

# Social Media: Workplace Policies & Legal Issues

What Management Should Do & What Management Should Avoid?

A Review of Court & Agency Rulings Regarding Who Owns  
Work-Related Social Media Accounts & Content, & What Employers Can Do  
to Manage Their Employee's Social Media Activities.

**THIS IS AN OPEN DISCUSSION OF SUGGESTED POLICIES & PRACTICES INCLUDING:**

- What courts & governmental regulatory agencies say about social media policies & practices in the workplace.
- What are the areas of liability for businesses & how to avoid or minimize liability.

**FEEL FREE TO ASK QUESTIONS AT ANY TIME**

# Legal Disclaimer

AKA Covering My A \* \*

- All of the content presented here is general information only & shouldn't be construed as me giving you legal advice.
- Just because I'm giving this presentation to you, doesn't make me your attorney (that's a separate fee 😊).
- This presentation is purely for educational purposes & shouldn't be relied upon as your sole source of information concerning a specific issue or set of circumstances, though we may examine or discuss them.

# Presentation Format

- Although this is a PowerPoint formatted presentation & I'm lecturing, **PLEASE** don't hesitate to ask questions at any time. It's okay, I'm flexible.
- I tend to talk quickly. So, if you want me to repeat something, just ask me to.

# Additional Materials

## (In Case You Have Nothing to Do)

- **Eagle v. Edcomm, 11-4303, U.S. District Court, Eastern District of Pennsylvania, 10/4/12 (*ruling on federal law allegations*)**
- **Eagle v. Edcomm, 11-4303, U.S. District Court, Eastern District of Pennsylvania, 3/12/13 (*ruling on state law allegations*)**
- **Rubino v. City of New York, Supreme Court, Appellate Division (NY State Court), 2013 NY Slip Op 03272 (Slip Op = not yet published but might be)**
- **NLRB: Office of the General Counsel, Memorandum OM 12-59, 5/30/12, Report of the Acting General Counsel Concerning Social Media Cases**
- **NLRB: California Institute of Technology Jet Propulsion Laboratory v. Byrnes, Maxwell, et al., 31 CA 030208, 030249, 030293, 030326, 088775; 5/6/13**
- **National Labor Relations Board: Costco Wholesale Corp. & United Food & Commercial Workers Union, Local 731, 34 CA 012421, 9/7/12**
- **NLRB: Tasker Healthcare Group d/b/a Skinsmart Dermatology, 04-CA-094222, 5/8/13**
- **NLRB: Hispanics United of Buffalo & Carlos Ortiz, 03-CA-027872, 12/14/12**
- **Disruptions–Social Media Images Form a New Language Online, 6-30-13, Nick Bilton, NY Times**

# Defining Our Terms – Common Reference Points slide # 1/2

- What’s “social media?”
  - It’s also called electronic media, e-media, social networking & online networking.
  - It’s simply communication via the internet.
    - It doesn’t matter whether it’s done via email, texting, LinkedIn, Facebook, chat rooms, Skype or Google Talk.
    - The terminology & methods change so quickly that terms that were popular a few years ago such as instant messaging, internet 2.0 & chat rooms are now obsolete. Remember AOL, MySpace or Ryze?

# Defining Terms Cont. Slide # 2/2

- Although the modes of communication & the lingo may change, the basic component of social media is communication via the internet.
  - These communications can be recorded or published.
  - Some theorize that whether our communications are *intentionally* recorded or not, they're still recorded forever. Does this matter? Is the government or business eavesdropping or listening? (rhetorical question because we know the answer is **YES!**).
- What happens to social media if the internet is no longer the in vogue method of communication?
  - For our purposes, social media is just the name given to this mode of communication. It can & will change, but it seems that it will always be electronic & it will always exist.

# Popular Social Media in July 2013

- In my opinion, the most popular social media right now are:
  - Facebook
  - Instagram
  - Email & text/MMS/SMS messaging
  - LinkedIn
  - Go To Meeting, Skype & other video & audio chatting services
  - Google & their multiple services (can't say it's YouTube, Chat or Talk since Google keeps changing their names), but Google is the common interface
  - Flickr
  - Twitter
  - Yelp
  - My Blog ([charlesakrugel.com](http://charlesakrugel.com)) & LinkedIn group (Charles Krugel's Labor & Employment Law & Human Resources Practices Group) 😊
    - FYI: My only e-media affiliations are LinkedIn, my blog, Google+, my YouTube channel (Charles Krugel's YouTube Channel) & my media interviews

