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Illinois Department of Commerce and Economic Opportunity

Social Media, Human Resources & Labor & Employment Law

PRESENTED BY



**HUMAN RESOURCES ATTORNEY & COUNSELOR
LABOR & EMPLOYMENT LAW ON BEHALF OF MANAGEMENT**

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What's Social Networking, E-Media, Etc., & Its Implications on Human Resources?

Introduction:

Essentially, at the onset of the 21st century, online or Internet-based media has captivated the entire planet, and turned the Internet into a sort of global workplace water-cooler.

Perhaps the Internet and other forms of e-communication have totally blurred and are actually re-drawing our commonly accepted social and interpersonal boundaries. This is happening so much so that common sense rules, manners and courtesy now appear to be up for grabs. Many people just don't seem to know what rules, if any, apply.

Whether we're viewing wars abroad or someone dancing, practically everyone who has access to the technology is engaged in some form of online communication. Much of this communication is relatively cheap, easy to use, ubiquitous in our culture and available without regard to race, sex, national origin, age or any other legally protected class.

Now, concerns and legal cases are starting to arise wherein the legality of these communications, in the workplace context, are being explored, tested and mandated. Employers don't want employees or customers trashing their business' reputation or exposing confidential information to the public, and many employees seem to believe that anything is open for display or discussion.

There isn't much legal guidance, in the form of judicial decisions or regulatory agency mandates, as to how employers should create and word social media policies, or whether even to have them.

Really, the first question a business should ask is why should I use social or e-media, and does my business need a social media policy? Exactly what is it that I'm trying to prevent, protect or encourage?

Obviously, an employer can't mandate that a person never uses social media in any form whatsoever. But, at least for now, an employer can mandate that any employee posting about the business' reputation keep it honest and civil. For how long employers will have at least this much control over how e-media affects their business is anyone's guess. The rules and laws of social media are a constantly changing.

In my opinion, one of the key issues a business needs to address is if employees and clients are

using these forums for venting or voicing issues, how do we encourage civility and sincerity as opposed to vindictiveness and open hostility?

If employees are using e-media for venting workplace frustrations, is this something that we want to prevent? I believe that it's better for a business if an employee vents face-to-face and not by proxy. However, if an employee vents using e-media isn't that better than the employee venting to a third party like an attorney or regulatory agency? Or, by communicating via social media are employees actually disclosing confidential information to those same third parties?

For the most part, the answers to these questions are the same as with regulating any other form of communication.

Factors to Consider for HR Management:

1. Determine how important social media is to your company. Where does this fit with strategy?
2. Decide who will manage and monitor your company's social media content.
3. If you have an e-media policy, then make sure it integrates with your other media and communication policies and the business' overall branding.
4. Create a response or intervention plan in case a crisis occurs.
5. Establish which topics are taboo or off-limits to discuss on company social media outlets.
6. Be consistent in your treatment of employees.
7. Be transparent; inform employees why you're taking action "A" as opposed to action "B."
8. Be respectful of other's privacy.
9. Be cognizant of when an employee is posting as themselves as opposed to being your employee.
10. Decide where any policy will be located--handbook, online, memo, all three?
11. Consider the timing for implementing a policy.
12. Stay current on trends and technology—including slang and vernacular, security issues, gossip.
13. The courts & regulatory agencies haven't provided clear & consistent guidelines for companies to use relative to policies & procedures. HR management & workplace relations are in the developmental stages of evolution in social media.

Chuck Krugel Quoted in “Ethical & Legal Workplace Monitoring” Article

Thanks to Dawn Lomer of [i-Sight Blog](#)—News & Tools for Better Investigations for quoting me in her 9/8/11 article.”

Walking the line between employer and big brother is a matter of knowing the rules and using common sense

It’s only natural to be concerned about what your employees are doing at work, using equipment, while they are being paid to work. Productivity aside, your company’s reputation may be at risk if they are engaging in online activities that are illegal, unethical or damaging to your brand. [Workplace monitoring](#) is one way to keep an eye on these risks. But there’s a fine line between being concerned and invading employee privacy, and crossing that line can destroy the atmosphere in the workplace.

Employers can monitor employees’ online activities, with or without employee consent or prior knowledge if they are using company owned and operated equipment, says Charles Krugel, a [Chicago labor and employment lawyer](#).

Transparency Makes it Fair

“However, even though it may be legal, I don’t recommend that employers conduct any sort of monitoring (audio, video, online or all three) without giving their employees prior notice, and maybe even obtaining consent,” says Krugel, “because this creates unnecessary suspicion and distrust in the workplace. In short, it’s bad human resources management,” he says.

