute therefore turns on whether employee discipline or termination would impinge on constitutional rights. Perhaps the most obvious right, the right to free speech, is not an issue for private employers. Unlike the protections for privacy in the California Constitution
analyzed in Barbee, California’s protections for free speech require state action. See Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n, 111 Cal. Rptr. 2d 336, 26 Cal. 4th 1013, 1031 (Cal. 2001). However, privacy rights are enforceable against private actors and could affect employer liability.

Although section 96(k) was not expressly at issue, there is at least one example of a California court upholding an employer’s decision to terminate an employee based on his off-duty conduct. In San Diego Unified Sch. Dist. v. Comm’n on Prof’l Competence, 124 Cal. Rptr. 3d 320 (Ct. App. 2011), a school district suspended and served a notice to terminate a dean of students for soliciting sex on Craigslist via a posting that included explicit and pornographic pictures of himself. The dean removed the ad upon notification and argued that he did not intend students to see it and that parents should be monitoring their children’s Internet activities. Both the Commission on Professional Competence and the trial court (who reviewed the commission’s decision) found no cause for dismissal existed because, although “this sexually explicit ad was vulgar and inappropriate and demonstrated a serious lapse in good judgment,” the school district failed to prove any nexus between the ad and the employee’s employment. However, the California Court of Appeal reversed. Although the court found that the employee did not use school time, resources, or equipment to post the ad and that the employee did not intend any student to view it, the court determined that the employee’s actions demonstrated “evident unfitness to teach” and that he had engaged in immoral conduct under California Education Code section 44932, either of which was enough to warrant termination by itself. Although section 96(k) was not expressly at issue, this case provides some support for an employer’s decision to terminate an employee based on his or her off-duty conduct involving social media use.

§ 11:4.8 The Right to Privacy and the Stored Communications Act

Although more thoroughly discussed in chapter 8, both federal and state law define when employees have a reasonable expectation of privacy in their use of social media and blogs. Additionally, to the extent that employees’ outside postings on blogs or social networking sites are invitation only and password-protected, unauthorized access of these postings may result in liability under the federal Stored Communications Act (SCA), a statute that has spawned a new realm of litigation with the growing use of social media in business.

In Pietrylo v. Hillstone Rest. Grp., 2009 WL 3128420 (D.N.J. Sept. 25, 2009), two employees established an invitation-only and password-protected chat group on MySpace for employees of Hillstone to vent their grievances about their employer. Upon request of one of Hillstone’s managers, an
employee who had been given access to the chat group turned over her account log-in and password information. After accessing the site several times, management fired the two employees who created the group. The employees filed suit claiming that the employer violated the SCA and invaded their right to privacy. The jury returned a verdict for the employees finding that although the employees’ common-law right to privacy was not invaded, the employer had violated the SCA by accessing the password-protected MySpace postings without authorization. The jury also found that the employer had acted maliciously, and awarded punitive damages. In upholding the jury verdict, the trial court held that, even though the managers were provided log-in and password information from another employee, the jury’s finding that the employer’s access was not authorized was supported by evidence that the employee who turned over the log-in and password information was coerced into providing the information.

A New Jersey federal district court has found that the SCA also applies to privately held data maintained on Facebook. Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 872 F. Supp. 2d 369 (D.N.J. 2013). The plaintiff in Ehling, a registered nurse, had posted a comment on her Facebook wall implying that paramedics who arrived at the scene of a museum shooting should have let the felon die. The plaintiff had made her account visible to only her friends, but unbeknownst to the plaintiff, one of those Facebook “friends”—a co-worker—transmitted snapshots of her postings to management. The plaintiff was suspended as a result. She filed suit two years later, alleging that the employer improperly accessed her Facebook account in violation of the SCA and her right to privacy, in addition to other causes of action.

