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**IMPLEMENTING THE RIGHT
GAME PLAN FOR SOCIAL MEDIA:
CURRENT ISSUES AND DEVELOPMENTS**

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SOCIAL MEDIA: WHY DOES IT MATTER FOR EMPLOYERS?

Social media or social networking impacts almost every facet of our daily lives, including the workplace. The most common forms of social networking that employers deal with in the workplace are:

- Facebook
- Twitter
- LinkedIn
- Blogs
- YouTube



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USE BUT DON'T ABUSE

Some employers encourage their employees to use social media in the performance of their job duties. There are many benefits to the use of social media in the workplace, such as:

- Platform for marketing of products and services.
- Increased efficiency with instant communications.
- Developing strong relationships with customers and clients.



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NO USE = NO ABUSE

Other employers discourage or prohibit employees from using or accessing social media sites during the work day due to concerns, such as:

- Decreased productivity in the workplace.
- Multiple layers of legal exposure.

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POTENTIAL LEGAL EXPOSURE DUE TO EMPLOYEE USE OF SOCIAL MEDIA

- Discriminatory/derogatory postings by employees.
- Threats of violence against co-workers or third parties.
- Intentional or inadvertent disclosure of the Company's confidential information/trade secrets or that of a client or customer.
- Defamation of co-workers or third parties.
- Illegal content accessed or posted by employees.



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POTENTIAL LEGAL EXPOSURE (cont.)

- Suppressing employees' participation in lawful conduct.
- Invading employee privacy by accessing and reviewing social media content.
- Intentional or inadvertent copyright, trademark or patent infringement by using a third party's work without authorization.
- False advertising of an employer's products and/or services.
- Violations of security laws.



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DESIGN AND IMPLEMENT A SOCIAL MEDIA USE POLICY

Whether your Company implements a “Use But Don’t Abuse” or “No Use = No Abuse” philosophy regarding social media, the social media policy needs to be in writing.

- A written policy decreases any ambiguity regarding the Company’s position on social media.
- A written policy promotes consistency and fair treatment of all employees.



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IMPLEMENTING A SOCIAL MEDIA POLICY THAT WORKS

Incorporate and reference other policies which impact use of social media, such as:

- Policies prohibiting unlawful harassment, discrimination and retaliation.
- Policies regarding computer, e-mail and internet usage.
- Policies regarding code of conduct and behavior.



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IMPLEMENTING A SOCIAL MEDIA POLICY (cont.)

- Policies regarding the use and dissemination of confidential and/or proprietary information of the Company and its clients.
- Policies regarding marketing and public relations.



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PRIVACY CONCERNS

- With the advent of and increased use of mobile devices by employees there is no longer a clear distinction between the workplace and home.
- Reinforce within the social media policy the limits to an employee's expectation of privacy when accessing and/or using social media on Company time and when using Company computer and mobile devices.

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PRIVACY CONCERNS (cont.)

- Remind employees that the Company reserves the right to monitor and search Company owned and provided computers and mobile devices.
- Remind employees that the Company has the right to access and review postings on public sites, such as blogs or social networking sites.
- Remind employees that use of Company issued computers and mobile devices is reserved for business use and any unauthorized or inappropriate use may result in disciplinary measures, up to and including termination of employment.



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PRIVACY CONCERNS (cont.)

- Regardless of a clear statement that the employee has no expectation of privacy, avoid using trickery or deceit to access a site the employee attempted to maintain as private.
 - Establish a clearly defined business need for accessing the information.
 - See City of Ontario v. Quon, 529 F.3d 892 (9th Cir. 2008), *reversed and remanded*, 130 S. Ct. 2619.
 - See Yath v. Fairview Clinic, N.P., 767 N.W.2d 34 (Minn. App. 2009).



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PROTECT THE COMPANY'S CONFIDENTIAL INFORMATION – TWEETING YOUR WAY TO UNEMPLOYMENT

- Remind employees of the Company's policies regarding the use and disclosure of confidential or proprietary information of the Company and its customers, clients and vendors.
- Remind employees that they can't make statements on behalf of the Company unless authorized to do so.



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PROTECT THE COMPANY'S CONFIDENTIAL INFORMATION (cont.)

- Remind employees that upon termination of employment they must return to the Company all confidential and/or proprietary information of the Company and its customers, clients and vendors, including information maintained on social media sites. See *TEK Systems, Inc. v. Brelyn Hammernick, et. al.*, 10-cv-00819 (D. Minn. March 16, 2010) (customer and employee contact lists on LinkedIn).



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PROTECT THE COMPANY'S BRAND AND REPUTATION

- The FTC's Guides Concerning the Use of Endorsements and Testimonials requires employees to disclose Company affiliation when commenting on Company products and services, including testimonials on social media sites. 16 C.F.R. § 255.
- The Company can be held liable for false or misleading statements made by its employees in the act of commenting on the Company's products and services.



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PROTECT THE COMPANY'S BRAND (cont.)

- Remind employees that what they say on social network sites may reflect directly on the Company and the Company reserves the right to take action to prevent damage to its reputation.
- Remind employees that they should not use the Company's logo, trademark or brand when making personal statements on social media sites.



PROTECT THE COMPANY'S BRAND (cont.)

- Remind employees as to who is authorized to make statements on the Company's behalf using social media sites.
- Remind employees that personal Internet postings unrelated to the employee's job duties should clearly state that the opinions expressed in the posting are the individual's personal opinion and not the Company's opinion.

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WHO IS MONITORING COMPANY SANCTIONED USE OF SOCIAL MEDIA?

Look for:

- complaints of discrimination or harassment.
- complaints of unpaid overtime or other wage and hour violations.
- any concerted activities that may be protected under the National Labor Relations Act.



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MONITORING COMPANY SANCTIONED USE OF SOCIAL MEDIA (cont.)

- complaints of unlawful activities that may be protected by whistleblower and anti-retaliation laws.
- make sure Company policies clearly state correct procedures to file a complaint.



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USE OF SOCIAL MEDIA IN THE HIRING PROCESS – BE CAREFUL WHAT YOU ASK FOR

Employers should limit their searches to relevant job-related information, such as:

- Job skills
- Experience
- Education
- Criminal background



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USE OF SOCIAL MEDIA IN THE HIRING PROCESS (cont.)

Types of information to avoid:

- Pictures that reveal protected classification.
- Searches that uncover membership in organizations based on protected classification. See Gaskell v. University of Kentucky, 2010 WL 4867630 (November 23, 2010).
- Participation in Lawful Conduct/Protected Activities.
- Confidential personal information.



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HOW TO MINIMIZE RISK TO YOUR COMPANY

- Include on-line screening as part of your background authorization release.
- If you use social media to review an applicant's background, do so for all applicants in the same job category.
- Hiring policies must be applied consistently with regard to all applicants.
- Verify information obtained through Internet searches.
- Document the reasons for any employment decision.


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