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SPECIAL FEATURE

Social media both blessing and curse for employers

By William E. Hannum III



Social media is a blessing and a curse for employers.

It presents significant opportunities to market products and services and to establish and strengthen relationships.

It also presents real challenges; it can decrease productivity and give employees an

easy opportunity to disclose confidential information or disparage the company.

Accordingly, employers need to understand social media, how it affects their business generally, and then address the issue head-on, with policies and training that fit their culture and goals.

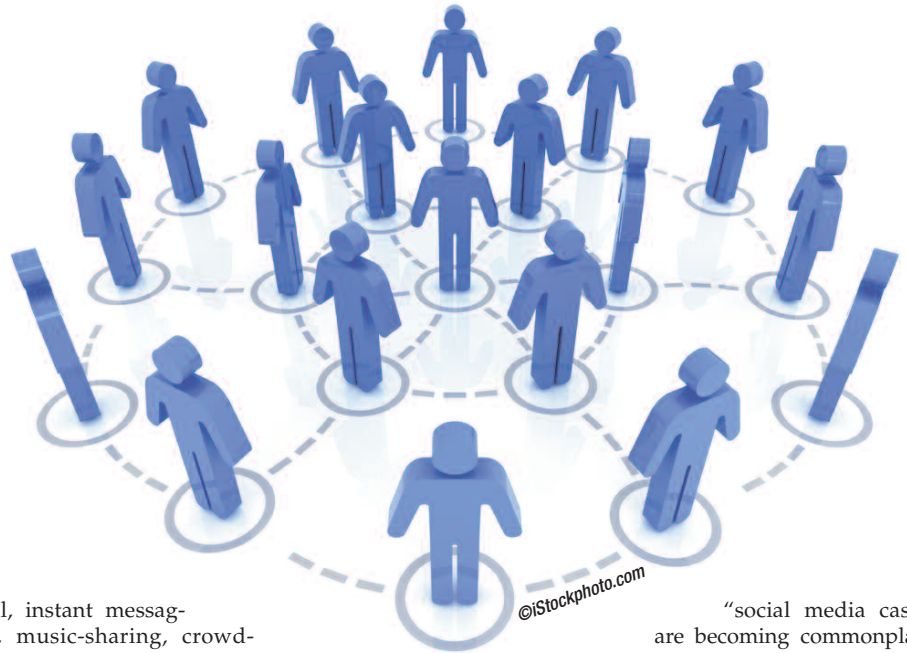
What is social media?

Social media is a means by which anybody can easily say anything to everyone.

For example, according to Wikipedia (which is, itself, a kind of social media): “social media uses Internet and web-based technologies to transform broadcast media monologues (one to many) into social media dialogues (many to many). It supports the democratization of knowledge and information, *transforming people from content consumers into content producers.*” (Emphasis added.) (Got that?) The key point is, again, that anyone can say anything to everyone.

There are many types of social media. Wikipedia lists several types such as Internet forums, weblogs, social blogs, microblogging, wikis, podcasts, pictures, video, rating and social bookmarking.

Different technologies are used, including blogs, picture-sharing, vlogs, wall-postings, e-



mail, instant messaging, music-sharing, crowdsourcing, etc.

Some examples of social media include blogs, micro-blogging (e.g., Twitter), social networking (e.g., Facebook, LinkedIn, and MySpace), collaborative websites (e.g., Wikipedia), video sharing websites (e.g., YouTube), and Livecasting (e.g., Skype), to name a few.

Why should employers care?

Employers should care about social media because it is in the workplace. It is taking up employees' time and affecting employers' businesses. Almost everyone is posting or tweeting, it seems. Friends and loved ones are connecting; business relationships are being formed; and employers, products and services are being discussed. Some of it is positive, and some is negative. Everyone can read it, if they know where to look.

The amount of time spent on social networking sites has increased dramatically in the past few years, according to one source. Facebook time rose 700 percent from 2008 to 2009, and Twitter increased by almost 4,000 percent. Thus,

“social media cases” are becoming commonplace, and human resources departments will spend more and more time handling these matters.

Social media is hurting productivity

Social media has caused decreased productivity. An independent study by Nucleus Research found that companies that allow access to Facebook lose an average of 1.5 percent in employee productivity. Also, nearly half of employees, and 77 percent of those with an account, use Facebook during working hours; some employees use Facebook as much as two hours per day while at work; and, of those using Facebook at work, 87 percent could not define a clear business reason for doing so.

But increased use of social media can also have business benefits. Some companies encourage the use of social media to improve business.

For example, Forrester Research in Cambridge, Mass., wants its analysts to employ more social media. Recently, a Forrester official was quoted explaining Forrester's blog: “The research [Forrester writes] for clients has always depended

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on a rich two-way conversation with experts and practitioners in the marketplace. The rise of social tools like blogs and Twitter allows analysts to extend that conversation with more people in the marketplace.”

These types of employers are spending considerable resources designing the latest application or outlining the content of their blogs to stay ahead of this latest trend.

Watch out for troubling content

There are not many court decisions on social media cases yet, but we have seen an increasing number of calls from employers concerned because an employee (or former employee) has defamed or disparaged the company (or an executive). In other cases, the employee has divulged confidential information such as trade secrets, or confidential patient information, or personal information protected by data security laws.