The employer successfully moved to dismiss those claims. While the court found that the plaintiff’s efforts to maintain the private nature of her Facebook account entitled it to protection under the SCA, the alleged wrongful conduct for which she sought redress fell within an exception precluding her employer’s liability. As the court pointed out, the plaintiff authorized her co-worker’s access to her Facebook wall with the intent of communicating her updates. And because the co-worker voluntarily provided screenshots to her employer, the employer did not violate the SCA. Indeed, the very fact that her employer was merely a “passive recipient[ ] of information” was also fatal to her claim for invasion of privacy.28

28. See also Sumien v. CareFlite, 2012 Tex. App. LEXIS 53 (Tex. App. July 5, 2012) (rejecting employee’s intrusion claim arising out of offensive comments he exchanged on Facebook with a co-worker that were discovered by a compliance officer who was Facebook friends with the co-worker; employee’s misunderstanding about co-worker’s privacy settings did not mean that employer intentionally intruded on his seclusion). But see Rodriguez v. Widener Univ., 2013 U.S. Dist.
Maremont v. Susan Fredman Design Grp., Ltd., 2011 U.S. Dist. LEXIS 140446 (N.D. Ill. Dec. 7, 2011), yet another case involving similar causes of action, highlights the hurdles that employees must overcome to wage a successful privacy-related claim. The plaintiff in Maremont alleged that her employer made business-related postings to her personal Twitter and Facebook accounts while she remained on medical leave. The plaintiff had stored her access information for those accounts on the employer’s servers, but she never gave anyone explicit authority to access her accounts, and the employer failed to stop posting on them despite her request to do so.

The plaintiff later sued her employer under various theories, including violations of the SCA and breach of privacy. On cross-motions for summary judgment, the court allowed the plaintiff’s SCA claim to move forward, finding unanswered questions with respect to whether plaintiff suffered actual injury as a result of the employer’s SCA violation and the extent to which the employer had been authorized to post on her social media accounts.29 As for plaintiff’s privacy claim, it was dismissed. The court noted that the plaintiff had approximately 1,250 subscribers to her Twitter and Facebook postings—a broad online following, which left no dispute that the contents of her accounts were public; plaintiff, therefore, did not identify any private content breached by her employer.

To address these privacy issues, employers should promulgate well-defined technology policies that explicitly state that network and equipment use is subject to monitoring and search. While publicly available blog and social media postings are unlikely to be the subject of any privacy protection, stored or archived material on a work computer could potentially qualify.

For further discussion of how privacy rights may impact social media use, see chapter 8, Employee Privacy Law.
§ 11:4.9 New Laws Prohibiting Employers’ Access to Employees’ Social Media Accounts

Whether an employer can demand access to an employee’s, or potential employee’s, social networking profile or blog has been the subject of recent debate and legislative activity.

In 2009, the city of Bozeman, Montana, came under fire for a policy that asked, but did not require, all job applicants to provide log-in information and passwords to social networking profiles because the public had a right to know who the city hired. The city’s stance also stated that this information would be helpful for certain positions, such as child care or law enforcement. Following widespread, nationwide opposition to the practice, the city eliminated the hiring practice.

In 2011, a job applicant applying for a position with the Maryland Department of Corrections was required to undergo a background investigation. Part of that investigation included providing the department with the applicant’s Facebook log-in and password to permit the interviewer to review the applicant’s Facebook profile and postings. While the Maryland Department of Public Safety and Correctional Services (DPSCS) denied that a log-in and password were required for employment, the applicant stated he was informed the requirement was department policy. The ACLU sent a letter to the DPSCS requesting this practice be suspended indefinitely. In response, the DPSCS agreed to temporarily suspend the process of asking applicants for social media information, agreed that an applicant’s refusal to provide log-in and password information would not be grounds for disqualification, but reserved the right to inquire about a candidate’s Facebook account.

