

SOCIAL MEDIA AND EMERGING TECHNOLOGIES WHAT EVERY EMPLOYER NEEDS TO KNOW

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I. SOCIAL MEDIA IN HIRING, DISCIPLINING, AND TERMINATING EMPLOYEES

A. *Hiring and Interview Process*

1. Protected Class Discrimination: Via Facebook, Twitter, LinkedIn, and other sites, individuals supply prospective employers with access to information beyond that found on their resumes
 - a) Benefits: This information is free, easy to access, and provides an employer with insight into the individual's personality that does not often come across in an interview
 - b) Traps: Access to intimate details of a candidate's personal life can expose the employer to information regarding the individual's protected status by law
 - (1) *Protected status under Michigan and Federal law: sex, age, race, color, religion, sexual preference or orientation, marital status, national origin, ancestry, citizenship, genetic information, military status, veteran status, disability, height, weight, misdemeanor arrest record or membership in any other legally protected class*
 - (2) *Protected classes differ based on state and municipality*
 - (3) *Decisions based on information acquired through social media: rejecting an applicant before or after the interview process based on information concerning a protected class gathered through social media is unlawful and can expose the employer to liability*
 - (i) Even if information concerning protected status acquired through a social media review was not used in an employment decision, the mere fact that an employer accessed the information may be used to infer improper motive by the employer in making the employment decision

2. Recommendations: many job-seeker sites, or resume posting websites provide users the ability to upload letters of recommendation from previous employers
 - a) Trap: posting and providing letters of recommendation, both positive and negative can expose an employer to potential liability
 - (1) *Positive Review: posting a positive review of a former employee's job performance or attitude can come back to bite an employer. If that employee later files a wrongful termination claim, the employer will have a defense when they publically display how great the employee was*
 - (2) *Negative Review: employers open themselves up to discrimination, defamation or workplace retaliation claims by former employees*

B. Accessing Employee's Accounts:

1. Prohibited Acts by Employers: under the Michigan Internet Privacy Act, employers may not request, discharge, discipline, fail or hire, or penalize an employee or prospective employee for failing to provide the employer with access to their personal account or allow observation of their personal account
 - a) Employers may not ask for or required employees or prospective employees to provide their user names or passwords
 - b) Employers may:
 - (1) *access information stored or transmitted on employer owned devises,*
 - (2) *access an account or service provided by employer to employee for use within employee's employment,*
 - (3) *discipline an employee for transferring the employer's proprietary or confidential information without authorization,*
 - (4) *conduct an investigation if there are specific facts about employee's activity on personal accounts for the purpose of ensuring compliance with law, prohibitions against work related misconduct, or*

information about unauthorized transfers of proprietary or confidential information

- (5) *Employers may not require employees to add them as friends or force employees to change their privacy settings*

C. *Disciplining/Terminating Employees based on Social Media usage*

1. Social Media Handbook Policy: the best way to combat issues presented by employees' social media usage is through enacting a comprehensive social media policy with sufficient examples from the commencement of employment rather than when incidents occur
 - a) Structure and Content of Social Media Policy: tremendous scrutiny has been given to social media handbook policies under the National Labor Relations Board this year
 - (1) *Policies cannot have a chilling effect on an employee's Section 7 of the NLRA right to engage in concerted activity, or would be reasonably construed to prohibit and employee's Section 7 rights*
 - (a) Most common problems: limit employees' right to discuss terms and conditions of employment, including wages, remark about their supervisors, management, or the company
2. Discipline: employees and their social media comments about their employer are protected from adverse employment decisions if their comments are considered to be an effort to engage in concerted activity under Section 7
 - a) Any negative comments about the employer related to terms and conditions of employment are not grounds for employer discipline
3. Social Media as Watch Dog: employee's off duty conduct that is caught on tape and subsequently goes viral can be a way to monitor employees actions which can be grounds for termination if the proper policies are in place

II. SOCIAL MEDIA MARKETING

A. *Social media sites as free marketing: social media marketing campaigns are a cost effective way to engage a target community of consumers in a user friendly way, and its easy to create*

