

**A Better Outlook**

With so much at stake, this could be  
the best management decision you'll make.



# Weathering the Social Media Storm: The legal & ethical implications of social media





What type of social media do you primarily use?

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



## 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



# Statistically Speaking

- In 2005, only 5% of Americans reported using some form of social media.
- As of 2012:
  - 63% of all Americans use some form of social media.
  - 48% use social media every day.
  - 86% of 18 to 29 year olds use social media.



# To Google or Not to Google:

## Google:

The pitfalls of applicant screening





# Pitfalls of Applicant Screening

Linked 



tumblr.

Google

You   
Broadcast Yourself





# Pitfalls of Applicant Screening

Does your company  
use Internet screening  
in their application  
process?



# Pitfalls of Applicant Screening

## Who performs the screening?

- A. We contract with an outside vendor.
- B. We have a designated dept. or individual in-house
- C. Anyone in our organization can screen.





# 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.”



# Pitfalls of Applicant Screening



## 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.



# Pitfalls of Applicant Screening

## 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



# 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



# 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!



# 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 services, ensure you are complying with the Fair Credit Reporting Act





# 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



# Pitfalls of Applicant Screening

## 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



# The World Wide Water Cooler:

**Lawful policies and  
procedures for your  
employees**



Who drafted your social media policy?

- A. A committee of employees who like social media.
- B. The human resources department
- C. Counsel



When was your social media policy last revised?

- A. Within the last six months
- B. Within the last year
- C. When we originally wrote it



# 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





# Lawful policies & procedures

## Social Media Can Be Used For Good

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



# Lawful policies & procedures

## ... 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



# Lawful policies & procedures

## 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."

# Lawful policies & procedures



## *Snyder v. Millersville University* “The Drunken Pirate”





# 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 BBBBQ awesome this year. Specially the brews – getting wasted w/ my buds.

HootSuite **Favorite Retweet Reply**



# Lawful policies & procedures

## The Law

- **Electronic Communications Privacy Act of 1986**
  - Prohibitions
  - Exceptions
- **Stored Communications Act**
  - Prohibitions





# Lawful policies & procedures

- **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.



# 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?



# Lawful policies & procedures

## 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...”



# Lawful policies & procedures

## 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.



# 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.



# Lawful policies & procedures

## HR's Role in Employee Monitoring

- Can be the “enforcement” arm of company monitoring initiatives.
- Once again provides insulation from decision makers
- Can assist in drafting or implementation of tailored and current social media policies
- Provide training on the appropriate use of social media





# Lawful policies & procedures

## 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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## QUESTIONS?

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