Prompted by the nationwide publicity of these and other cases, an increasing number of states, including California, have passed legislation in the last several years that bars employers from requesting that current and/or prospective employees provide account information for social media site...
access.\textsuperscript{33} The California statute, for example, specifically prohibits an employer from requiring or requesting an employee or applicant for employment to disclose a user name or password for the purpose of accessing personal social media in the presence of the employer, or to divulge any personal social media. In addition, the statute prohibits an employer from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand by a violating employer.\textsuperscript{34} However, employers may request social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or an employee violation of law.\textsuperscript{35} Other states have opted to promulgate statutes with similar provisions banning demands for user name or password information;\textsuperscript{36} additional proscriptions against employer requests to be added as a social media contact;\textsuperscript{37} prohibitions on employers from requiring or requesting an employee or applicant to authorize an employer to advertise on the personal social media account of the employee or applicant;\textsuperscript{38} or broad language prohibiting coerced access by an employer generally.\textsuperscript{39} The Vermont legislature, meanwhile, has elected to commission a study of social network privacy in the workplace before taking further action.\textsuperscript{40}

\begin{itemize}
\item \textsuperscript{35} Notably, pending legislation in New York State could limit an employer’s ability to investigate an employee’s electronic misconduct. See S.2434-D (Klein)/A.443-D (Dinowitz). In addition to prohibiting an employer from rejecting a job applicant, or disciplining or discharging an employee for refusal to provide access to personal social media accounts, this bill would preclude employers from accessing any employee personal accounts or services on an electronic device paid for in whole or in part by the employer, except in very limited circumstances, such as compliance with a court order.
\item \textsuperscript{38} 2015 Or. Laws ch. 229 (S.B. 185).
\item \textsuperscript{39} See, e.g., COLO. REV. STAT. § 8-2–126; 820 ILL. COMP. STAT. § 55/10; N.J. REV. STAT. § 34:6B-6; N.M. S.B. 371 (2013); WASH. REV. CODE § 49.44.200.
\item \textsuperscript{40} Vt. S.7 (2013).
\end{itemize}
Similar legislation was introduced on the federal level to regulate employer access to employee and applicant account information. The Password Protection Act of 2012 was introduced in the U.S. Senate to prohibit employers from compelling or coercing disclosure of private user information to gain access to private social media accounts as a condition of employment.41 The bill also sought to prohibit employers from discriminating or retaliating against a prospective or current employee due to a refusal to comply with an employer’s request for access. Likewise, the Social Networking Online Protection Act was introduced in the House to prohibit employers and universities from requiring employees or students to provide access information to personal email or social media accounts.42 Both bills expired after being referred to committees, but have since been reintroduced.43 It remains to be seen whether these incarnations will muster as much support as their state counterparts.

Facebook has also weighed in and is warning employers not to ask job applicants for their passwords and threatening legal action to enforce its policy against sharing passwords.44

§ 11:5 Utilizing Social Media in Investigations and Litigation

§ 11:5.1 Social Media Considerations in Workplace Investigations

Employers conducting workplace investigations involving social media should consider the following:

- Limiting investigations to legitimate business purposes, such as investigating and remediating workplace harassment or other unlawful inappropriate conduct; or preventing improper use of an employer’s computer and electronic systems; or investigating noncompliance with company policies.

§ 11:5.2 Establishing policies that notify employees that all of their electronic communications that are created, sent, received, or stored on the employer's computer system, or on any electronic device provided or paid for by the employer are not private, and are subject to search.

- Preserving any electronic evidence of employee misconduct voluntarily provided by third parties.
- Contacting the police when an employee's social media may include evidence of criminal conduct.
- Upon discovering potential electronic misconduct by an employee, immediately shutting down the employee's access to his/her work computer and other employer-issued devices and preserving the entire contents of those devices.
- Except for communications on an employer's electronic equipment or communications voluntarily provided by a third party, only using publicly available information.
- Before taking corrective action, providing the employee an opportunity to refute any negative, job-related information found during the investigation.

§ 11:5.2 Scope of Discoverability of Blogs and Social Media

Based on the wealth of information available on blogs and social networking sites, it comes as no surprise that these sites have discoverable information. Employers in litigation should consider sending a preservation notice to opposing counsel that includes a request to preserve such information and include such information in their own data preservation policies. For example, company-issued computers, phones, or other devices may contain a user's blog and/or social networking information.