It may be tempting to adopt a blanket ban on employee use of social media, but that could cause real problems for the employer. While employers can do limited monitoring and regulating of employees' use of social media, there are limits, so it has to be done properly.

Last summer, a jury awarded two former employees approximately \$17,000 in compensatory and punitive damages following the termination of their employment because one created a private group on MySpace where the other gossiped and complained about work. After management learned about the group and gained access using another employee's password, the restaurant fired the group's creator and another employee who posted comments about the restaurant and its management.

Ultimately, a New Jersey jury in the case (*Petrylo v. Hillstone Restaurant Group d/b/a Houston's*) found that the restaurant unlawfully accessed the MySpace group without authorization — and thus violated the federal Stored Communications Act and the New Jersey Wiretapping and Electronic Surveillance Control Act.

Because the jury found that the plaintiffs did not have a reasonable expectation of privacy regarding the MySpace group, their wrongful termination and privacy claims failed. In addition to compensatory and punitive damages, the former employees were also entitled to attorneys' fees.

Of course, while private-sector employers are not limited by the Constitution's prohibition on regulating speech, private employers are limited by other laws.

- The federal Stored Communications Act and similar state laws (such as the New Jersey Wiretapping and Electronic Surveillance Control Act) prohibit employers from unlawfully accessing certain social media. These restrictions vary from state to state.
- Many states protect employees from an unlawful invasion of privacy. But employers can give themselves greater leeway if they

have a clear and effective policy governing employee use and employer monitoring of electronic communications.

- Whistleblower laws protect posts and tweets that disclose an employer's alleged violation of certain laws (from Sarbanes-Oxley to state laws).
- Anti-discrimination and anti-retaliation laws protect employees to the extent that they suffer adverse action in connection with a post or tweet containing references to race, gender, religion, age, protected activity, or other factors protected by these laws.
- The National Labor Relations Act protects all employees' right to engage in "concerted activity," which includes discussing wages, benefits, management and other terms and conditions of employment. For example, on Feb. 5, the Newspaper Guild of New York filed a charge with the National Labor Relations Board alleging that Thompson Reuters illegally implemented a Twitter policy that bars employees from tweeting anything that would damage the reputation of the company.
- Off-duty conduct laws prohibit employers from taking certain disciplinary action against employees for lawful off-duty conduct. Specifically, California, Colorado and New York limit employers' ability to discipline employees for off-duty conduct. While these statutes typically permit discipline when the employee's off-duty conduct conflicts with the interests of the employer, employers should always consider the laws of each relevant state when developing policies and disciplining employees for off-duty conduct.

These protections impose real limits to employers' ability to regulate employees' posts and tweets.

What should employers do?

Employers should have a clear policy and practice defining what is acceptable in the workplace to minimize the risks of lost productivity, disparaging comments, improperly disclosed confidential information, and legal violations for disciplining employees whose use of social media damages the employer.

Many employers have policies that limit employees' use of the employer's communications systems, like e-mail and internet access, to business purposes only, and direct that employees must not disclose the employer's confidential or proprietary information.

These policies are designed to protect the employer's business interests and to prevent employees from disclosing sensitive business information, using their employer's communication systems for personal reasons, and engaging in harassing or defamatory conduct by e-mail. It is critical that these policies also address the use of all social media, as described above (from blogs, to chat rooms, to Twitter, to Facebook).

While some social media may require passwords or limit access, most are generally accessible by anyone with an Internet connection — and

all can be disclosed by someone who has both the necessary password and access to the Internet.

At a minimum, then, an effective policy must:

- Address any claim that the employee did not know that the use of social media in question violated the employer's policies;
- Make clear that the employee does not enjoy unlimited freedom of speech or an expectation of privacy as to all comments published via social media;
- State that while the employer respects employees' rights to personal expression, and views an employee's use of social media as the employee's personal project, each employee must also understand that the personal use of social media can impact the employer;
- Require that if the employee discusses his employment or identifies herself as an employee, the employee must include a disclaimer that the views expressed do not necessarily reflect the views of the employer;
- Prohibit the use or disclosure of confidential, proprietary, sensitive and/or trade secret information of the employer, its clients and third-parties;
- State that harassment of other employees will not be tolerated. The policy may further explain that employees should be respectful of others when using social media and should assume that people, including co-workers, are reading their posts and tweets, etc.;
- Cross-reference any related employer policies such as electronic resources, anti-harassment and discrimination, and confidential information;
- Explain that policies regarding use of corporate logos and other branding and identity are applicable;
- Explain the potential civil and criminal penalties of disclosing copyrighted material without authorization; and
- State that the employer reserves the right to take disciplinary action against an employee if his or her communications violate any of the employer's policies.

Depending upon the company's culture and business goals, these terms might need to be modified, to define the types of social media and purposes being encouraged.

A well-drafted policy that reflects the employer's culture, that is applied consistently, and that is legally compliant will ensure that employers have the tools to take corrective action when necessary.

However, a social media policy or comprehensive communications policy will not eliminate all the risks presented by employees' use of the Internet. Some of those risks can be effectively managed only by well-trained Human Resources and management personnel. Thus, once the policy is ready, the employer should train management and employees on the new policy. **NEH**