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## ***“EMPLOYMENT ISSUES IN THE DIGITAL AGE”***

### ***The Legal and Ethical Implications of Social Media***

**May, 2015**

***Presented By:***

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***Guest Speaker: Muhannad Malki, V.P. of inTouch Insurance Services.***

“Malki” is a seasoned 21 year veteran in managing risk, and more specifically, Cyber Security risk issues plaguing Employers across the Nation.



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*The attached material must not be considered legal advice. The sample forms and policies are for educational purposes only. We strongly recommend that you consult with legal counsel before adopting or implementing any of the attached sample forms and policies so as to avoid potential liability.*

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What type of social media do you primarily use?

- A. LinkedIn
- B. Facebook
- C. Twitter
- D. Blog
- E. Other

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How often do you check a social media site?

- A. Weekly
- B. More than once per week
- C. Daily
- D. More than once per day
- E. I'm checking it right now

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# To Google or Not to Google:

*The pitfalls of applicant  
screening*

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## **Pitfalls of Applicant Screening**

Does your company use Internet  
screening in their application process?

- A. Yes.
- B. No, we don't need no stinkin'  
Internet.

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## Pitfalls of Applicant Screening

### Problematic or no?

“A recent RN candidate had on her Facebook that she practiced witchcraft. We did not hire as this would not sit well with our conservative area.”

- A. Sounds fine to me!
- B. Oh, dear.

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## The “Cisco Fatty”

- Connor, a Cisco applicant, posted the following “tweet” on Twitter:
  - Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.
- A Cisco employee tweeted back:
  - Who is the hiring manager? I’m sure they would love to know that you will hate the work. We here at Cisco are versed in the web.

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## **The Creative Professor**

- Professor applied to manage student planetarium.
- Search committee member conducted online research, and the committee took issue with information found online discussing Christian beliefs and Creative Design
- Professor not hired
- \$125,000 settlement

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## **Pitfalls of Applicant Screening** Legal Issues for Hiring

Searching social media provides an opportunity for employers to learn information they normally should not acquire during the hiring process.

- Title VII
- ADA
- GINA

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## **Pitfalls of Applicant Screening**

### **Practical Considerations**

- Designate a non-decision making “Googler.”
- Establish clear, written guidelines as to what will (and won’t) be searched, and what will (and won’t) be conveyed.
- Be consistent!

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## **Pitfalls of Applicant Screening**

### **Practical Considerations**

- Establish document retention guidelines.
- Review obligations if employer is federal contractor or otherwise subject to affirmative action requirements.
- If you are using an outside vendor for shared services, ensure you are complying with the Fair Credit Reporting Act

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## Pitfalls of Applicant Screening

### True or False:

A company may require an applicant's username and/or password to social media or email accounts.

- A. True
- B. False

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## Requiring Disclosure of Social Media

- Five states passed legislation prohibiting employers from requiring applicants or employees to give access to social media.
  - 10 more states introduced similar legislation
- Password Protection Act:
  - Would prohibit access to any password-protected account

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## Statistically Speaking

- 64% of employees visit non-work Internet sites every day
- 41% spend time on Facebook
- Employees spend about 2 hours per day on the Internet during work, 50% of which is not work related
- 49% of employees say a policy ban does not affect their at work or away from work activity on social sites
- 53% of employees say what they do on social sites is none of their employers business.
- 27% of employees say they do not consider ethical costs of posting videos, photos or comments on the Internet

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## Social Media Can Be Used For Good

### **Lawful policies & procedures**

- Employee efficiency
- Research
- Advertising (YouTube)
- Company blogging

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### ... And For Evil

- Piracy/Theft/Copyright Infringement
- Theft of Time
- Harassment/Discrimination
- Litigation Discovery
- Negative Blogging
- Unauthorized content/ representations attributed to or damaging to the employer

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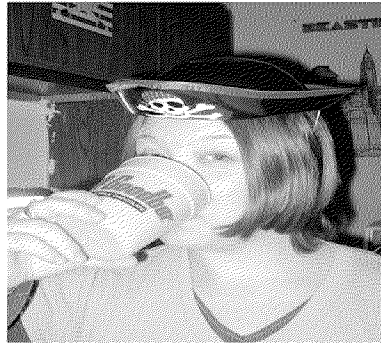
### Applebee's Uproar

- Group's receipt included automatic 18% gratuity, causing customer (a local pastor) to write: "I give God 10%, why do you get 18?"
- Co-worker took picture of receipt and posted to Reddit, adding "I'm sure Jesus will pay for my rent and groceries."

