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The Social Media Revolution: Recent Developments And Guidelines For Employers To Consider

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Now more than ever workers are leading double lives, only not in the way that you might expect. The old distinctions of day job and night job, or office life and home life are fading to the background as we rapidly embrace a new double life: one actual and one virtual. It is almost cliché to cite statistics detailing the staggering growth of social media, but it is nevertheless instructive. Facebook, MySpace, Twitter and LinkedIn boast a combined 885 million worldwide users, with Facebook accounting for 56 percent of that figure despite first reaching 250 million users just last year.¹ Facebook is currently the second most visited Internet site in the United States behind Google, while MySpace, Twitter and LinkedIn each place in the top 20.² Combine all social media and blog sites, and suddenly 22 percent of all time spent on the Internet is accounted for.³ If use of social media has not already permeated your workplace, perhaps the next IT roll out should focus on ditching the dial-up modems.

Employers must heed the social media revolution and the significant changes it has brought to the employment landscape. Indeed, the double lives of social media users can profoundly affect employment decisions spanning issues such as background checks, hiring, termination, and litigation strategies.

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The reason is that virtual personas created on these websites are not so much creations as they are extensions of users' real lives. A Facebook profile could just as easily tell you someone's employment history and experience, as it could their least favorite '80s hair band. For that matter, a profile could also detail negative information about an individual's employer.

While many employers have come to realize the plethora of information that can be garnered from an employee's social media account, several recent cases suggest that employers must tread carefully before looking to social media sites for applicant and employee information, and when making employment decisions based on information culled from these sites. In that connection, the following shall review two recent cases in which an employer's use of social media has come under challenge, and offer some straightforward suggestions that will enable employers not only to avoid the pitfalls of social media, but also to use these sites to their advantage.

My Boss is a Psych Patient

One of the most recent legal challenges to an employer's use of information gleaned from social media sites comes out of the National Labor Relations Board, Region 34 ("NLRB").⁴ On October 27, 2010, the NLRB issued a complaint against American Medical Response of Connecticut, Inc. ("AMR"), alleging that the ambulance service unlawfully terminated an employee after she posted disparaging remarks about her supervisor on Facebook.

The facts alleged in the AMR complaint are eerily similar to the ones we, as management-side employment lawyers, are regularly asked to provide counsel on. In AMR, an emergency medical technician, Ms. Dawnmarie Souza, was asked by her supervisor to prepare a report responding to a customer complaint about her work. Upset by her supervisor's directive, Ms. Souza logged onto her personal Facebook account from her

home computer and wrote: "Looks like I'm getting some time off. Love how the company allows a 17 to be a supervisor." ("17" is AMR terminology for "psychiatric patient.")

According to the NLRB's complaint, Ms. Souza went on to deride her supervisor using several expletives. These postings eventually "drew supportive responses from her co-workers" on Facebook, and led to further negative comments about the supervisor. In response, AMR suspended, and then ultimately terminated Ms. Souza for violating the Company's blogging and Internet posting policy. Ms. Souza's union thereafter filed an unfair labor practice charge with the NLRB.

Following its investigation into Ms. Souza's unfair labor practice charge, the NLRB issued a complaint alleging that AMR's Blogging and Internet Posting Policy which prohibited employees from making disparaging, discriminating or defamatory comments about the company or its supervisors, as well as its termination of Ms. Souza, interfered with her exercise of rights guaranteed in the National Labor Relations Act ("NLRA"). Specifically, the NLRB alleges that AMR's policy and actions interfered with Ms. Souza's right to engage in protected and concerted activities.

While recognizing that this case is still in its infancy, prudent employers – unionized or not – must nevertheless take notice. At the outset, it is important to note that while many employers think of the NLRA as only applying to companies with unionized workforces, the NLRA applies to all employers – unionized or not – and the NLRB has broad authority to issue complaints against such employers. Further, while the NLRA has always afforded employees protection against adverse employment actions for having engaged in certain concerted activities, traditionally an employee was only deemed to have engaged in "concerted activity" when raising or discussing employment issues with other employees, or on behalf of other employees. With AMR, the NLRB is attempting to extend this principle to a "discussion"

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taking place on a Facebook page – an action the NLRB's Acting General Counsel has equated to water cooler talk. Moreover, it appears that the NLRB is taking an expansive view of the concept of "protected" concerted activity. While employees are generally protected from retaliation for criticizing management in order to improve certain conditions of employment, they have not generally enjoyed the same protection for the expletive-laced and highly derogatory and defamatory comments Ms. Souza made about her supervisor.

How an Employer Gains Access to the Social Media Site is Important

While many employers will sympathize with AMR, things could have been worse for them. Indeed, while the NLRB's complaint makes no mention of how AMR obtained access to Ms. Souza's Facebook page, how one gains such access has been the subject of other recent litigation.

In *Pietrylo v. Hillstone Restaurant Group*,⁵ a recent case out of the United States District Court for the District of New Jersey, a jury found that the employer violated the Stored Communications Act and a parallel New Jersey state law, which makes "it an offense to intentionally access stored communications without authorization or in excess of authorization," by accessing a password-protected online discussion group maintained by its employees through MySpace. In *Hillstone*, a group of employees formed a password-protected discussion site, which included sexual remarks about management and customers, references to violence and illegal drug use, and confidential employer information. Although one of the employee members of the group voluntarily showed a manager some of the discussions, another manager later asked the same person for the group's password so that he could review the various postings. Subsequently, the two employees who moderated the discussion group were fired. Based on testimony that the employee member gave management the password out of fear of retaliation, a jury concluded that the employer, through its managers, accessed the discussion group without authorization in violation of the Stored Communications Act and parallel New Jersey state law, and ordered the employer to pay both compensatory and punitive damages.

