



Social Media in the Workplace: Employer Guidelines for Limiting Liability for Tweets Gone Bad

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Presented by

William Betley
Partner

Atkinson, Andelson, Loya, Ruud & Romo

Lisa Norton
Of Counsel
DLA Piper

Robert A. Orozco
Counsel
Ford & Harrison LLP

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Source: Universal Declaration of Human Rights, Article 19.

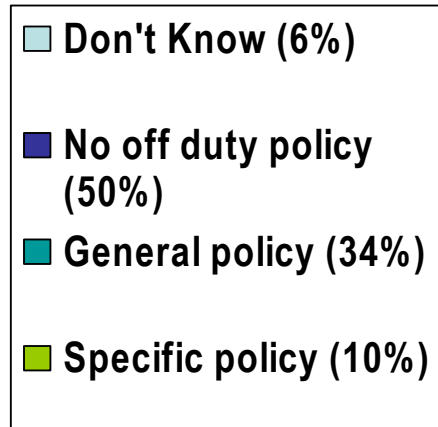
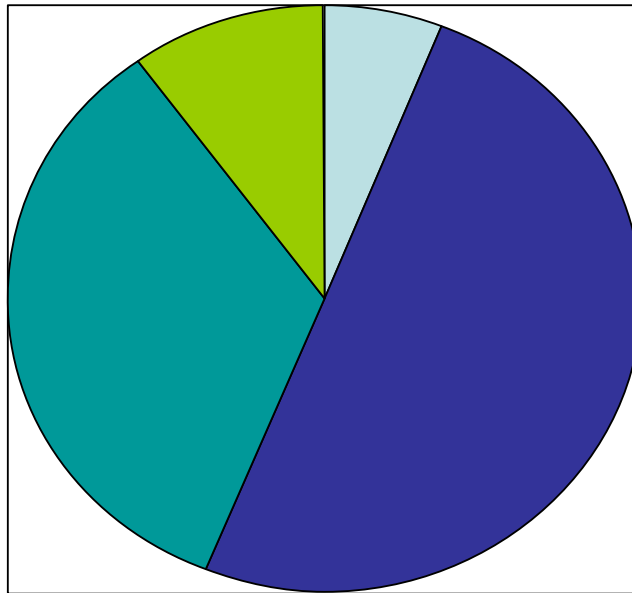
The New Town Crier

New methods to disseminate information quickly:

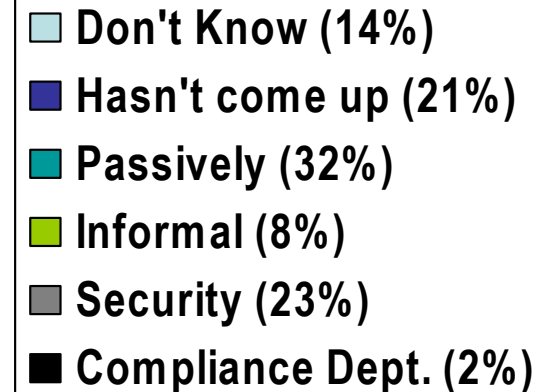
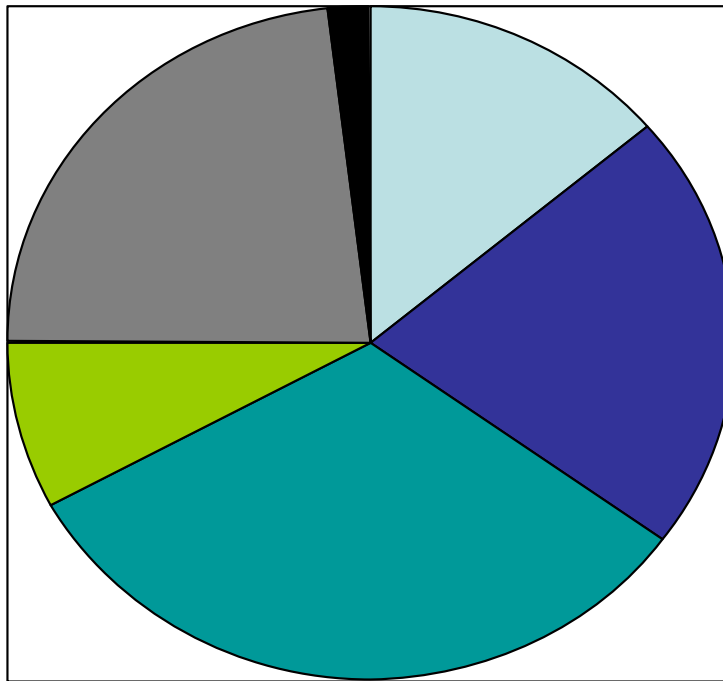
- Blogs
- Texting
- Twitter
- Social networking sites
- Digital cameras
- You Tube
- iPhones and cell phones