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## Lawful policies & procedures

*Snyder v. Millersville University*  
"The Drunken Pirate"



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## Lawful policies & procedures

### Twitter



#### **SeaWorld**

@SeaWorld Visit Bands, Brew & BBQ this weekend at SeaWorld and Busch Gardens.

<http://www.seaworldparksblog.com>

HootSuite **Favorite Retweet Reply**



#### **SWBestEmployeeEver**

@SeaWorld BBBBBQ awesome this year.

Specially the brews – getting wasted w/ my buds.

HootSuite **Favorite Retweet Reply**

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## The Law

- Title VII/Discrimination statutes
  - Application to at-work employee use
  - Application to supervisor use
  - Control of information obtained on the Internet
  - Litigation: If it is on your system, it will be found.

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## Lawful policies & procedures

### The Law

- State statutes prohibiting employment action based on legal activities away from work.
- For example: State laws that prevent employers from taking action based on lawful use of alcohol or tobacco products
- What if employee places picture of himself on Facebook smoking marijuana while on vacation in Colorado?

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## **The Law: NLRA Blast from the Past**

“Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection...”

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## **What is “protected concerted activity”?**

- Actions must be concerted in nature and pursued either for union related purposes aimed at collective bargaining OR for other mutual aid and protection.
- Individual action can be sufficient if spoken on behalf or as representative for the group.

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## Lawful policies & procedures

### What does this mean?

There is still no reason an employer has to tolerate blogging or social networking that reveals trade secrets, violates confidentiality or other confidential information, or that is grossly disloyal to the Company.

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## Social Media Policies

- Should do the following:
  - advise employees you own equipment and will monitor so no privacy
  - prohibit harassment/discrimination
  - prohibit piracy
  - prohibit release of confidential or trade secrets
  - prohibit non-business related activities during working time
  - prohibit solicitation
  - prohibit individual passwords
  - prohibit inappropriate social activity (must meet NLRA standard)
  - require a signed acknowledgment
- DO coordinate policy with related policies (ethics, HIPAA, Harassment/Discrimination)

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## ELECTRONIC COMMUNICATION SYSTEM

The e-mail system is the property of the Company. It has been provided to you for the use of conducting company business. All information transmitted by, received from, or stored in this system are company records and property of the Company. Use of the e-mail system for personal purposes is allowed with limited parameters. Abuse of the e-mail system is prohibited.

Employees have no right to personal privacy in any matter stored in, created, received or sent over the Company e-mail system. The Company reserves the right to monitor, restrict, access, or retrieve information sent over the e-mail system, for any reason and without the permission of any employee.

Employees must be aware that deletion of messages or files will not truly eliminate the information from the system. All e-mail messages are stored in the central back-up system during the course of normal data management.

Information retrieved and read by authorized personnel is treated confidentially. However, other employees are not authorized to retrieve or read any messages not addressed to them. Exceptions to this policy must have the prior approval of management.

Company policies against sexual or other harassment apply fully to the e-mail system, and any violation of those policies is grounds for discipline up to and including termination. E-mail must not be created, sent or received if they contain intimidating, hostile, or offensive material concerning race, color, religion, sex, age, national origin, disability or any other classification protected by law.

The following are additional but not limited to prohibited activities on the e-mailing system:

- Solicitation for religious or political causes, commercial enterprises, outside organizations, or other non-job related solicitations.
- Sending or receiving copyrighted materials, trade secrets, proprietary financial information, or similar materials without prior written consent of Company management.

Employees should consult with the Office Manager when unsure of whether certain information falls within any of the above categories.



