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SOCIAL MEDIA, PERSONAL ELECTRONIC DEVICES, AND THEIR USE AND CONFLICT IN THE WORKPLACE

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This outline is intended to convey general information on topics of interest to employers. Although prepared by professionals, this outline should not be used as a substitute for legal counseling in specific situations. Readers should not act upon the information contained in this publication without professional guidance

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BIOGRAPHY

GARY S. BATKE is a Member and Chair of the Labor and Employment Practice Group of the law firm of Bailey Cavalieri LLC where he practices exclusively in the area of management-side labor and employment law. He has successfully represented public and private employers in matters which include harassment litigation, restrictive covenant litigation, wrongful discharge and employment discrimination litigation, union representational matters, collective bargaining negotiations, arbitration hearings, OSHA and prevailing wage matters, and wage-hour disputes. He also regularly counsels and assists employers regarding a wide range of workplace issues, including policies, contracts, employee leave rights, discipline, investigation, discharge and layoffs.

Mr. Batke is a frequent lecturer with various employer organizations concerning labor and employment issues, including The Council on Education in Management, Lorman Education Services, The Fisher College of Business at The Ohio State University and The Builders Exchange of Central Ohio. He is a contributing author to the third edition of *Ohio Public Contract Law and Construction Claims* with respect to labor and employment issues common in the construction industry, and also serves on the Legal Advisory Panel to the Builders Exchange of Central Ohio. Mr. Batke has been honored with membership in The Ohio Management Lawyers Association, has been named as one of the best labor and employment lawyers in Columbus in both *Columbus CEO Magazine* and *Columbus Business First,* has been recognized in *Best Lawyers in America,* and has received from his peers through *Martindale Hubbell* a preeminent rating for his legal ability and the highest possible rating for ethical standards.

Mr. Batke is a graduate of the Indiana University School of Law where he was selected for the Indiana Law Journal. He has served in leadership and volunteer capacities with numerous charitable and church organizations and served as President of The Big Brothers Big Sisters of Central Ohio Board of Directors, as well as The Big Brothers Big Sisters Foundation Board of Directors. His professional memberships include the American, Ohio, Illinois and Columbus Bar Associations.

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"THE TELESCREEN RECEIVED AND TRANSMITTED SIMULTANEOUSLY. ANY SOUND ... WOULD BE PICKED UP BY IT; ... HE COULD BE SEEN AS WELL AS HEARD. THERE WAS OF COURSE NO WAY OF KNOWING WHETHER YOU WERE BEING WATCHED AT ANY GIVEN MOMENT. ... YOU HAD TO LIVE -- DID LIVE, FROM HABIT THAT BECAME INSTINCT--IN THE ASSUMPTION THAT EVERY SOUND YOU MADE WAS OVERHEARD, AND ... EVERY MOVEMENT SCRUTINIZED."[1]

[1] GEORGE ORWELL, 1984, AT 4 (HARCOURT BRACE JOVANOVICH, INC. 1977) (1949).

Social Media Statistics

- **30 billion** pieces of content (e.g., links, photos, notes) are shared on Facebook each month (Source: Royal Pingdom)
- **25 billion** tweets were sent on Twitter in 2010 (Source: Royal Pingdom)
- **200 million** views of YouTube via mobile per day (Source: Google)
- **152 million** blogs on the Internet at the end of 2010 (Source: Royal Pingdom)
- **100 million** new accounts added on Twitter in 2010 (Source: Royal Pingdom)
- **53%** of American Internet users look for information on Wikipedia, up from 36 percent in 2007 (Source: Pew Internet)
- **50%** of U.S. CMOs at fortune 1,000 companies said they launched a corporate blog because "it's the cost of doing business today" (Source: eMarketer)
- **$3.08 billion** will be spent to advertise on social networking sites in 2011, a 55 percent increase over 2010 (Source: eMarketer)
- **200 million** registered accounts on Twitter as of January 2011 (Source: Twitter)
- **110 million** tweets are sent per day on Twitter (Source: Twitter)
- **27.5 million** "stumbles" on content discovery site StumbleUpon in one day, a new all time record (Source: StumbleUpon)
- **65%** of U.S. adults use social media and say they have received a positive benefit as a result (Source: Harris Interactive)

Twitter v. Facebook

Facebook:

Creates illusion of a "closed" system – communicate only with "friends" and shield content from others.

Twitter:

"Open" system – everything one "tweets" can be immediately seen by anyone else on Twitter unless specific individual is blocked from access.

- Using them interchangeably has consequences. A successful job applicant tweeted the following:

  > "Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work."

- The response reinforced the truism that Darwin's Theory is applicable to the workforce:

  > "Who is the hiring manager? I'm sure they would love to know that you will hate the work. We here at Cisco are versed on the Web."

- OOPS! Amazingly, the applicant is working on a master's degree in information management at UC Berkley (and not working at Cisco)!

Social Media Issues for Employers

- **Pre-Employment**:

  - Use of applicant information in social media for hiring decision

- **During Employment**:

  - Prohibit use by some or all employees at work
  - Allow/encourage some or all employees to use social media at work
  - Contemplate personal use of social media which impacts workplace and co-employees
  - Use of information from social media sites for discipline/discharge decisions
  - Use of social media by employees with personal electronic devices may jeopardize trade secret protections.