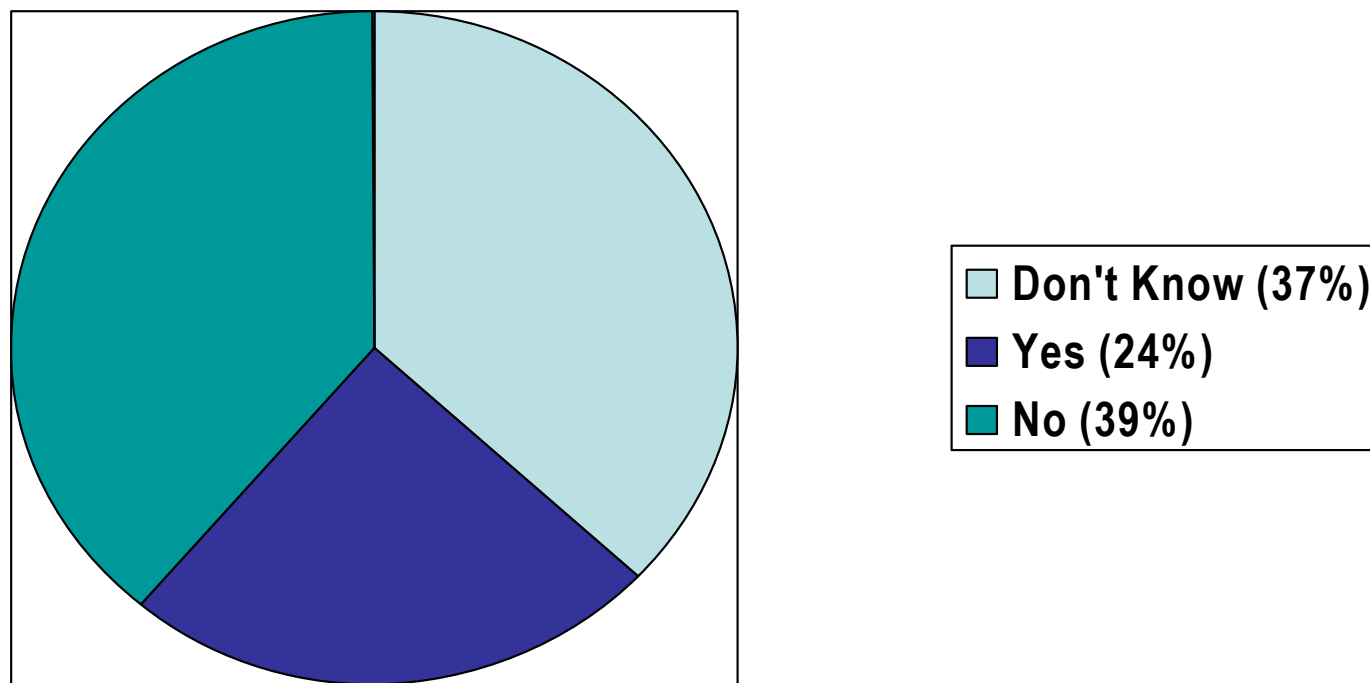
Does your company have policies specifically addressing employee use of Facebook, Twitter, LinkedIn and other social networking sites?



How is employee activity monitored on Facebook, Twitter, LinkedIn and other social network sites?