## INTERNET POLICY PROVISIONS

Employees must not deliberately perform acts that waste computer resources or unfairly monopolize resources to the exclusion of others. These acts include but are not limited to: sending mass mailings or chain letters, spending excessive amounts of time on the Internet, playing games, engaging in online chat groups, printing multiple pages of documents, or otherwise creating unnecessary network traffic. Because audio, video, and picture files require significant storage space, files of this nature may not be downloaded unless they are business related.

An employee should not expect to have privacy when accessing Internet sites using Company property. The Company reserves the right to monitor sites visited by employees on the Internet. The Company uses the appropriate tools to block inappropriate or sexually explicit Web sites. In the event the employee encounters inappropriate or sexually explicit materials while browsing on the Internet, the employee must immediately disconnect from the site, regardless of whether the site was subject to company blocking software.

The following are additional but not limited to prohibited activities on the Internet:

- Use of any Company resources for illegal activity. The Company will cooperate with any legitimate law enforcement activity.
- Downloading or distribution of pirated software or data.
- Deliberately propagating any virus, worm, trap-door program code, or other damaging software contaminant.

Supervisors will be held responsible for their employees' non-compliance with the software policy.

Deliberate abuse of the Company's computer hardware is prohibited.

## **Internet Social Networking and Blogging Policy for Employees**

Social media have become an extremely important communications channel. This technology, and the capabilities of the World Wide Web, blurs the line between personal and professional communications. While this creates new opportunities for communications and collaboration, it also creates new responsibilities for individuals. Posted material can, when matched with an identity or photograph, reflect not only on the individual, but also on that individual's employer, clients, associates and profession. When you participate in social networking or use social media, use common sense and good judgment when posting or sharing material. There may be consequences that can include, among other issues, negative publicity, regulatory attention and confidentiality or copyright concerns. This policy is not meant to infringe on your personal interaction or commentary online, inasmuch as it does not pertain to the Company or create a negative image for the Company, its employees, clients, vendors and other such parties.

You should also understand that any posted material will be available on the Internet indefinitely—it is virtually impossible to recall or permanently or completely delete material once posted. The overall goal of social media participation from a business perspective is one of adding value and providing worthwhile information and perspectives. the Company's brand is best represented by our people; what you post may reflect on our brand whether you intend for it to or not.

In general, the Company views social networking sites (e.g., Facebook, Twitter, Instagram), personal Web sites, and Blogs positively and respects the right of employees to use them as a medium of self-expression. However, an employee who chooses to use such social networking site should not identify himself or herself as an employee of the Company or any of its affiliates on such Internet venues because some readers of such websites or blogs may view the employee as a representative or spokesperson of the Company or its affiliates or, depending on the content of the website or blog, may view the Company, its employees, and its affiliates negatively. In addition to the foregoing, the Company requires that employees observe the following guidelines:

1. Employees must be respectful in all communications and blogs. Employees should not use obscenities, profanity, or vulgar language.
2. Employees must not use blogs or personal websites to disparage the Company, its employees, its clients, vendors and other such parties.
3. Employees must not use blogs or personal websites to disclose any confidential information of the Company, its current, former or prospective clients, consumers, contacts, business partners, service recipients, vendors, its employees or its affiliates.
4. Employees must not use blogs or personal websites to harass, bully, or intimidate other employees. Behaviors that constitute harassment and bullying include, but are not limited to, comments that are derogatory with respect to age, race, religion, gender, sexual orientation, color, or disability; sexually suggestive, humiliating, or demeaning comments; and threats to stalk, haze, or physically injure another employee.

5. Employees must not use blogs or personal web sites to discuss engaging in conduct that is prohibited by Company policies and MERIT principles, including, but not limited to, the improper or illegal use of alcohol and drugs, sexual behavior and sexual harassment, and bullying.
6. Employees must not post pictures of employees, staff members, or clients, consumers, contacts, business partners, service recipients on a web site without obtaining written permission. Employees should be aware that pictures posted on a web site are often available for viewing by third parties and could be considered detrimental to the Company and its character and reputation and that of its employees.
7. The use of any copyrighted the Company name or logo is not allowed without written permission.