# Issues We'll Cover

- Over the past decade, various workplace issues involving social media have arisen. Undoubtedly, the quantity of issues will greatly increase.
- Based on the cases I've seen & read about here's what businesses are dealing with the most:
  - Negative statements from employees concerning their bosses, customers, co-workers, products or services sold, *compensation, benefits, work hours & rules.*
  - Blatantly inappropriate statements; e.g., lewdness, nudity, profanity, racism, sexism, other "isms." Also, bullying or harassing behavior, lying or exaggeration, & political or ideological statements.
  - Ownership issues. Who owns a company's social media account? What constitutes ownership?



# What Kind of Guidance Exists Concerning the Employer–Employee Relationship? Slide #1/2

- Over the past few years, the National Labor Relations Board (NLRB) has inserted itself as a key arbiter of workplace social media issues (compensation, hours, conditions of employment). We'll examine why.
- Even though the constitutionality of the NLRB's current makeup is in question, the guidance from the regional & board levels is still VERY helpful & could be upheld.
  - The NLRB doesn't have enough board members for a majority, & therefore, the U.S. Supremes have *indicated* that all of those decisions might not be enforceable. From a business perspective, & considering the cost of litigation, it's better to view the NLRB's decisions as lawful.

## What Kind of Guidance Exists Concerning the Employer–Employee Relationship? Slide #2/2

- NLRB regulates what employers & employees can or can't say about wages, hours & conditions of employment (isn't this practically everything?).
- Courts have made some rulings: (1) company vs. employee ownership of a social media account & (2) a teacher's social media comments about her students. Surely, more to come.

# At Least 1 Federal Court Ruled on Who Owns A Business' Social Media Account (This is Our Launch Point for Analysis)

- Eagle v. Edcomm—Analyzes who owns a social media account—employer or employee?
- Linda Eagle started Edcomm in 1987. Edcomm trains people to work in banks & finance. In 2008, she started a LinkedIn (LI) account with her profile (photo, bio, etc.) for marketing & development. You can look her up today on LI; she's still there; this is living history 😊.
- Another company bought Edcomm in 2010. It kept the Edcomm name & kept Eagle on as an employee—for a while.
- Edcomm, via its new owners, encouraged employees to engage in LI for business. It had a general & unwritten e-media policy: When an employee left Edcomm, it would take control of the former employee's LI account.
- For whatever reasons, Eagle was fired by Edcomm in 2011. It immediately took control of her LI account & locked her out of it. At the same time, Edcomm changed **most** of the info. on that account to eliminate most of Eagle's personal info. Eagle's LI account was restored to her after a few weeks.
- Due to the temporary loss of her LI account & alleged loss of business, Eagle sued Edcomm, in Pennsylvania federal court, per 10 different legal theories—2 federal claims & 8 state claims.

# Eagle vs. Edcomm—The Court’s Decision

## Federal Law Claims

- Computer Fraud & Abuse Act (CFAA) — federal law that permits civil action for “loss” or “damage” to a computer or related system (e.g., OS, data, hardware or something concrete).
- Permits recovery of concrete \$ damages, including legal fees, revenues & related damages. But no recovery for future lost revenue or lost business.
- Eagle failed to provide any evidence of concrete losses or equipment damage as a result of losing her LI account. Consequently, her CFAA claim was dismissed prior to a trial (AKA summary judgment).

# Eagle Decision—Lanham Act (federal)

- Relates to unfair competition due to misleading or confusing consumers that Eagle's LI account was now Edcomm's official LI account.
- Eagle needed to prove that she had a valid interest in her LI account, she owned the account, & Edcomm's use of her LI account caused *confusion* among customers as to whom they were doing business with or whose account it was.
- Because Edcomm changed most of her identifying information (the key stuff) on the LI account there was no confusion or misrepresentation. So, Eagle's Lanham claim was dismissed without a trial being held (again, summary judgment).
- So, Eagle lost on both of her federal claims; no trial; summarily dismissed.

# Eagle's State Law Claims Went to Trial

I.e., Court Didn't Dismiss Them Prior to Trial

- State claims: (1) Unauthorized use of name; (2) Invasion of privacy due to Edcomm taking her LI identity & account; (3) Edcomm stole her publicity; (4) Identity theft; (5) Stealing of clients/business; (6) Edcomm interfered with Eagle's relationship with LI & caused her damage; (7) Civil conspiracy by Edcomm & its directors; (8) Civil aiding & abetting.
- This is a “throw in everything including the kitchen sink” approach to litigation. Very costly. So, just going to trial is sort of a “moral” victory for her. But, was it a \$\$ victory?