Has your organization ever disciplined an employee for his or her activities on Facebook, Twitter, or LinkedIn?



Confronting the Issues

- What are the limits an employer faces in regulating and monitoring computer activity?
- Can an employer utilize social networking sites to conduct background checks?
- Can an employer utilize the postings made by an employee as a basis for discipline including termination?

Employer's Rights and Obligations

Reasons for Monitoring

- Verifying information on application
- Improving productivity
- Protecting employer's confidential information
- Preventing unlawful activity

Pitfalls of Monitoring

- Inaccurate information
- Public employees have increased protections
- Inconsistent application of discipline or computer policy
- Lack of computer policy
- Privacy

Pre-Employment Screening

Pros

- Verifying applications
- Negligent hiring lawsuits
- Compliance with applicable state and federal laws

Cons

- Factual inaccuracies
- Obtaining “illegal” information
- Violating your own policy by accessing improper Web sites

Archaic, But Valid, Background Checks

- Federal Fair Credit Reporting Act (15 U.S.C. section 1681, et seq)
- California Investigative Consumer Reporting Agencies Act (Civil Code section 1786, et seq.)

Title VII or FEHA Implications

- Unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
- Can bloggers claim protection by anti-discrimination laws if the contents of their blogs reveal their protected characteristics?

You Hired Them ... Now What?

- Under what circumstances can an employer monitor their employees?
- What typical off-duty conduct can reasonably lead to discipline or promotions?
- What policies should an employer have in place to address these issues?
- Are they covered under the CBA?



Potential Claims Based on Privacy

- California Constitution
- Federal Electronic Communications Privacy Act
- Wiretap Act (18 U.S.C. section 2511)
- Stored Communications Act (18 U.S.C. section 2701)
- National Labor Relations Act (29 U.S.C. sections 151-169)

Employees Lack Reasonable Expectation of Privacy

Employees, both public and private, do not have an expectation of privacy when using an employer's computer or electronic systems.



A Few Notable Cases

- ***Beye v. Horizon* and *Foley v. Horizon*** (unpublished order)
 - Minors' writings shared with others on social networking sites were discoverable.
- ***Mackelprang v. Fidelity National Title Agency of Nevada, Inc.***, 2007 WL 119149 (D. Nev. 2007)
 - Wholesale discovery of private email messages from a sexual harassment plaintiff's MySpace account was not appropriate, but email messages related to the lawsuit were discoverable.
- ***Moreno v. Hanford Sentinel, Inc.***, 172 Cal. App. 4th 1125 (2009)
 - Author posting an article on MySpace had no expectation of privacy regarding the published material, even if the author expected only a limited audience.

Still Not Convinced?

- ***EEOC v. Simply Storage Management*** (unpublished order)
 - In sexual harassment lawsuit, employer sought following information:
 - All photographs or videos by the claimants or anyone on their behalf on Facebook or MySpace
 - Electronic copies of plaintiffs' profiles, including all status updates, messages, comments, groups joined, blog entries, links, etc.
 - **Court agreed with employer, ordered discovery, and made four key observations about social media:**
 - Social networking content is not shielded from discovery merely because it is “blocked” or “private”
 - All social networking material is not relevant or discoverable
 - Allegations of depressions, stress disorders, or similar injuries will manifest itself in a social networking context.
 - Since discovery is liberal, producing party should err in favor of production if there is any doubt over “arguable relevance” of social networking information

Can a Public Employer Discipline Employees for Internet Postings?

- The First Amendment protects citizens, including public employees, from state or government action. Any action by a public employer triggers the protections afforded under the Constitution.
- Depending on the content, a public employee's posts have greater protections than those of a private employee.

