

RMG 203: The New World of Social Media: Business and Legal Risks

Presented by:

Rennie Muzii, Marsh USA

Tamara Russell, Barran Liebman

Melissa Krasnow, Dorsey & Whitney

Chad Jackson, FedEx Corporation

This presentation was created by Dorsey & Whitney LLP, 50 South Sixth Street, Suite 1500, Minneapolis, MN 55402. This presentation is intended for general information purposes only and should not be construed as legal advice or legal opinions on any specific facts or circumstances. An attorney-client relationship is not created or continued by sending and/or receiving this presentation. Members of Dorsey & Whitney will be pleased to provide further information regarding the matters discussed in this presentation.

Discussion Agenda

- Introduction
 - Rennie Muzii, Marsh USA
- Social Website Dangers for Unwary Employers
 - Tamara Russell, Barran Liebman
- Social Media: Business and Legal Issues & Company Policies
 - Melissa Krasnow, Dorsey & Whitney
- Social Media: Risk Management Views
 - Chad Jackson, FedEx Corporation

Social Website Dangers for Unwary Employers

Tamara E. Russell



trussell@barran.com

www.barran.com

A “typical” day in the new world of social media and employee relations

- Oregon nonprofit’s mission: To “support people with developmental disabilities and mental health challenges to lead self determined lives and realize their full potential.”
- Manager posts the following:

Wall



[Redacted Name]

I just realized although i work caring for disabled people...i actually work with some really retarded people...socially , emotionally and personality wise...omg ! I need to run and fast....

15 hours ago ·

To Hire,
or Not to Hire,
Using the Internet:
Legitimate
Background Check
or
“Digging for Dirt”?



Photo credit SOCIALisBETTER via flickr

Found on employmentblawg.com

Advantage:

Legal risks of doing a background check on the internet

1. Potential violation of state or federal discrimination laws
 - Why? Because you're "asking" questions that you wouldn't (and shouldn't) otherwise ask during an interview.
 - Are you basing your decision to hire, or not hire, someone based on what you see (even inadvertently)?

What if you saw these photos of an applicant on the internet?



Source: www.marijuana-seeds.com/marijuana_seeds_cannabis_Medical.php

[www.marijuana_seeds_cannabis_Medical.php](http://www.marijuana-seeds.com/marijuana_seeds_cannabis_Medical.php)

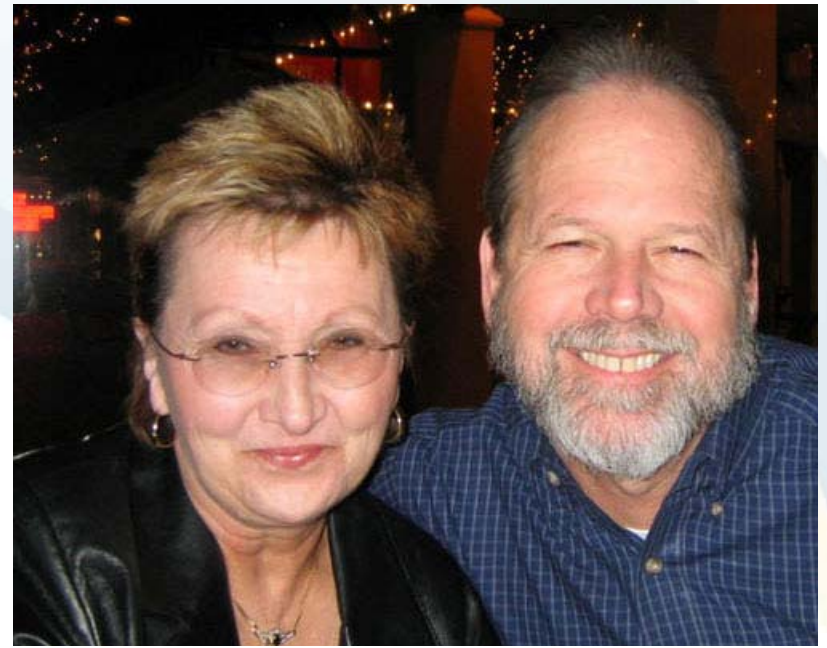
Advantage:



What if you saw these photos of an applicant on the internet?