# How the Court Ruled on Eagle's State Claims

- Edcomm did not have a formal social media policy, though it informally encouraged employees to engage in social media. Obviously, a formal policy would have helped & a written policy even more so.
  - Does formal = written? (context/circumstances control)
- On the other hand even though Edcomm changed her LI page, Edcomm didn't pretend to be Eagle, & the LI page gave notice that she left Edcomm.
- So, regarding Eagle's unauthorized use of name claim:
  - Edcomm was guilty of this because for a short period of time, it used Eagle's LI identity for its own purposes.
  - However, the time period was so short that Eagle was unable to prove any damages like lost business, credit problems, etc., therefore, she gets \$0. Edcomm got lucky.

# Eagle's Invasion of Privacy Claim

- Eagle needed to prove that Edcomm misappropriated her identity for its own gain.
- For a little while, anyone searching for Eagle on LI would be sent to Edcomm's profile.
- This was enough to prove the invasion claim.
- But, just like the name claim, Eagle couldn't prove any concrete damages like lost business, credit problems, etc.
- Again, she gets \$0 & Edcomm catches a break.



# Eagle's Misappropriation of Publicity Claim (Important)

- Eagle needed to prove that (a) her name or likeness had \$ value, (b) that Edcomm took her name/likeness without permission & (c) they used it for commercial advantage.
- The idea is that a person has exclusive entitlement to the commercial value of their name or likeness. This relates only to commercial value.
- Court ruled for Eagle on this. *By taking Eagle's LinkedIn account as its own, instead of creating a new account, Edcomm took Eagle's commercial identity. Anyone searching for Eagle on LinkedIn would unwittingly be directed to Edcomm, thinking that it's Eagle.*
  - I think that this is where a lot of employers could have problems.
- But did she get any \$\$ for this? Again, NO, because she was unable to prove any actual losses. Another break for Edcomm.

# Eagle's Identity Theft Claim

- Reminder: This is per PA law; other states might be different. This occurs when someone's identity is taken without prior consent & for an unlawful purpose.
- Court rules for Edcomm because: Eagle's name was in the public domain & her account/identity wasn't used for unlawful purposes. Keeping Eagle locked out of her LI account was sleazy but not illegal ID theft.

# Eagle's Conversion Claim

- Eagle needed to prove that Edcomm deprived her of some right to tangible property or took her property as its own.
- PA court only applies this tort to tangible property. Some other states apply this to intangible property.
- A LI account, like any other software, domain name, or electronic transmission, is intangible property. So, Eagle loses on this claim.

# Eagle's Tortious Interference With Contract Claim

- Eagle claims that Edcomm interfered with her contract with LI & this caused \$ harm to Eagle.
- Court says that because Eagle unable to prove \$ damages due to Edcomm's actions, she loses.
- This was Eagle's big problem, she couldn't prove sufficient \$\$ loss under any sort of legal theory. More on this soon.

# Eagle's Civil Conspiracy Claim

- Conspiracy is 2 or more people acting together with malice; it's not just Edcomm as a sole business entity; it's Edcomm's individual officers/personnel.
- Eagle claimed that Edcom's people, via its officers, conspired to take her LI account.
- Eagle had to prove that this "taking" was intended to injure & she was in fact injured.
- Eagle couldn't prove any of this, so she lost.

# Eagle's Civil Aiding & Abetting Claim

- Eagle claimed that Edcomm's executives individually aided in the taking of her LI account & online identity (as opposed to Edcomm as a single entity). Not same as conspiracy though.
  - Difference between conspiracy & civil aiding & abetting is that individuals acting together, as a unit, vs. acting separately.
- Eagle needed to prove that the individually named defendants knew that what they were doing was wrong or illegal, & that they would hurt Eagle.
- Here's why she lost: She couldn't provide any evidence as to a single named defendant who aided & abetted in the taking of her LI account & online identity.