Courts, however, are still sorting out the extent to which blogs and social networking information are discoverable in litigation. New York courts apply a two-prong analysis in determining whether to compel production of the contents of social media accounts. First, a court must assess "whether the content contained on/in a social media account is 'material and necessary'; and then [conduct] a balancing test as to whether the production of this content would result in a violation of the account holder's privacy rights." Fawcett v.

Altieri, 960 N.Y.S.2d 592, 595 (Sup. Ct. Richmond Cty. 2013) (omitting citations). In Fawcett, the defendant sought access to plaintiff’s “social media website pages” ostensibly to probe plaintiff’s allegations that his injuries resulted in social, emotional and economic harm. Id. The court held that “[t]here must be a clear factual predicate in order to compel the production of social media records from the defendants or authorizations for the production of that material from certain social media providers.” Id. at 597. To guard against “fishing expeditions,” a party seeking such records must “show with some credible facts that the adversary subscriber has posted information or photographs that are relevant to the facts of the case at hand.” Id. Because defendants failed to present the requisite factual predicate, the court denied access to plaintiff’s social media content.46

Some recent decisions, however, have questioned whether the above approach is consistent with the far-reaching scope of New York CPLR 3101(a), which provides that “There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” In Forman v. Henkin, 2015 WL 9115509 (N.Y. App. Div. 1st Dep’t Dec. 17, 2015), a personal injury action, the court denied defendant access to plaintiff’s deactivated, private Facebook account for failure to make the predicate factual showing. The dissent, however, criticized “[t]he procedure created by these cases, by which a defendant may obtain discovery of nonpublic information posted on a social media source in a plaintiff’s control only if that defendant has first found an item tending to contradict the plaintiff’s claims, at which time the trial court must conduct an in camera review of all the items contained in that social media source, [because it] imposes a substantial—and unnecessary—burden on trial courts.” Id. at *8. Moreover, the dissent noted

46. New York courts have applied Fawcett with varying outcomes. Compare Tapp v. N.Y.S. Urban Dev. Corp., 958 N.Y.S.2d 392, 393 (App. Div. 2013) (denying access to plaintiff’s Facebook records after concluding that “defendant’s argument that plaintiff’s Facebook postings ‘may reveal daily activities that contradict or conflict with’ plaintiff’s claim of disability” did not establish the necessary “factual predicate,” and “amounts to nothing more than a request for permission to conduct a fishing expedition”) (omitting citations), with Gonzalez v. City of New York, 16 N.Y.S.3d 792 (Sup. Ct. 2015) (ordering personal injury plaintiff to produce contents of social media accounts for in camera inspection because “Defendants have demonstrated that the plaintiff has posted photographs and comments concerning how the accident happened and the extent of his injuries.”), and Jennings v. TD Bank, 2013 N.Y. Misc. LEXIS 5085 (N.Y. Sup. Ct. Nassau Cty. July 3, 2013) (granting access to plaintiff’s social media accounts based on defendant’s proffer of photographs from public, unblocked portions of plaintiff’s Facebook account which appeared to contradict her allegations that she suffered from permanent and continuing physical injuries).
that this process is inconsistent with the general discovery practice where there is no “preliminary requirement that the party seeking discovery must be able to prove that the other side has in its possession an item or items answering to the description in the discovery demand.” *Id.*

Moreover, social networking sites may be deemed discoverable, notwithstanding a party’s expectation of privacy as evidenced by “private” or restricted settings. For example, in 2010, a New York state court ordered a plaintiff to turn over access to her entire Facebook and MySpace pages even though she had used strict privacy settings. Romano v. Steelcase, Inc., 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010). The plaintiff alleged in a personal injury action that her injuries prevented her from participating in certain activities and affected her enjoyment of life. However, public pictures on social media sites showed her participating in an active social life and traveling to other states, contrary to her assertions that her injuries prohibited travel. Defendant moved to compel production of the “private” or restricted portions of her social networking sites. In granting the request, the court dismissed plaintiff’s privacy concerns because social networking sites have policies that state the information is in public space, and indeed the “very purpose” of social networking sites is to share information with others.47

Some cases take a more restrictive approach and find that social media sites with restricted access are not discoverable. See Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965 (C.D. Cal. 2010) (finding Facebook and MySpace messages with restricted access were not discoverable due to their private nature).