1. Risks: any campaign in which third parties or user generated content is published under an employer's name poses risks of liability for trademark and copyright infringement
2. Compliance with General Legal Standards: Federal Trade Commission Act prohibits false advertising, deceptive and misleading conduct such as misleading price comparisons, rebates, or sweepstake promotions
 - a) Adds and promotions must be checked for accuracy and truthfulness before being published
 - b) Third party advertising affiliates: ensure compliance with marketing laws
 - (1) *Should require indemnification for any liability arising out of third party's conduct on behalf of employer, require affiliate carry sufficient insurance, and execute a sufficient confidentiality agreement regarding the content and material you provide the marketer*
3. Compliance with third-party platforms Terms and Conditions: every social media site require compliance with the site specific terms and conditions for employers to adversities and engage in other promotion activities
 - a) Possible liability: a marketing campaign that lease consumers to violate a social media site's terms and conditions can expose the company to liability, damage its reputation among customers, cause the social media site to bar the employer's use or future marketing

B. *Implement Website Use Policies: website terms and conditions and privacy policies to prevent potential liability for third party users*

1. Terms and Conditions: policies governing others' use of your website, social media page, prevent company employees and third parties from using the platform in an unlawful way, which would otherwise expose the employer to liability

- a) User generated content: creates legal risk for domain owners when the content infringes others intellectual property rights
 - (1) *Disclaimers: website owners should screen posters before content goes live, post notices disclaiming any association with the content or content creator and possibly express disapproval of the content, and that the content does not reflect the opinions of the website*

- b) Privacy and Data Security policies: companies with their own blogs or that maintain their own social media platforms should maintain comprehensive policies that disclose the company's data collection, use, and storage practices, and any responsibilities that third parties have when using the site
 - (1) *Minors: specific disclosure and consent required for data collection from children under age 13*
 - (2) *Safe Harbors: Communications Decency Act and Digital Millennium Copyright Act – provide immunity for website operators for third party content published to the site which create liability*
 - (a) Protect website owners from all monetary and equitable relief for copyright infringement where a third party initiated infringing content
 - (i) Take Down procedures – immunity if provider removes and disables access to infringing content

2. Terms and Conditions as protection against scrapping:

- a) Internet scrapping- using data from a website without permission, extracting large amounts of data from public websites using sophisticated analytics, commonly used on price comparison websites. Victims of internet scrapping have sought intellectual property infringement claims against scrappers – however, where website owners cannot established intellectual property rights in their published material, users can be held to the standards in the websites terms and conditions, which can prohibit scrapping

C. *Sweepstakes, Contests and Promotions: can capture consumers attention, incentivize consumer conduct and increases exposure to brands*

1. Compliance with general legal requirements of promotions and applicable terms and conditions:
 - a) Facebook: specific consent requirements to administer a promotion through Facebook's platforms – almost all social media sites have promotional and advertising guidelines that if not followed can expose the employer to liabilities for violation

D. *Endorsements and Testimonials:*

1. Disclosure: consumer endorses who receive or have a material connection with the company, such a compensation arrangement, is provided with free merchandise, or services, is required to be disclosed

III. ELECTRONIC DEVICES AT WORKPLACE

A. *Wage and Hours issues:*

1. FLSA: requires non-exempt employees be paid at least federal minimum wage for all hours worked, non-exempt employees must be paid overtime for hours worked over 40
 - a) Requiring, expecting, or when employees check work email on their own time can create wage/overtime liability for employer
2. Reimbursement: employers may reimburse for work related expenses including the cost of work related phone calls or email on personal devices, wages and reimbursement combined may not bring employee's total salary below minimum wage

B. *Personal Devices used for Work:*

1. Breach of confidentiality
2. Breach of legal obligations
 - a) HIPPA
 - b) Client information
3. Lost devices, lost information

C. *Work Devices used for personal purposes:*

1. Loss of information
 - a) Contacts – employers lose control of employees relationship with customers, vendors, and others when employees use person devises, emails and phone numbers to communicate
 - b) Can get around non-solicitations/compete
2. Potential for discrimination
3. Breach of privacy
4. Control: policies can require password protection, apps or services that can wipe out contents to protect confidential information
 - a) Prevent or limit employees access to certain websites during working hours

D. *Vicarious Liability:*

1. Drivers: liability employees who cause traffic accidents within the scope of their employment, while on personal or employer provided devises can be transferred to employer
 - a) Drivers who are required to check in
 - b) Texting with driving within scope of employment
 - c) Accident occurring with employer provided vehicle

IV. POLICIES MUST BE REASONABLE, REALISTIC AND PROPERLY ENFORCED TO PROTECT EMPLOYERS