# The “Meaty” Part – Damages (Actual Losses & Punitives)

- Because Eagle succeeded on 3 of her state claims (unauthorized use of name; invasion of privacy by taking her identity; & misappropriation of publicity), she’s entitled to monetary compensation for losses.
- Eagle needed to provide some credible evidence of actual lost business from Edcomm’s actions. The evidentiary standard is that there was some “fair degree of probability” that she would make money or gain some advantage because of an alleged transaction.
  - She needed to provide some “reasonable” substantiation like reports, figures, communications, prospects, etc. Eagle failed to do this. She provided overall sales figures & oral testimony from her accountant. None of this equaled “reasonable certainty” of \$ gain from her LI account or online identity.
- Punitive damages are awarded for “willful, wanton or reckless conduct.” Although Edcomm broke the law, it didn’t try to hurt Eagle. It only took something that it thought it owned as a result of buying out Eagle.
- **SO, EVEN THOUGH EDCOMM BROKE THE LAW, EAGLE GOT BUPKIS** (Unless you count her moral victories as something).

# Edcomm Counterclaimed Against Eagle

What the Heck, It's Only \$\$\$!

- Edcomm made 2 counterclaims against Eagle, concerning her LI account. The court's ruling is instructive for employers.
- 1<sup>st</sup> counterclaim: Misappropriation. Edcomm alleged that Eagle took Edcomm's LI account as her own (this was after she got it back from Edcomm).
- Court holds against Edcomm. It never had a written or express policy concerning LI. It encouraged individual employees to engage in LI, but it didn't do anything to regulate that involvement.
- Also, LI's contract was originally between LI & Eagle, not between LI & Edcomm. In fact, Edcomm never had its own individual account, it just had the account started by Eagle.



# Edcomm's 2<sup>nd</sup> Counterclaim: Unfair Competition

- Edcomm alleged that Eagle improperly took the content & connections (links, profiles, info.) & illegally used them to compete with Edcomm.
- Injury has to result from this alleged misconduct; i.e., the “misappropriation.”
- Since misappropriation not proved, & Edcomm provided no independent evidence of injury of unfair competition, it loses.

# Eagle v. Edcomm — Lessons Learned

- Remember, this is PA federal court, & except for the federal CFAA & Lanham Act allegations, PA state law applies.
  - As far as I know, this is the only ruling on company ownership of social media account & it's very current.
  - Also, these are very well written & easy to read decisions. Kudos to Judge Buckwalter. Just wait until we get to the NLRB's decisions & advice—oy vay!.
- In order for a company to claim ownership of an employee's social media account the company should do the following (in no particular order:

# Companies Should Slide #1/2

- Have a written or express (i.e., a commonly known even though not in necessarily writing) social media policy. This could be a broad policy concerning all media communications (print, radio, etc.).
- A company should clearly delineate the “W’s.” The who, when, why, what – who speaks, when they speak, why they’re the chosen ones & what they can say.
  - But as we’ll soon discuss, the NLRB has stepped into the “who, when, why & what” issue. So, it’s not a simple task to “clearly delineate” the W’s. Shame on the NLRB for confusing everyone! 😊
- Consistently, review & monitor the policy for compliance & currency. As with any employment related policy, the longer it exists without review, compliance or enforcement, the less credible it is — so sayeth the courts, arbitrators, agencies, etc.

# Companies Should Slide #2/2

- Consistently monitor its social media presence. That is, don't just create accounts or encourage employees to engage, then let it slide. Stay involved. Monitor communications, update policy as needed, or if necessary, hire a 3<sup>rd</sup> party to do it for you. Show that you care & that this means something to you.
- If you want to prove ownership in court, then act/behave like an owner from inception onward.

# Another Court Case: New York State Reinstates Teacher Who Made Inappropriate Remarks About Students (I.e., Conduct)

- In June 2010, teacher posted on Facebook that her students were “devil spawn,” & that she wanted them to die of drowning. She was fired. This is Rubino (handout).
- In May, 2013, court ordered her re-hiring because she had a 15-year career with no prior disciplinary action. Also, this was an isolated incident, she was venting about her frustrations with her students, the comments were on her “private” FB page & deleted after 3 days, & prior to that, none of her students or their parents had seen the comments. Note: Her remarks became public after someone told her principal about them (why would anyone do such a thing?).

# Switching Gears: The NLRB & Content—What Can Be Said & By Whom. *But 1<sup>st</sup> Some Context* Slide #1/2

- The National Labor Relations Board (NLRB) was created in 1935 per the National Labor Relations Act (NLRA).
- It's purpose is to promote democracy in the workplace & employees' right to collectively organize. Anything that relates to the wages, hours or conditions of employment is subject to the Act (almost anything).
- The last substantive change to the NLRA was in 1959. That's 5 years before the Civil Rights Act of 1964.
- Since 1964, there have been many more federal, state & local workplace protection laws passed.