Source: <http://come2islam.wordpress.com/2011/03/07/i-am-a-muslim-woman/>



I am a Cancer Survivor!

Source: www.ecancerawareness.com

Legal risks of doing a background check on the internet, *continued*

2. Fair Credit Reporting Act?
3. Violate terms of service of website?
4. Federal Computer Fraud and Abuse Act?
5. Federal Stored Communications Act?
6. Common law privacy claims?

If you MUST use the internet to research a candidate . . .

- Ask: Is the information I am going to learn a valid predictor of job performance?
- Consider modifying written authorizations for background checks to include reference to internet searches



If you **MUST** use the internet to research a candidate . . .

- Consider researching after a conditional job offer is made
 - If you find something negative, give the applicant time to correct or explain



If you **MUST** use the internet to research a candidate . . .

Update your policies:

- Specify who will do the internet background checks on candidates (and keep it that way)
- Develop and consistently follow criteria about how and when to use the internet in evaluating applicants
- Clarify and identify who is authorized to give referrals, if any
 - Should you be wary of the LinkedIn “recommendation”?



To Fire, or Not Fire, Using the Internet: To “dooce” or not to “dooce”?

Dooched (verb): To lose one's job because of one's website or blog.

-- Urban Dictionary



American Medical Response of Conn., Inc. (NLRB Case No. 34-CA-12576)

- Facts: What was said, to whom was it said, and when was it said? What did the employer's policy state?
- Procedural History: What happened (and what didn't happen)

Sears Holdings (Roebuck)

NLRB Case No. 18-CA-19081 (12/09)

- Sears' policy: Ban on “disparagement of [the] company's or competitors' products, services, executive leadership, employees, strategy, and business prospects.”
- Analysis: Does the policy as a whole provide sufficient context to preclude a reasonable employee from construing the rule as a limit on Section 7 conduct?

Pietrylo v. Hillstone Restaurant Group (2009)

- Plaintiff created a group on MySpace called “The Spec-Tator,” where employees – by invitation only – could engage in “shit talking” about the restaurant and its managers
- Site contained ethnic slurs and derogatory comments about guests and managers and discussions about drug use and sexual acts
- A non-manager employee joined and showed content to a manager, who used non-manager employee’s account name and password to access the account and show it to other managers



Pietrylo, continued

- Plaintiff claimed his termination violated federal and state statutes that prohibit “knowing” and “unauthorized access” to stored electronic information; violations of privacy rights; and unlawful termination
- Tried to jury in June 2009
- Verdict for plaintiff – violation of federal Stored Communications Act
- Damages for plaintiff were nominal, but attorney fees could have been significant (case settled)



Discharging employees for internet postings – so-called “safe” cases

- When the content of the posting violates the law
- When the content of the posting discloses trade secrets or other confidential or proprietary information
- When the content was posted during work hours, and violates the employer’s policy on use of the internet



Discharging employees for internet postings – the “more difficult” cases

- When the employee says disparaging – but not unlawful – things about:
 - the employer or its services
 - co-workers, the work environment, etc.

Discharging employees for internet postings – when not to discharge

- When the employee's comments are protected by law
 - Federal and state anti-discrimination/anti-retaliation laws, including wage and hour laws
 - NLRA: Section 7
 - Lifestyle statutes (not in OR/WA but in, e.g., CA)
 - Constitutional laws applicable to public employees (1st and 4th Amendments)

Should I have a policy?

- Consider the company's culture, and history, with technology
- Does the company already have policies in place already that address this issue?
- Does the company have an intranet or other employer-sponsored forum where employees may post comments?