47. See also Bass v. Miss Porter’s Sch., 2009 WL 3724968 (D. Conn. Oct. 27, 2009) (ordering the production of the plaintiff’s entire Facebook profile); Ledbetter v. Wal-Mart Stores, Inc., 2009 WL 1067018 (D. Colo. Apr. 21, 2009) (denying plaintiff’s motion for protective order regarding their Facebook, MySpace, and Meetup.com content); Zimmerman v. Weis Mks., Inc., 2011 Pa. Dist. & Cty. Dec. LEXIS 187 (Pa. Ct. C.P. May 19, 2011) (finding that because plaintiff voluntarily posted all of the pictures and information on social media sites to share with other users, he had no reasonable expectation of privacy; social networking site is, by definition, the “interactive sharing of your personal life with others”); McMillen v. Hummingbird Speedway, Inc., 2010 Pa. Dist. & Cty. Dec. LEXIS 270 (Pa. Ct. C.P. 2010) (unrealistic for a person to believe that disclosures made to others on social media sites would be considered confidential and remain private because the goal of the sites is to connect with others); Patterson v. Turner Constr. Co., 931 N.Y.S.2d 311 (App. Div. 2011) (finding that discovery of relevant posting on plaintiff’s online Facebook account was not protected from discovery simply because privacy settings were used to restrict access); Largent v. Reed, No. 2009-1823 (Pa. Ct. C.P. Nov. 8, 2011) (finding plaintiff’s Facebook account was discoverable due to pictures and status updates contradicting her injury claims; “only the uninitiated or foolish could believe that Facebook is an online lockbox of secrets”).

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Other courts take a more nuanced approach to discovery of social networking sites, carefully scrutinizing whether the underlying information is relevant. For example, in Mailhoit v. Home Depot USA, Inc., No. CV-11-03892, 2012 WL 3939063 (C.D. Cal. Sept. 7, 2012), the defendant in an employment lawsuit sought several categories of social media communications related to plaintiff, including social networking posts about plaintiff’s emotions, posts to place plaintiff’s own communications “in context,” employment-related posts, and all pictures on her profile or tagged during the relevant time period. Although the court recognized that social networking sites are generally subject to discovery, the federal rules still required “a threshold show that the information is reasonably calculated to lead to the discovery of admissible evidence.” Therefore, the court found three of the four categories overbroad but approved the defendant’s request for employment-related social media communications, specifically communications between plaintiff and any current or former employee of Home Depot, or which in any way refers to her employment at Home Depot or the lawsuit.48

Mailhoit appears to be part of a common, if not prevailing, trend in which judges approach social media discovery on a case-by-case basis, often demanding that parties submit tailored requests49 for production or employing

48. See also Pecile v. Titan Capital Grp., LLC, 979 N.Y.S.2d 303 (App. Div. 1st Dep’t 2014) (denying defendant’s motion to compel sexual harassment plaintiffs to produce their social media postings as employer’s “vague” assertions that the postings in question might conflict with their emotional claims was insufficient to order disclosure); Tompkins v. Detroit Metro. Airport, 278 F.R.D. 387 (E.D. Mich. 2012) (acknowledging that material posted on Facebook is neither privileged nor protected by a right to privacy, but finding that the defendant does not have a “generalized right to rummage at will through information”); McCann v. Harleyville Ins. Co. of N.Y., 910 N.Y.S.2d 614 (App. Div. 2010) (upholding the denial of a motion to compel Facebook information, because the defendant failed to establish a basis for relevancy of the evidence and instead was seeking to conduct a fishing expedition into plaintiff’s Facebook account); Offenback v. L.M. Bowman, Inc., 2011 WL 2491371 (M.D. Pa. June 22, 2011) (granting the defendant access to relevant information on the plaintiff’s Facebook and MySpace pages during an in camera review; questioning whether it was necessary for it to review the online “private” information).