***Ceballos v. Garcetti* (2006) 547 U.S. 410**

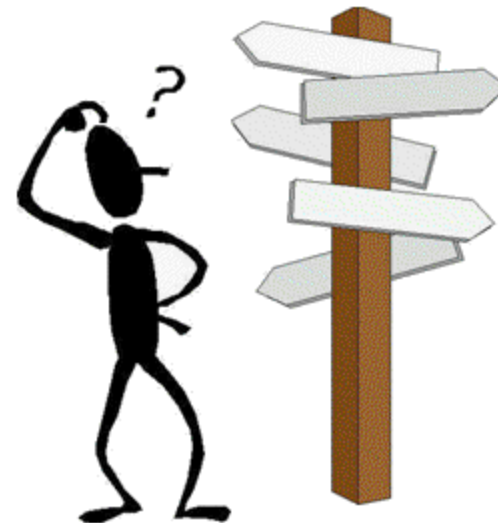
In *Ceballos*, the Supreme Court stated that when a “public employee speaks pursuant to employment responsibilities,” a heightened scrutiny standard under the First Amendment is inappropriate.

Impact of *Ceballos*

“When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”

Ceballos' Considerations

- Where do you draw the line between a private person and their official functions?
- Can you be disciplined for blogging or posting your vacation photos on your own computer?
- Are bloggers journalists?
- Do the posts become part of the public record?



City of Ontario v. Jeff Quon

Question presented to Supreme Court:

Does a police officer have a reasonable expectation of privacy in text messages transmitted on his city-issued pager, and whether third parties sending text messages to the police officer's pager have a similar expectation of privacy in the messages sent?

Impact of *City of Ontario*

- Court's comments regarding employer policies shaping privacy expectations demonstrate the importance of establishing and regularly disseminating broad policies that place employees on notice that communications may be accessed by the employer.
- In the event an employer is required to review employee communications, those investigations should be initiated based upon a legitimate business reason and be appropriately limited in scope.

Social Media in the Workplace (& News)

- **Tri-Center Medical Center (Oceanside)**
 - Hospital decided to proceed with termination of several nurses who allegedly posted patient information on social networking site.
 - May involve federal question due to public funds
- **Pittsburgh Pirates**
 - Team mascot terminated for making disparaging remarks about Team on Facebook; then rehired
 - Team states that “bad publicity” did not influence decision to rehire

Key Lessons

- Courts are willing to allow discovery of social networking information if relevant to the case
- Courts are more likely to compel production of information in response to narrowly tailored requests, rather than granting unlimited access
- Courts generally are not sympathetic to privacy objections where party chose to disclose the information, even if to a limited audience

Potential Ethical Limitations

- Philadelphia Bar Association Professional Guidance Committee, Ethics Opinion No. 2009-02
 - Addressed propriety of obtaining information from Facebook profile
 - Attorney sought to enlist a third party to send a “friend request” to unrepresented witness
 - Per Bar, attorney must disclose true intention when attempting to access a member’s profile page



Developing a Social Networking Policy

1. A social networking policy should make clear that employees cannot identify themselves as representatives of the agency on their profiles or in their blogs.
2. The employee must disclaim that their views do not reflect those of their employer.



Developing a Social Networking Policy

(cont'd)

3. The employee should not use company images or logos without prior written consent.

Developing a Social Networking Policy (cont'd)

4. Information published on a blog or other posting must comply with the employer's confidentiality and non-disclosure policies.
5. The policy should make it clear that proprietary information of the employer should not be disclosed or discussed under any circumstances. NOTE: Define proprietary information in your policy manual.

Developing a Social Networking Policy (cont'd)

6. Blogs or other postings should not contain foul or offensive language or be disrespectful to the employee's co-workers, the employer, or any third party.
7. Employees cannot blog during business hours.
8. Employees cannot register work email addresses for social media sites.
9. The policy should state that violations may result in disciplinary action, up to and including, termination.

IF YOU DON'T HAVE A POLICY, DON'T...

- Determine rules for employee access
- How will you manage accounts from your computers or PDAs
- Define acceptable use
- Ensure supervisor training & policies are consistent



Thank You

William Betley

Partner

wbetley@aalrr.com

951-683-1122

Atkinson, Andelson, Loya, Ruud & Romo

Lisa Norton

Of Counsel

Lisa.Norton@dlapiper.com

703-773-4141

DLA Piper

Robert A. Orozco

Counsel

rorozco@fordharrison.com

213-237-2449

Ford & Harrison LLP