What tone should my policy have?

- Positive? Encourage use?
 - Key provisions:
 - What is OK to state
 - What to do if there's a mistake/error
 - Be positive (“We love our employer!”)
- Restrictive?

Contents of Policy - Restrictive

- No access to social/web networking sites or blogs using employer-provided equipment (computers, cell phones, etc.)
 - Consider blocking access to the well-known accounts
- Employees may not access social/web networking sites and may not blog during work hours

Scope of Policy, continued

- Employees who access social/web networking sites or who blog during non-work hours, using non-work computers, ***may not***
 - ***disclose or discuss*** confidential or proprietary information (include definition)
 - ***disclose or discuss*** information regarding the employer's constituents or business partners
 - ***use*** the employer's trademarks, logo, and any copyright-protected material of the employer in the blog, posting, etc. ***

Scope of Policy, continued

- And employees . . . ***may not***:
 - Post any material or content that is discriminatory or harassing [unlawful] ***or***
 - Engage in any ***unlawful or unprotected*** activity that reflects or may reflect negatively on the employer, its constituents, employees, etc. ***

Scope of Policy, continued

- Employees who access social/web networking sites or who blog during non-work hours, using non-work computers, ***must***:
 - Remain respectful of the employer, its services and constituents, affiliates, vendors and suppliers, etc. ***

Scope of Policy, continued

- And employees . . . ***must***:
 - Make clear in any post or blog that the views and opinions they express about work-related matters:
 - Are their own;
 - Have not been reviewed or approved by the employer; and
 - Do not necessarily represent the views and opinions of their employer.

Scope of Policy, continued

- Employees should expect that any information created, transmitted, downloaded, exchanged, or discussed on social networking sites and/or blogs may be accessed by the employer at any time without prior notice

Welcome to RIMS 2011 Annual Conference & Exhibition

Social Media: Business and Legal Issues & Company Policies

May 3, 2011

Melissa J. Krasnow

Partner, Dorsey & Whitney LLP, and
Certified Information Privacy
Professional

Use of social media

- What are the goals?
- What is the strategy?
- What are the outcomes?

Recent and newsworthy*

- General Mills
 - Impostor/crisis management/public relations
 - Target
 - Corporate governance/social media backlash/
public relations
- * involving 2 of the 21 Fortune 500 companies in Minnesota

Legal considerations

- Social media is regulated by a variety of regulators, including:
 - Federal Trade Commission (FTC)
 - Financial Industry Regulatory Authority (FINRA)
 - Securities and Exchange Commission (SEC)
- Regulation of social media will increase
- Recent FTC enforcement actions

Example of recent social media regulation

- FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising (2009)
 - Do not make false or unsubstantiated statements
 - Fully disclose material connection between advertiser and the endorser that might materially affect the weight or credibility of the endorsement (for example, advertiser providing endorser with free products, employee of advertiser, etc.)
 - Recent FTC enforcement actions

Social media policies

- Often not publicly available
- Some common elements of social media policies:
 - Identify yourself and make it clear when you are speaking on behalf of or about the company
 - Employee versus individual capacity
 - Seek advice from the legal department or management when necessary
 - “Facebook firing” - negative employee comments
 - Information should be accurate
 - Personal liability for content
 - Disclaimers are advisable, but not a shield from liability
 - Do not disclose company confidential or financial information (for instance, material non-public information)

First steps in formulating a social media policy

- Review existing company policies and agreements – is a separate policy necessary or advisable?
- What are legal requirements and what does guidance say?

Hot topics

- Convergence of mobile devices and social media
- Privacy/security - spam, malware, and phishing through social media sites
- Litigation/e-discovery/record retention
 - Did you know that all public tweets since Twitter's inception are digitally archived at the Library of Congress?
- Social media as a source of information - regulators and news media

Determine and weigh the benefits and risks of company use of social media

- **Benefits**

- Facilitates communication between company and its customers
- Provides information about what is being said about company and its competitors

- **Risks**

- Potential for disclosure of company confidential information by employees and service providers (could be an unintended consequence of communicating information via social media)
- Are there policies and, if so, are policies being implemented and enforced?
- What do confidentiality/non-disclosure agreements and provisions say?