49. See, e.g., Reid v. Ingerman Smith, 2012 U.S. Dist. LEXIS 182439 (E.D.N.Y. Dec. 27, 2012) (electing not to require full disclosure of all materials contained in plaintiff’s social media accounts because not all of the information would be relevant); Giachetto v. Patchogue-Medford Union Free Sch. Dist., 293 F.R.D. 112 (E.D.N.Y. May 6, 2013) (holding that routine status updates on social networking sites were not relevant to plaintiff’s claim for emotional distress, but that postings related to the emotional distress alleged were relevant and discoverable); Robinson v. Jones Lang LaSalle Ann., Inc., 2012 U.S. Dist. LEXIS 123883 (D. Or. Aug. 29, 2012)
§ 11:5.3 Methods of Discovering Blogs and Social Media

During litigation, employers are likely to be more successful obtaining social networking information from individual users rather than third-party providers. This is because some courts interpret the Stored Communications Act to find that it may not enforce subpoenas to third-party social networking providers for user information. See, e.g., Crispin, 717 F. Supp. 2d 965 (finding that Facebook and MySpace are electronic communications services providers under the Stored Communications Act). However, employers can still rely on

(granting a motion to compel in part to facilitate discovery of social media activity that could demonstrate the degree to which plaintiff experienced alleged emotional distress); Caban v. Plaza Constr., 41 Misc. 3d 1205(A) (Sup. Ct. N.Y. Sept. 24, 2012) (denying with prejudice motion seeking a compressed file of plaintiff’s social media accounts subject to a new demand with more specific identification of relevant social media data). A “unique[ ]” case in which the near totality of plaintiff’s Facebook activity was “more relevant than normal” is Appler v. Mead Johnson & Co., 2015 WL 5615038, at *5 (S.D. Ind. Sept. 24, 2015). Plaintiff alleged that defendant had discriminated against her on the basis of her narcolepsy and defendant subsequently requested the entire contents of her Facebook account. The court granted almost the entirety of defendant’s request because plaintiff’s online history would “reveal the times she is active online, so obviously awake.” Id.
traditional forms of discovery to obtain user’s social networking information, and some providers are enabling employers to do so. For example, Facebook has a feature called “Download Your Information,” where users can download all information ever uploaded into their Facebook account, including their profile, friend list, notes, events, photos and videos, wall posts, and sent and received messages and comments.\(^5\) This “Download Your Information” feature should allow employers in litigation to request Facebook information easily by requesting all documents accessible through the user’s “Download Your Information” feature.\(^1\) Furthermore, because of the simplicity of the download feature, employers should be able to successfully resist arguments that retrieving such data is overly burdensome.

Facebook also has unveiled its “Timeline” feature, which allows users to (1) keep a historical record of everything they have done on Facebook, and (2) compile a catalog of everything the user is interested in.\(^2\) This new feature further increases Facebook’s potential as a discovery engine for attorneys and others interested in the information. The enhancements to users’ profiles allow Facebook and its users to compile a mini encyclopedia about users and the users’ interests. The Timeline information enables users to flip through wall posts and other actions and is organized by year.\(^3\) Moreover, users can go back into their timeline and fill in past details and events, and users’ friends can see comprehensive summaries of their friends’ profiles.\(^4\) Notably, any additions made retroactively to a picture or previous status will appear under the prior year in Timeline.\(^5\) For example, if a user comments in 2015 on a picture initially posted in 2002, the new comment from 2015 will appear in 2002 on Timeline. Though metadata will show when the new information was actually posted, this may result in increased time and cost to attorneys analyzing the Facebook posts in an effort to prevent litigants from posting comments retroactively in an effort to improve their case. This further increases the wealth of information available on social networking sites that may be subject to discovery.

\(^5\) How to Download Your Information from Facebook, YouTube (Dec. 15, 2013), www.youtube.com/watch?v=_N5iuKJzeFU.