Any employee found to be in violation of any portion of this Social Networking and Blogging Policy will be subject to immediate disciplinary action, up to and including termination of employment.

#### **ADDITIONAL OPTIONAL LANGUAGE**

The Company requires that employees observe the following guidelines:

- 1) **You are responsible for what you post.** Even if your employment with the Company is not explicitly stated when using a social media site, your use of the site reflects on the Company. Represent yourself and the Company well. Be professional, respectful, discreet and authentic. Remember that you can't control what happens to your content once you hit "update." Employees and attorneys should not use obscenities, profanity, or vulgar language nor should they engage in threatening or racially/ethnically hateful behavior online or make defamatory or offensive statements under an identity that can be tied to your employment with the Company. This includes any posting under a screen name behind which is a profile – even if "private" – that includes your actual identity, whether or not that profile itself identifies you as an employee of the Company.
- 2) **For non-business participation on social media sites, you must use a personal e-mail address and must not attribute to or imply personal opinions or statements are endorsed or supported by the Company.** If you choose to list your work affiliation on a social network, then you should regard all communication on that network as you would in a professional network. Online lives are ultimately linked, whether or not you choose to mention the Company in your personal online networking activity. If you identify yourself as being affiliated with The Company, you must state that entries are your personal opinion and do not represent the position of the Company. If you extol the virtues of the Company on a social media site, you must identify yourself as having an affiliation with the Company.

- 3) **When participating in social networking sites in a professional context and when writing personal blogs, make an explicit statement that the views expressed by the author represent the author's alone and do not represent the views of the Company.** Write or speak in the first person to help identify that you speak for yourself and not the Company.
- 4) **Employees must not use social media to disparage the Company, its employees, clients, competitors or vendors.**
- 5) **Employees must not use social media to disclose any confidential or proprietary information of the Company or its clients, including financial information.** Honor the terms of your contracts with the Company and contracts we have with any client. Employees must at all times keep client matters confidential and must not discuss ANY client-related business via social media, from identification of clients to discussion of their matters. Employees should also refrain from commenting on the business or practices of any Company client. Any such discussion will be considered a serious violation of the Company's social media policy.
- 6) **Employees must not use social media to harass, bully or intimidate other employees.** Behaviors that constitute harassment and bullying include, but are not limited to, comments that are derogatory with respect to race, religion, gender, sexual orientation, color, or disability; sexually suggestive, humiliating, or demeaning comments; and threats to stalk, haze, or physically injure another employee.
- 7) **Employees must not use social media to discuss engaging in conduct that is prohibited by Company policies,** including, but not limited to, the improper or illegal use of alcohol and drugs, sexual behavior and sexual harassment and bullying.
- 8) Follow the rules of privacy/confidentiality.
- 9) **Employees should comply with any applicable state and federal, trademark, copyright and other intellectual property laws.** The use of any copyrighted Company name or logo is not allowed without written permission.
- 10) **Do not give advice or form client relationships when using social media.** The Company's standard intake procedures should be used to avoid conflict or other ethical problems.
- 11) **Employees must not post pictures of or comments made by employees or clients on a website without obtaining permission.** Employees should be aware that pictures posted on a web site are often available for viewing by third parties and could be considered detrimental to the Company and its character and reputation and that of its employees. Therefore, employees are cautioned to review their privacy settings on the various social media sites they use.

**12) Never be false and misleading in your online credentials.** Maintain complete accuracy in all online bios and ensure there is no embellishment. For example – a employee attends a conference at Harvard for a weekend and states in his/her bio - "Harvard trained" - this is inaccurate and noncompliant. Use the words "expert" or "specialized" very sparingly and only when such claims can be substantiated and are approved for usage by the appropriate association.

**13)** Follow the terms and conditions of use that have been established by each site or application used for your social networking activities.

**14) If a member of the news media contacts you about an Internet posting that concerns the Company's or a client's business, treat it as any other media inquiry, and do not respond to them directly.** Please refer that person to [ ] or [ ].