The lessons of *Hillstone* are significant for employers seeking to learn more about potential hires through social media websites, and for employers attempting to obtain discovery materials from adverse parties or non-party witnesses in the course of litigation. Not only might material obtained from social media sites be inadmissible in a future legal action, but it could actually give rise to employer liability under the Stored Communications Act or similar state laws.

Effective Use of Social Media

Make no mistake, even with the risks and pitfalls identifiable in the *AMR* and *Hillstone* cases, social media and its use in the modern workplace can still be an employer's ally. It is now common for companies to use social media for marketing, customer feedback, promotions, and contests. Social media is also often an inexpensive and effective way to perform certain employee background checks and to conduct discovery. If the aforementioned cases teach us anything at all, it is that employers need to be vigilant with respect to their use of social media sites and their policies regarding them, and consult counsel when uncertainties arise.

To help avoid some of the potential social media pitfalls detailed above, the following are a few practical tips to guide employers in their use of social media.

- *Hiring Decisions*

User profiles on social media sites are saturated with information that could form the basis of discriminatory hiring decisions. Federal and state statutes prohibit employers from making employment decisions based on race, religion, sex, age, and national origin, just to name a few. This kind of information is readily available on most users' profiles and could form the basis of a failure to hire action if an employer cannot provide a legitimate business reason for rejecting an applicant. To avoid any missteps, employers should institute a policy removing all decision-makers from performing social media background checks, and from examining the information background checks produce. As part of this policy, employers should also require that searches be performed in a consistent manner for every applicant in order to avoid disparate treatment liability.

- *Limit Use to Publicly Available Information*

Employers must limit their searches to publicly available user information, and should not fraudulently gain access to users' profiles – such as by posing as a long lost friend – or else risk violating the end-user licensing agreements of social media sites, the Stored Communications Act, and possibly common law privacy laws as well. Regardless of the reasons why an employer might want to access a current or former employee's social media profile, it is absolutely necessary that an employer not attempt to do so through any type of fraud or misdeed.

- *Workplace Policy and Practice Implementation*

Another issue for employers to tackle is their current employees' use of social media sites. It is imperative that employers implement sound policies regarding social media and other Internet use in order to protect against liability. Employees should be cautioned that the company can and will monitor

its e-mail and computer systems, and that employees should have no expectation of privacy when using company systems. With respect to blogging, employees should be told that they cannot attach company logos to their postings, or attribute to the company any views expressed in their writing, without prior permission. Employers should also have a policy detailing how the company will deal with lawful but inappropriate comments or material made publicly available by employees through social media sites.

- *Disciplining Employees*

In the wake of the NLRB's AMR complaint, all employers – whether unionized or not – must be especially careful when taking adverse employment actions based on information found on social media sites, including employee rants against their supervisors. Moreover, in light of the "off-duty conduct" statutes prohibiting employers from taking action against employees for engaging in certain lawful activities outside of work that many states have enacted, employers should be cautious when considering taking adverse employment actions based on information it learns of through employees' social media user profiles.

Conclusion

The debate over whether the Internet and its social media sites are just a fleeting fad, or a force that is here to stay, is long over. Employers and their attorneys are well advised to stay at the forefront of the fast changing social media environment. While employer use of social media sites has its drawbacks, these sites can still be a useful and cost effective tool to obtain usable information about employees, and to assist employers in making important personnel decisions. By utilizing some of the tips outlined above, the road less travelled will be the one to the courtroom.

¹ See Facebook's "statistics" and "press room" pages, <http://www.facebook.com/press/info.php?statistics> and <http://www.facebook.com/press/info.php?timeline> (last visited Nov. 19, 2010); LinkedIn's "about us" page, <http://press.linkedin.com/about> (last visited Nov. 19, 2010); Jemima Kiss, *MySpace Goes Cool, Crisp and Clean in a Last Bid to Recapture Lost Friends*, *The Observer*, Oct 31, 2010, <http://www.guardian.co.uk/technology/2010/oct/31/myspace-new-look>; David Murphy, *Twitter: On-Track for 200 Million Users by Year's End*, *PCMag.com*, Oct 31, 2010, <http://www.pcmag.com/article2/0,2817,2371826,00.asp>.

² See Alexa's "Top Sites in United States" page, <http://www.alexa.com/topsites/countries/US> (last visited Nov. 19, 2010).

³ See *Social Networks/Blogs Now Account for One in Every Four and a Half Minutes Online*, *Nielsenwire.com*, June 15, 2010, http://blog.nielsen.com/nielsenwire/online_mobile/social-media-accounts-for-22-percent-of-time-online/.

⁴ See *American Medical Response of Connecticut v. International Brotherhood of Teamsters, Local 443*, Case No. 354-CA-12576 (Oct. 27, 2010).

⁵ *Pietrylo v. Hillstone Rest. Group*, 2009 WL 3128420, at *1 (D.N.J. Sept. 25, 2009).