- **Post-Employment**:

  - "Recommend" a former employee using social media

- **Document retention, discovery and litigation**:

  - Social media impacts legal obligations

Pre-Employment: Applicant Screening

Opportunities:

- Social media allows access to information typically not available in traditional hiring process. Applicant 'DNA'.

  - Eg., New Facebook privacy settings made name, profile picture, current city, gender, networks, friends, Pages, and some photos public

- Use access to lawful information in hiring decision:

  - Illegal drug use
  - Poor work ethic
  - Poor writing/communications skills
  - Racist or discriminatory tendencies
  - Lack of discretion regarding prior employment or employers

Risks:

- Access to information the use of which in hiring decision is prohibited by law
- Evidence of accessed information may be revealed in later litigation
- Cannot "unring the bell:" difficult to prove non-use of information once it is in employer's possession
- Lawsuit under state law prohibiting adverse employment decisions based on applicant's lawful, off-duty activities (not applicable in Ohio)

During Employment: Allowing Employee Use of Social Media

Opportunities:

- More collegial atmosphere among employees who build 'cyber' friendships
- Open lines of communication and information between employees, customers, and competitors
- Respond to legitimate criticisms of employer business/product
- Business development

Internal Risks:

- Awkward and potentially unlawful "cyber" relationships and communications between employees and supervisors
- Potential liability for defamation of co-workers/supervisors
- Diminished efficiency/productivity
  - Associated Chambers of Commerce and Industry, survey of 4,000 employees:
    - Average employee spends **1 hour per day** at work on social media sites.
- Ownership of "followers" or "friends" or "contacts"

During Employment: Allowing Employee Use of Social Media (Cont'd)

External Risks:

- Unauthorized disclosure of company information (confidential, proprietary, and/or trade secret)
- Corporate embarrassment, public relations issues
- Unauthorized disclosure regarding mass layoffs, settlement agreements, severance packages, etc.
- Potential liability for trade libel: factual misrepresentations made by employees about a competitor
- Federal Trade Commission Endorsement Guides
    - New "Guides" addressing FTC's concerns about deceptive practices through consumer-generated media and endorsements became effective December 1, 2009
        - Any material connection between endorser and seller of product or service must be fully disclosed
        - Material connection includes employment relationship between endorser and seller
        - Substance and frequency of disclosures not specified
        - Employee/endorser **and** employer face potential fines of $11,000 **per violation**
            - Example: Employee gives favorable review of employer's product on employee's blog, Facebook page, or Twitter account. Employee is considered an endorser and must disclose employment relationship with employer.
        - Anonymous employee postings/blog comments pose problems as they remain subject to FTC Guides.

During Employment: Using Social Media for Investigations and Discipline

OPPORTUNITIES:

- Helps employers investigate employee misconduct for potential discipline or discharge

- Creates a potential treasure trove of evidence to support employer claims and defenses in trade secret and other employment-related cases

RISKS:

- Discrimination/Equal Enforcement

- Discovery of Protected Status
  (Sexual Orientation, Disabilities, Religious Affiliation, Pregnancy, etc.)

- Protection of legal off-duty activities
  (such as under state law – *i.e.*, California and New York)

- National Labor Relations Act union protections – protected activity

- Whistleblower protection

- Employers' unauthorized access to private websites and blogs may violate federal and/or state laws *(e.g. Konop v. Hawaiian Airlines)*

- Obligation to produce electronically stored information

Post-Employment Issues

References:

- Supervisor/co-worker asked to "recommend" former employee on LinkedIn
- Positive recommendation on LinkedIn could conflict with company position regarding performance
- Post-employment reference policy should either:
  - Specifically address appropriate info for social media "reference," or
  - Prohibit social media "references" unless authorized by the company

Separation and settlement agreements:

- Confidentiality
- Non-disparagement
- References

Should Your Company Develop a Social Media Policy?

- **Yes.** Coordinate with other related policies such as policies on e-mail, Internet and electronic media usage, code of business conduct, record retention and discrimination/harassment

Issues to Consider:

- Personal use of social media during work time, if any
- Disclosure/approval of company-related content
- "Friending" of bosses, managers, subordinates, and clients, whether of the same sex or opposite sex
- Right of the company to monitor employee use of social media while at work or while using company electronic devices
- Company right to hold employees accountable for use on their personal devices, and/or while on non-work time where the company's business interests are implicated
- Specify uses of social media that violate law or company policy
- Emphasize the use of common sense and good judgment when using social media in a way that affects the company, its customers, its employees or its competitors
- What training will be done and the content and frequency of such training
- What monitoring will be done and by whom
- Responsibility for Enforcement
- Periodic revisions to address changing cultural, law and/or technology
- Specify that the Policy <u>does</u> <u>not</u> limit employee exercise of rights protected by law, including right to engage in concerted activity with co-workers.

Conclusion

- Emerging workplace issues with little case law guidance
- Rapidly-changing technology
- Understand the issues and chart a course
- Don't ignore the risks, but don't let them control decision
- Craft appropriate policies and procedures and don't be afraid to revise them on a regular basis as the workplace, law and technology change