Social media monitoring

- Entry into social media likely involves monitoring by
 - Company
 - Outside provider
- Court cases
 - Any expectation of employee privacy? (for example, 2010 U.S. Supreme Court case in Quon)

Overall recommendations

- Take into account strategic goals for social media
- Consider and work together with all areas implicated by social media
- Review company procedures and revise or establish new policies as needed
- Make sure company policies are consistent and integrated
- Train and educate employees and others that handle social media (for instance, marketing, customer service, human resources, investor relations, legal department, etc.)

Social Media: Risk Management Views

Chad Jackson

Director of Risk Management

FedEx[®]
Corporation

Social Media Risk v. Reward

- Wall Street Journal article from Feb. 15, 2011 entitled “Facebook’s Web of Frenemies” shows Facebook overtaking Yahoo, Google, AOL and others in share of minutes online
- Yet all are intricately tied and connected to each other while competing for advertising dollars

Social Media Risk v. Reward

- The Independent's article from February 3, 2011 "Social networks are now the tyrant's weapon of choice, too"
 - "You can call people from your mobile phone, send text messages, use Facebook, dispatch a tweet to your friends or fire off email messages. We're all connected now."
 - This goes for customers, competitors, fans, the disenchanted
- If your Company is not utilizing Social Media to grow, are you missing serious rewards?
- If your Company is utilizing Social Media, are you adequately protecting the Company?

Social Media Risk v. Reward

- Rewards

- Increased product/service awareness
- Improved Company perception
- Ability to respond to issues and concerns
- Meet customers where they spend their time

- Risks

- Sensitive data breach
- Confidential data breach
- Company perception
- Product perception
- Product/service boycotts
- Snowballing negativity

Social Media Risk Management Tools

- Online activity tracking
- Internal Communication/Awareness
- Decisive philosophy regarding your Company's use of Social Media
- Established and consistent guidelines that show respect for the Company and for employees

Sample Guidelines

- Only allow certain authorized employees to establish social media websites on behalf of the Company or to speak on behalf of the Company in social media websites
- Referring to the Company in social media websites
 - Be clear you are speaking for yourself and not Company
 - Use personal contact information – not Company information

Sample Guidelines

- Personal responsibility
 - Know and follow guidelines
 - Your identity matters
 - Write about what you know
 - Use your own style
 - Respect other people's content and intellectual property rights
 - Your views are your own
 - Communicate honestly, professionally, and respectfully

Items to Consider

- Recommendations are Forever
 - Consider limiting or avoiding recommendations posted on Linked In
- Consider Levels of Information that can be Posted Online
 - Never post
 - Financials
 - Sensitive information and data
 - Copyright information
 - Personal information on employees, vendors, customers
- Personal Responsibility

Next Steps

- Establish guidelines
- Evaluate social media tracking software
 - Potential Benefit Uses
 - Customer Service/Problem Resolution
 - Reputational promotion/protection
 - Customer awareness
 - Potential Risk Mitigation
 - Claim awareness
 - Media relations
- Determine focus of Risk/Reward tradeoff
- **Know and develop a comfort with insurance protection**

AS PART OF RIMS GREEN INITIATIVES, THERE ARE NO PRINTED HANDOUTS. VISIT WWW.RIMS.ORG/2011HANDOUTS TO DOWNLOAD AVAILABLE HANDOUTS. PRINTING ON DEMAND STATIONS ARE AVAILABLE IN LEVEL 1 LOBBY OF THE CONVENTION CENTRE, AS WELL AS IN RIMS CYBER STATIONS LOCATED IN BOOTHS #227 AND #1931 IN THE EXHIBIT HALL.