“It’s more productive to let employees know why, how and when such monitoring takes place. Generally speaking, if an employer doesn’t trust its workforce enough to treat them as mature adults, the workforce will react in kind; i.e., they’ll treat their employer with distrust and suspicion. Consequently, turnover, disputes and other behavioral problems will flourish, and profits will decline,” says Krugel.

E-Mail Monitoring

When it comes to e-mail, messages sent and received using a company e-mail address on company computers are the property of the employer. Sometimes they can become evidence in the case of a lawsuit and the employer may be required to preserve them. Use of personal web-based e-mail on company computers, however, is more complicated.

“Federal law (the stored communications act) prohibits employer monitoring of personal employee e-mail accounts without the employee’s express consent,” explains [attorney Jonathan Hyman](#), a partner in the Labor & Employment Group at Kohrman Jackson & Krantz. “Thus, it is illegal for an employer to intercept or monitor an employee’s gmail or other personal e-mail account, even if the employee accesses it through the employer’s computer and systems.”

[Michigan-based attorney Jason Shinn](#) gives the example of Stengart v Loving Care Agency, in which an employee used a personal, password-protected, web-based e-mail account accessed on the company-owned computer to send e-mails to her attorney. “After Stengart’s employment ended, she sued Loving Care for employment discrimination,” says Shinn. “Loving Care hired an outside investigator to access Stengart’s Yahoo! e-mail account, which provided information helpful to the defense of the lawsuit.”

When Stengart challenged the use of the e-mails by the employer, the New Jersey Supreme Court held that Loving Care had wrongfully accessed the e-mails between Stengart and her counsel, rejecting the employer’s argument that its handbook policy made the e-mails company records and that no expectation of privacy existed, explains Shinn.

“In this regard, the court focused on ambiguities in the employer’s handbook policy and the lack of a clear indication in the policy that employees’ personal e-mail accounts accessed through company computers constituted employer property,” says Shinn. “The take-away for employers is that policies must be properly drafted to identify the material covered and scope of permissible uses of the employer’s equipment.”

STATE & LOCAL LABOR & EMPLOYMENT LAWS

Some E-Media Related Laws Likely to Be Encountered by Businesses

| Act/Law | Coverage | Basic Requirements | Damages/Penalties |
|--|--|--|--|
| Chicago Human Rights Ordinance | All employers | Can't discriminate on basis of race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military service, source of income or social status. There are narrowly construed exceptions. | Fine of \$100 to \$500 per violation. Each day a violation continues is a separate offense. |
| Cook County Human Rights Ordinance | All employers | Can't discriminate on basis of race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military service, source of income or social status. There are narrowly construed exceptions. | Actual damages, back pay, attorney's fees & costs, fine of \$100 to \$500 per violation. Each day a violation continues is a separate offense. Remedial action; e.g., hiring, reinstatement, promotion. |
| Criminal Conviction Information Acts or Criminal Identification Acts | All employers (except many law enforcement or prosecutorial agencies) | If conducting criminal background checks for employment purposes, must obtain applicant's express approval & maintain on file for a specified number of years. Can't ask applicants to disclose criminal convictions which have been expunged or sealed. Also, can't ask if they have any expunged or sealed records. | Fines, actual & general compensatory damages, attorney's fees & costs. Criminal penalties in certain circumstances |
| Employment Record Disclosure Act | All employers | Employer providing a job reference to a prospective employer will have civil immunity if it provides truthful & only job performance information. | None specified (but perhaps an employer can be held liable for libel, slander or defamation?). |
| IL Human Rights Act | Employers of 15 or more working during 20 or more weeks in the calendar year. But, if disability or sexual harassment alleged, then Act covers all employers | Can't discriminate against employees on basis of race, color, national origin, sex, age, marital status, military status, religion, arrest record or handicap. Maintain records for 1 year; indefinitely for complaints. | Damages include: Cease & desist order, actual damages, emotional distress, hiring, reinstatement, promotion, back pay & benefits; attorney's fees & costs; compliance reports; posting of notices; penalty payments to the state; loss of state contracts for up to 3 years. |
| IL Uniform Conviction Information Act | All employers conducting criminal background checks | If conducting criminal background checks for employment purposes, must obtain applicant's signature for release & maintain on file for at least 2 years. | Up to \$1k for willful violation, plus actual & general compensatory damages, attorney's fees & costs. Criminal penalties in certain circumstances. |
| Right to Privacy in the Workplace Act | All employers, except some nonprofits | Can't discriminate for lawful activities outside of work. No inquiry of employee or prior employers whether employee has previously filed a worker's compensation claim or occupational disease claim. | Actual damages, costs & fees awardable. If willful violation, then a \$200 fine. |