# NLRB Context Continued Slide #2/2

- Since 1964, because of so many changes in our workplace laws, & for other reasons, labor union organizing has sharply declined in our private sector (around 7% of our private sector workforce; around 11% overall).
- The NLRA/NLRB is increasingly seen as an obsolete relic of a bygone “industrial age.”
- Consequently, the NLRB is looking for ways to stay relevant & to avoid being shut down.
- The NLRB employs about 1,100 people nationwide.
- The NLRA doesn’t apply to managers/supervisors; it only applies to employees.

# Is The NLRA/B the Maytag Repairmen of U.S. Labor Policy? Is it Time to Retire the NLRA/B?



THE MAYTAG REPAIRMAN

*Should a long running, popular brand character be updated, revised or retired in response to changes in the positioning of the brand?*

Two men in blue Maytag repairman uniforms, including blue caps with the Maytag logo, standing back-to-back with their arms crossed. They are wearing blue suits and black shoes. The background is a solid light green color.



# Or is the NLRB Entrepreneurial, Innovative & Adaptive? Is it the Steve Jobs of Government?



- Recognizing that unions are in decline, around 2009, the NLRB began to apply the collective actions aspects of the NLRA TO ALL WORKPLACE COMMUNICATIONS IN ALL INDUSTRIES REGARDLESS OF THEIR NON-UNION OR UNION STATUS.
- Through a series of cases & guidance, the Board has picked apart companies social media policies to ensure compliance with the Act. Some of those are handouts.
- Some of the companies & industries that have been hit with NLRB litigation over social media include Costco, Target & GM, small healthcare companies, individual schools, not-for-profit social services organizations, a dermatology clinic & a newspaper.

# NLRB Guidance on Social Media Slide #1/3

- Its 3<sup>rd</sup> published guidance was issued on 5/30/12. It's a long (24 pages) inconsistent slog through its views on social media policy & practices. The first 2 weren't any easier to understand either.
- Unfortunately, the NLRB's opinions are equally inconsistent & difficult to apply to many workplace situations. Ironically, they issued the guidance in order to *help* businesses understand their opinions in a larger context.
- Their guidance & decisions contain lots of bureaucratic double talk & jargon.
- It appears that the NLRB has succeeded in staving off obsolescence by confusing & confounding anyone who tries to make sense of its opinions & guidance.

# NLRB Guidance on Social Media Slide #2/3

- **Specific examples of the NLRB's failure to communicate:**
  - It's okay for employers to require that their employees be honest & accurate, but requiring employees to be "completely accurate & not misleading" is illegal because so long as the posted info. isn't "maliciously false," then it's okay as protected activity. Huh?
  - Requiring employees to be fair, courteous or professional to others is fine, but prohibiting "disparaging or defamatory" comments is illegal. In other words, the NLRB is saying that making disparaging or defamatory comments about the company, using the company's equipment & bandwidth, is permissible so long as it's not "maliciously false." Still, it's okay if it's "defamatory" or "disparaging." I guess it all depends on context, except that the NLRB applied its prohibitory language without regard to the employer's context or motivation for instituting the policy in the first place!
  - A company can't make a blanket prohibition for sharing "confidential" & "personal" info. of others or the company. But, the company can prohibit the employees from sharing "Secret, Confidential or Attorney-Client Privileged Information" (so long as that posted info. doesn't relate to employees, then it's illegal to prohibit it).
    - For some reason, the NLRB emphasizes capitalization of "Secret, Confidential or Attorney-Client Privileged Information," but they don't explain why capitalization is so important (weird, wild stuff).