\(^1\) At least one court has compelled a party to supply social media data using the “Download Your Information” tool. See In re White Tail Oilfield Servs., 2012 U.S. Dist. LEXIS 146321 (E.D. La. Oct. 11, 2012).


\(^4\) Sullivan & Newman, supra note 52.

\(^5\) Ryan, supra note 53.
§ 11:5.4 The Importance of Prompt Discovery Notices

Social media provides such significant leverage in litigation that a party that fails to preserve relevant data may be subject to considerable penalties. The personal injury plaintiff in Gatto v. United Air Lines, Inc., 2013 U.S. Dist. LEXIS 41909 (D.N.J. Mar. 25, 2013), learned this lesson after neglecting to recover his deactivated Facebook account. Per court order, the plaintiff in that case had agreed to change the password on his Facebook account in order to give the defendants access to his profile. When the defendants subsequently used the furnished password, Facebook alerted the plaintiff that an unfamiliar IP address had accessed his account. As a result, plaintiff’s counsel contacted defense counsel, who confirmed that they—and not an unauthorized user—were responsible for the warnings.

Despite receiving affirmation that his account had not been compromised, the plaintiff still deactivated his Facebook profile on the basis of those alerts. By the time plaintiff’s counsel advised defense counsel of this development, Facebook’s purported practice of automatically deleting accounts fourteen days after deactivation had already taken effect, rendering the plaintiff’s former account irretrievably lost. Asserting that the lost account contained relevant data that contradicted the plaintiff’s claims and deposition testimony, the defendants filed a motion for sanctions that included a trial instruction for the jury to draw an adverse inference against the plaintiff for failing to preserve his Facebook account.

The court held that the plaintiff’s failure to preserve his Facebook account warranted the adverse inference (or “spoliation instruction”) because:

1. the account was within his control;
2. the destroyed evidence was relevant to the parties’ claims or defenses;
3. it was reasonably foreseeable that his account would be discoverable; and
4. the evidence in the account had actually been suppressed.

Notably, in reaching this conclusion, the court found it immaterial whether or not the plaintiff had unintentionally deprived the defendants of evidence. According to the court, the spoliation inference serves a remedial function that remains operative so long as the suppressed evidence was relevant. Moreover, the court held that even if the plaintiff did not intend to deprive the defendants of relevant data, it was undisputed that he acted intentionally when he deactivated his Facebook account and failed to reactivate it within fourteen days.

Gatto highlights the duty of plaintiffs to preserve their social media accounts, as well as the need of employers to serve related discovery requests promptly. Once an employee is put on notice of his obligation to preserve
relevant evidence, any subsequent misconduct in suppressing information will provide employers with grounds for seeking sanctions.

Not only may parties not destroy relevant social media information, but attorneys may not advise clients to do so. While attorneys may counsel their clients not to post on social media or to change their privacy settings during a litigation, attorneys should not counsel clients to “clean up” their social media accounts to avoid discovery of same. For example, in Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. Sup. Ct. Jan. 10, 2013), the court imposed monetary sanctions of $542,000 on an attorney who advised his client, Lester, to clean up his Facebook page so that certain information and photos would not be shown at trial. Lester was suing for the wrongful death of his wife, who was killed in a car accident. In addition to sanctioning the attorney, the court referred the attorney to the state disciplinary board, which imposed a five-year suspension.

§ 11:5.5 Limitations on Attorney Research Using Blogs and Social Networking Sites

While social networking provides new avenues for discovery and research, attorney ethical restraints remain in place. States prohibit attorneys from using dishonesty, fraud, deceit, or misrepresentation to discover information from blogging or social networking sites. For example, the Philadelphia Bar Association did not allow an attorney to ask a third party to “friend” the witness in order to gain access to the individual’s social network profile, without disclosing any affiliation with the lawyer or the purpose for which access was being sought, but did allow the attorney to do so using truthful information because it would not constitute “dishonesty, fraud, deceit, or misrepresentation.” Phila. Bar Ass’n, Opinion 2009-02 (Mar. 2009).56 On the other hand, the New York City Bar Association has opined that an attorney or agent for an attorney may use his or her “real name to send a ‘friend request’ to obtain information from an unrepresented person’s social networking website without also disclosing the reasons for making the request.” Ass’n of Bar of City of N.Y. Comm. on Prof’l & Judicial Ethics, Formal Op. 2010-2. With respect to represented parties, the New York State Bar Association allows lawyers to access a represented party’s social media pages only if the profile was