FEDERAL LABOR & EMPLOYMENT LAWS

Some E-Media Related Laws Likely to Be Encountered by Businesses

| Act/Law | Coverage | Basic Requirements | Damages/Penalties |
|--|--|--|--|
| Age Discrimination in Employment Act (ADEA) | 20 or more employees | Discrimination against persons 40 years of age or older prohibited. Includes all terms & conditions of employment. Keep records for 3 years. | Back pay, front pay, attorney's fees & costs, equitable relief, liquidated damages. |
| Americans with Disabilities Act (ADA) | 15 or more employees | Discrimination in terms or conditions of employment prohibited against qualified individuals with physical or mental disabilities. Reasonable accommodation must be provided for known disabilities. Pre-employment physical examinations are limited & disability related inquiries prohibited. Keep records for 1-2 years; indefinitely if charge filed. | Equitable relief; i.e., reinstatement, promotion, etc.). Back pay, front pay, lost benefits, attorney's fees & costs, & compensatory & punitive damages. |
| Consumer Credit Protection Act | All employers | Can't discharge an employee due to garnishments/wage deductions for debt. | Reinstatement, back pay, restitution for garnishments/deductions, civil penalties including fines up to \$1k &/or imprisonment up to 1 year. |
| Fair & Accurate Credit Transactions Act of 2003 | All employers | Undoes some of the more onerous employment investigation aspects of the Fair Credit Reporting Act. | Same as Fair Credit Reporting Act below. |
| Fair Credit Reporting Act | All employers | Limited use of consumer/credit reports for employment decisions. Must make written disclosure to the employee & obtain written authorization from employee. Before adverse action is taken, employer must provide candidate/employee with the report & summary of rights. | Actual/compensatory damages, attorney's fees & costs, punitive damages, \$2.5k fine per violation, criminal penalties, for willful & knowing violations, including imprisonment up to 2 years. |
| Federal Trade Commission Act | All employers; except financial services | Ancillary effect in employment due to other laws enforced by Federal Trade Commission; gives FTC & Congress authority over U.S. commerce/trade issues; establishes fair trade & commerce requirements | Nominal fines up to \$5k/violation; cease & desist orders; compliance monitoring/reporting; imprisonment for criminal acts. |
| Genetic Information Nondiscrimination Act (GINA) | 15 or more employees | Can't discriminate on basis of proven or perceived genetic tendencies. Pre-employment physical examinations are limited & disability related inquiries prohibited. Very narrow exceptions to how an employer can use legally obtained genetic information. | Equitable relief; i.e., reinstatement, promotion, etc.). Back pay, front pay, lost benefits, attorney's fees & costs, & compensatory & punitive damages. |

| Act/Law | Coverage | Basic Requirements | Damages/Penalties |
|--|----------------------|---|--|
| National Labor Relations Act | Most employers | Can't threaten or discriminate against employees engaged in union or concerted activities, involving a labor organization. Keep records indefinitely. | Injunctive/equitable relief. Criminal fines up to \$5k &/or imprisonment up to 1 year. |
| Title VII of the Civil Rights Act of 1964, Amended 1991, 2009 (Leadbetter Equal Pay) | 15 or more employees | Discrimination on basis of race, color, religion, sex & national origin & pregnancy/maternity. Covers all employment actions, including hiring, firing, promotion, pay, practices & all other terms & conditions of employment. Keep records for 1 year; indefinite if charge is filed. | Equitable relief; e.g., reinstatement, promotion). Back pay, front pay, lost benefits, attorney's fees & costs, & compensatory & punitive damages. |
| Uniformed Services Employment & Reemployment Rights Act (USERRA) | All employers | Can't discriminate against applicants or employees on basis of military obligations or connection. Allows for continuation of benefits during military duty. | Equitable relief, e.g., reinstatement, promotion, back pay, benefits, attorney's fees & costs, penalties for willful violations. |
| Whistle Blower Statutes (Federal & State) | All employers | Many federal & state laws prohibit discriminatory or punitive actions against employees who report illegal activities. | Criminal & civil penalties, including fines & imprisonment. |

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FREE RESOURCES FOR ADDITIONAL INFORMATION

There's a great deal of free high quality information available on the Internet. Many companies, universities, and professional organizations post their HR related policies and related information on the Web.

When using search engines such as Google or Bing it may be helpful to know what search terms to use. When using the following terms, use quotation marks as they help to reduce the number of frivolous hits. Also, combine terms to reduce excessive and irrelevant hits. The following terms are not all-inclusive and are only suggestive. However, I've personally found them to be useful, especially when combined with one another or in conjunction with the name of a statute or regulatory agency, also in quotation marks.