**15) If a negative post or comment is found online about the Company, a client or you in a business context, do not counter with another negative post.** You should seek assistance from the marketing department before forming a response, if one is warranted. If you are uncertain about any post on a social media site, contact the marketing department for additional guidance.

**16)** Violation of this policy **may result in disciplinary action** up to and including termination.

### **Personal Blogs**

Employees should feel free to create and maintain their own personal blogs, keeping in mind the rules and guidelines contained in this policy. However, while a blog itself is not subject to state or federal regulations governing advertising for a product or service, the content of a blog can be. For any business-related blog, the content must be informative only, and nothing in the content should propose a commercial transaction or be for the purpose of directly gaining a commercial transaction. The threshold question to ask is – does the content articulate commercial speech (i.e., attempting to sell services) in any way? If so, it's likely that it will be subject to state rules.

If you have a personal blog that mentions your employment or have a blog that discusses industry issues, your personal blog must contain a disclaimer that all content is solely the personal opinion of the author and is not endorsed by the Company with the following language: *The information and opinions expressed herein are solely the work and opinion of the author, and do not represent the position of the Company.*

### **Company Social Media Accounts**

The Company is currently expanding the use of social media for marketing purposes. These current and future accounts and profiles may include, but are not limited to blogs, LinkedIn, Twitter and Facebook. No employee may create a social media account on behalf of the Company, nor can they act on behalf of the Company through any online channels, including social media and social networking, without the express consent of the Company.

## **Company Blogs**

Company blogs, as with all Company publications, are overseen or approved through the marketing department and/or the President of the Company. Employees are not permitted to make comments on Company blogs that disagree with the blog author's position or make posts that could be considered inappropriate or detrimental to the Company and its reputation. Comments are monitored, and the Company reserves the right to not publish any comment for any reason.

## **LinkedIn**

Employees may and are encouraged to be active in their own personal LinkedIn accounts for personal and professional development reasons. However, only the marketing department may alter the Company's overall LinkedIn profile. If you have questions or concerns about the Company LinkedIn profile, please contact \_\_\_\_\_.

If you are connected on LinkedIn to a Company employee who then leaves the Company for a competitor, it is wise to disconnect from that person after his or her departure so he or she no longer has LinkedIn access to your current clients, prospects and other connected contacts.

## **Twitter**

The Company has reserved an overall Company Twitter account. Marketing is in control of tweets coming from this account, which is used for disseminating the Company and industry news, as well as for interacting with the media. If you have suggestions for tweets, we encourage you to contact \_\_\_\_\_ to discuss potential content. We welcome thoughts on industry happenings that our clients, potential clients, the media and other parties might be interested in. If you have found an interesting article or see a new workplace legal trend, please contact him/her to discuss how the Company might share this via Twitter. You are encouraged to re-tweet tweets from the Company's Twitter account *so long as your personal Twitter account and its content conforms to the rules and guidelines in this document.*

## **Facebook**

The Company has also established a Company Facebook page for sharing news on Company events and happenings and interacting with clients and other interested parties. Comments are not currently allowed, but may be allowed in the future. Please feel free to "share" events and posts from the Company's official Facebook page to your own personal Facebook page and network, if you would like, *so long as your personal profile follows the rules and guidelines in this document.* We encourage staff to "suggest" the Company Facebook page to clients who are already in your social media networks to alert them of our new page, and you are encouraged to "like" posts on the Company's Facebook page as well.

**USE OF COMPANY EQUIPMENT**  
**(INTERNET, E-MAIL, COMPUTERS, ETC.)**

Company employees are trusted to utilize computer equipment and electronic communication systems appropriately and according to the responsibilities of their jobs. In addition, each employee is responsible for the proper use, protection and maintenance of all equipment and other property furnished or made available to them by the Company in accordance with this policy. Unauthorized or abusive use of such property is prohibited.

Current, sophisticated technologies resources allow us to perform our work or make personal tasks easier. However, they also create unwanted or unexpected side effects, such as recording of unauthorized data or other media (photo, etc.), and the risk of invasive and destructive software.

Employees may use their Internet resources for non-business research or browsing during breaks, or outside of work hours, provided that employee complies with all of the following usage policies.