# NLRB Guidance on Social Media Slide #3/3

- It's illegal for a company to require employees to “report any unusual or inappropriate social media activity.” Also, it's illegal to say: “you are encouraged to resolve concerns about work by speaking with co-workers, supervisors, or managers.” NLRB — These prohibitions are just plain insane.
- Finally, 1 big problem with NLRB guidance & opinions is that sometimes if the employer has a good faith belief for believing something (e.g., that the employee no longer wants to work there; that employee hates the employer or co-workers; or that employee committed serious act of misconduct), the NLRB may or may not accept that as a valid defense to a charge that the employer acted illegally. With the NLRB it's all contextual. For example, if an employee tells a supervisor to “f \_ \_ k off, I hate you & I hate this company. You pay & treat everyone like s \_ \_ t, & we're not going to take it anymore!” Your guess is as good as mine whether the NLRB will support firing that employee, or whether by saying the 2<sup>nd</sup> sentence, they're engaged in concerted activity protects the employee. In the NLRB's opinion, it doesn't matter whether the employer acted in an objectively reasonable manner; it only matters if the employer acted in a way that the NLRB would have.
  - Remember, to be concerted there needs to be “some evidence” of shared concerns about employment.

# What Are Some of The NLRB Cases About? Slide #1/2

- Employer's Facebook Group is open to employees & former employees, but is otherwise private.
- Employee rants & says that employer is "full of shit," they can "FIRE ME . . . . Make my day." Employee is fired & files an NLRB complaint.
- Fortunately, the NLRB rules that personal ranting, not related to collective issues, isn't "concerted activity." So the firing is legal. Tasker Healthcare Group, d/b/a Skinsmart Dermatology, 04-CA-094222, 5/8/13.
- Per the NLRB: "Concerted activity includes circumstances where individual employees seek to 'initiate or to induce or to prepare for group action,' & where individual employees bring 'truly group complaints' to management's attention."

# What Are Some of The NLRB Cases About? Slide #2/2

- At a small social service agency in Buffalo, NY, several case workers who dealt with domestic violence issues complained about their employer & another coworker's performance. They were fired for violating the company's anti-harassment & bullying policies. Also, their supervisor believed that their conduct led to the employee's heart attack. They filed an NLRB complaint. The Board said those firings were illegal because they engaged in "concerted activity" for improved work conditions & their NLRA rights. Hispanics United of Buffalo & Carlos Ortiz, 03-CA-027872, 12/14/12.
  - Concerted activity doesn't need to be expressly concerted; it can be inferred from circumstances.
  - Supervisors good faith belief concerning cause of heart attack is irrelevant.
- Essentially, an employer can't have a rule that explicitly or implicitly prevents employees from communicating with each other or a 3<sup>rd</sup> party, like the NLRB, about their employment (w, h, coe).

# Costco vs. the NLRB

- Costco created a social media policy. Someone complained to the NLRB. The NLRB said that some of the policy was illegal & some of it was okay.
- Essentially, the Board said that any policy that prohibited employees talking amongst themselves or with a 3<sup>rd</sup> party (e.g, the NLRB) about wages, hours or conditions of employment is illegal.
- If the policy is intended to insure truthful communications, civility or protection of proprietary, trademarked or copyrighted info., then it's okay so long as it's narrowly written, i.e., not too broad—who knows what the heck that means!
- Many (not all) offensive, profane or unprofessional remarks, that are made in the context of discussing wages, hours or conditions of employment are legal. They can't be prohibited by policy. Which remarks? Only George Carlin's 7 FCC prohibited words?
- Costco Wholesale & UFCW Local 731, 34-CA-012421, 9/7/12 (handout)

## Other Noteworthy Cases to Be Aware Of

- Even lawyers make mistakes (no really!): Sometime in late May or early June 2013, a Cleveland, OH, criminal prosecutor was fired because he engaged in a Facebook chat with an accused killer's defense witnesses. He tried to persuade them to change their testimony by pretending to be an ex-girlfriend of the accused.
  - Whether the prosecutor was morally right or wrong, his conduct created a huge ethical dilemma.
- The dates are fuzzy on this one, but sometime in 2009 or 10, 2 attorneys had their paralegal Facebook friend a represented party in a case to get adverse info. on that party to undermine their claims. The 2 attorneys have been *CHARGED* with ethics violations. The ethics hearing was supposed to have taken place in late 2012.



# Social Media & Workplace Policies

- The threshold question is: Should your company have a social media policy? In order to answer this question, consider these factors:
  - How important is social media to your company? Does social media fit in with your growth plans? Is it important to employee or customer relations? If your answer is “yes,” then you probably need at least a barebones policy.
  - How important is controlling your company’s message to you? Is it key to your branding, marketing, etc.? If your answer is “yes,” then you probably need more than a barebones policy, but nothing too comprehensive.
  - How important is controlling what your employees say about you among themselves or to the public? If your answer is “very important,” then you need a comprehensive & carefully worded policy.
  - If social media isn’t part of your company’s development strategies, or employee relations, then you probably don’t need a social media policy.
  - However, if you have an employee communications policy, & haven’t factored social media into that policy, then you at least need to consider whether or not to include it via reference or in some other way.