Search terms:

"workplace behavior," workplace harassment," "occupational safety," "discipline policies," "discipline procedures," "human resources policies," "human resources procedures", "human resources practices," "free download," "free downloads," "sample policy," "sample policies," free, "labor law," "labor relations," "employment law," "employee relations," "employment relations," and "labor and employee relations." And, of course, you may want to include "social media," "e-media," "electronic media," "Facebook," or "LinkedIn" in searches.

- * 8/18/11 National Labor Relations Board (NLRB)--PDF Guidance on Social Media Cases
 - <http://www.nlr.gov/news/acting-general-counsel-releases-report-social-media-cases>
- * 9/7/11 NLRB Administrative Law Judge finds New York nonprofit unlawfully discharged employees following Facebook posts. Non-union case involving Hispanics United of Buffalo, NY.
 - <http://www.nlr.gov/news/administrative-law-judge-finds-new-york-nonprofit-unlawfully-discharged-employees-following-fac>
- * 5/24/11 NLRB sues Chicago car dealership, Knauz BMW, for allegations that they wrongfully discharged employee for Facebook posts. Non-union case.
 - <http://www.nlr.gov/news/chicago-car-dealership-wrongfully-discharged-employee-facebook-posts-complaint-alleges>
- * 4/27/11 Build.com settles charge of unlawful discharge for comments posted on Facebook with NLRB agreement in San Francisco. Non-union case involving disparaging remarks.
 - <http://www.nlr.gov/news/regional-news-buildcom-settles-charge-unlawful-discharge-comments-posted-facebook-nlr-agreemen>
- * 2/8/11 Settlement reached in case involving discharge for Facebook comments. Discharge of a Connecticut ambulance service employee for posting negative comments about a supervisor on her Facebook page,
 - <http://www.nlr.gov/news/settlement-reached-case-involving-discharge-facebook-comments>

A PERSONAL STATEMENT FROM CHARLES KRUGEL

Practice & Background Summary): www.charlesakrugel.com

As a management side labor & employment attorney & human resources (HR) counselor, I have more than 16 years of experience in the field & have been running my own practice for 10-plus years; www.charlesakrugel.com.

My clients are small to medium sized companies in a variety of industries. Besides providing traditional



labor & employment law services, I represent companies desiring to institute preventive & proactive HR functions. These functions include policies & procedures, which help to efficiently & discreetly resolve issues in-house & prevent lawsuits & complaints; they also help to reduce costs & act as catalysts for increasing productivity & profits.

Regarding my results, I have negotiated more than 100 labor & employment agreements & contracts, including noncompete & severance/separation agreements, collective bargaining & related labor agreements. Also, I have argued more than 11 arbitrations, 13 mediations & 39 agency cases/complaints & have resolved 100-plus labor grievances & similar in-house complaints & completed over 100 in-house investigations.

My career choice is the result of a long running fascination with workplace behavior, management styles, & how & why people pursue particular vocations. While in college, I advanced my interest by majoring in psychology. After college, I pursued graduate study in industrial/organizational (I/O) psychology with the thought of being an I/O consultant. During my first year of graduate school, I realized that the practice of I/O psychology was too "touchy feely" for me. Consequently, I decided that once I earned my masters degree in I/O psychology, I would attend law school.

I earned my law degree (Juris Doctorate) from Ohio Northern University. My MA degree in I/O psychology is from the University of North Carolina at Charlotte. My BS degree in psychology is from Bradley University. During law & graduate schools, I was a graduate student representative for each school's university senate. During college, I was a rush chairman & executive board member for my fraternity.

Regarding civic & association involvement, I'm on the following boards of directors:

- Member of the Young Professionals Board of the Chicago Bar Foundation, the charitable arm of the Chicago Bar Association;
- 2010 & 2011 Vice Chair of the Board of Directors for the Greater O'Hare Association, & Chair of the Government Affairs Team;
- Board Chairman for the YMCA Alliance, the workforce development arm of the YMCA's of Metropolitan Chicago;
- Member of the Board of Directors for ChildServ (www.childserv.org), a 100-plus year old child & family advocacy, housing & adoption organization.
- Member of the Board of Directors for The Lakeside Community Committee, a 45 year old child & family advocacy, housing & adoption agency; &
- Member of the Board of Directors for Youth Outreach Services, a 50+ year old teen advocacy, housing & direct service organization in Chicago.

Finally, some personal background information. I'm a native Chicagoan. Born & raised in West Rogers Park. I graduated from Rogers Public School. For high school, I graduated from Niles North in Skokie. It was during childhood that I was indoctrinated into the ways of business, self-employment & entrepreneurship. My father owned & ran his own chain of pharmacies in Chicago for 35 years. My grandfather was an immigrant businessman who owned his own grocery stores in Chicago. Family taught me the value of hard work & how to compete & succeed in business.