available to all members of the social network (that is, “public”) and the lawyer neither “friends” the party nor directs someone else to do so. N.Y. State Bar Ass’n, Ethics Op. 843 (Sept. 20, 2010). The New York Bar Association opinion was aimed at preventing the use of deception to obtain information such as attempting to “friend” a witness or adversary under false pretenses.

In June 2015, the New York State Bar Association’s Commercial and Federal Litigation Section updated the NYSBA, Social Media Ethics Guidelines (June 9, 2015), www.nysba.org/socialmediaguidelines/. These guidelines provide non-binding guidance on a host of issues including attorney advertising, furnishing legal advice through social media, reviewing and using evidence from social media, ethically communicating with clients, and researching jurors via social media. Under the guidelines, a lawyer may seek permission to view the restricted portion of an unrepresented person’s social media website, but the attorney must use his or her full name and accurate profile, and if the recipient asks for additional information, the attorney must accurately provide the information requested or withdraw the request. Id. Guideline 4.B.

Recent decisions have granted attorneys permission to investigate jurors and potential jurors using the Internet and social media sites so long as they do not communicate with them. For example, the New York City Bar Association issued an ethics opinion addressing when an attorney may research potential or sitting jurors through social media websites. N.Y. City Bar Ass’n, Formal Op. 2012-2: Jury Research and Social Media (2012), www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02. The opinion provides that attorneys may conduct research on jurors, but may not make any communication with them. The opinion defines prohibited conduct in the context of social media to include any communication that makes a juror or potential juror aware of the attorney’s viewing or attempted viewing of the juror’s personal social media page. Even an unintentional contact (such as a website’s automatic notification that someone has viewed the juror’s profile) may qualify as a violation. Further, while an attorney may view public information on jurors, attorneys may not engage in, or employ others to engage in, deceptive practices when researching to gain more information on jurors.

Similarly, the ABA issued a formal opinion in April 2014 that permits a lawyer to review a juror or potential juror’s publicly available Internet presence, but prohibits communication with such individual by, for example, attempting to access the juror or potential juror’s private social media profile through a “friend” request. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 466 (2014). Unlike the New York opinion, however, a juror or potential juror’s discovery that an attorney is viewing his or her Internet pres-
ence when a network setting notifies the juror of such does not constitute a communication from the lawyer. *Id.* Furthermore, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the attorney must take reasonable remedial measures, including, if necessary, disclosure to the tribunal. *Id.*

### § 11:5.6 Publicizing Litigation Proceedings via Blogs and Social Networks

With the advent of blogs and social networking sites, neither employees nor employers can rely on court proceedings with incendiary allegations remaining anonymous. With technology today anyone can quickly share court documents and testimony to the entire world, just by sitting in the audience with a smartphone. For example, even though the Northern District in California prohibited cameras in the courtroom for the Proposition 8 trial, numerous sources were tweeting the exact words from the proceedings in real time. Likewise, on appeal, documents posted on PACER are quickly disseminated to groups all across the country within a matter of minutes.

Similarly, blogs and social networking sites present special risks for employers who are currently in trial. Jurors may publish highly sensitive information presented in court, make disparaging comments about counsel and clients, attempt to improperly contact witnesses, attorneys or judges, and/or prematurely post verdicts. Parties should consider such risks before any case goes to a jury trial and prepare specific jury instructions prohibiting jurors from using social networks improperly during jury service. Judicial Conference Committee on Court Administration and Case Management, Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate About a Case (June 2012), www.uscourts.gov/file/3159/download+&cd=1&hl=en&ct=clnk&gl=us. Furthermore, the publicity risks of a full-blown trial, whether positive or negative, have grown exponentially with social networking.