## Sample Policy Language Slide #1/2

Please Don't Copy This Word-for-Word; They're Examples Only

- Savings Clauses: “Our social media policy will be administered in compliance with all applicable laws & regulations, like the NLRA.”
  - Or, “our policy will not be interpreted or administered in any way that unlawfully prohibits your rights pursuant to any laws.”
  - Be very careful of these types of clauses. Although they're useful & suggested, the NLRB has ruled that they won't save an otherwise defective policy or provision of a policy.
- Don't make derogatory comments that may damage the company's good will or public image before consumers & customers.
- Don't share information that the Company has taken aggressive actions to protect, such as attorney-client & privileged information, customer information, trade secrets & similar proprietary information. For guidance on what constitutes this type of information, speak to a supervisor or someone in communications. Show respect for copyright, trademark, fair use & other intellectual property laws.

# Sample Policy Language Slide #2/2

Pease Don't Copy This Word-for-Word; They're Examples Only

- Don't let anyone deceive you into disclosing protected or confidential information. If you're asked to ignore communications policies or procedures, be suspicious & request advice.
- Use common sense & exercise sound judgment when communicating. Take personal responsibility for your communications. If you're not sure about posting something, then talk to a co-worker about it. Remember, even though what you post might be legal that doesn't mean it's smart to share it. Plus, if we or your co-workers see it, it stands to reason that future prospective employers will see it too.
  - Frankly, in light of the NLRB's prohibitions, I'm not sure why saying "use common sense & exercise sound judgment" is legal, whereas other types of prohibitions aren't.
- Any harassing, bullying, discriminating or retaliatory communications or conduct isn't permitted between co-workers or towards our customers. When in doubt, talk to someone or consult our anti-harassment & discrimination policy.
- Don't impersonate someone. Don't post anything in the company's name, or in a manner that could reasonably be attributed to us, without first obtaining the authorization of the company's designated representative.
- Treat others as you'd like them to treat you – the "Golden Rule."

# If We Create A Policy, What Do We Do With It? Slide # 1/2

- Integrate your social media policy with other e-media or tech policies. Having multiple stand-alone policies is complicated & inefficient.
- Management are leaders, so behave as leaders (effective leaders that is). Walk-the-walk & set the example for others.
- Decide who will manage & monitor your company's social media. Where it's posted, when, by whom, what, etc.
- Have a response or intervention plan in case a crisis occurs.
- Establish which topics are taboo to post about or discuss; e.g., lewd images, protected intellectual property, dishonest information, regulated info. (SEC, FDA, etc.).
- Be consistent in your application of the policy. Document when applied, how applied, to whom, why, etc.
- Incentivize compliance or exemplary use of e-media.

# If We Create A Policy, What Do We Do With It? slide # 2/2

- Be respectful of others' privacy, especially those who aren't employees, or those who aren't personally or professionally engaged in social media. Recognize where the boundaries lie (easier said than done right?).
  - This can also be used as sample policy language.
- Recognize when an employee is communicating about the work lives of coworkers as opposed to something only affecting themselves.
- Stay current on trends & innovations, including slang, security issues.
- Train your company (everyone) on it. Get buy in from all.
- Finally, & this is really important, be transparent. It strikes me that one of the key aspects of all e-media is transparency. It's scary & intimidating to expose oneself, but this doesn't mean that you have to go "all the way."
  - Transparency can be as simple as explaining why your taking action "A" as opposed to actions "B" or "C."

# Trends – What to Watch Out For

- 13 states have made asking for passwords & related information illegal, more states are considering this & it's arguably bad management.
  - AR, CA, CO, IL, DE, MI, MD, NM, NV, OR, UT, VT, WA
  - 30-plus other states are considering such laws.
  - So don't ask job applicants or employees for access to *PERSONAL* social media accounts, passwords, information or devices that they've **actively** taken steps to protect.
- Language is less of a barrier to communicating across cultures; visuals are emphasized. See handout "Disruptions: Social Media Images Form a New Language Online," 6/30/13, Nick Bilton, NY Times Online, Bits Blog.
- More professionals whose careers are dedicated only to social media. They manage content, ownership, accounts & whatever else is invented.