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# Social Media Law

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# Addressing Social Media Issues in the Workplace

**BY ROBERT W. SMALL**
*Special to the Legal*

The use of social media in the workplace is expanding exponentially. More and more employers have adopted social media policies, reflecting a growing awareness of the need to use social media and monitor employees' use of social media in appropriate ways.

This article seeks to identify discreet uses of social media in the workplace and identify and discuss legal issues that arise in each area.

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## THE HIRING PROCESS

No law prohibits employers from accessing the public pages of an applicant's social media. Five states — California, Illinois, Maryland, Michigan and Utah — have social media privacy laws that limit access to passwords and/or prohibit employers from requiring applicants to log onto a social media site to enable the employer to access private pages. Several other states are considering similar laws. In states where these prohibitions do not exist, it is not per se unlawful to require passwords, but doing so is fraught with danger and probably not a good idea. Common law privacy rights arguably prohibit an employer from "faux friending" an applicant to gain access to private pages and could also apply even where an applicant, under the duress of seeking employment, "voluntarily" provides a password. Additionally, unauthorized accessing of applicant or employee personal computers might violate state and federal anti-hacking laws.

Although public pages can provide useful information in considering an applicant, they also pose a significant risk of liability for employers. As a general proposition, federal, state or local anti-discrimination laws prohibit basing employment decisions on age, race, religion, marital status, national origin, ethnicity, disability, gender, pregnancy, military service, citizenship, finances, medical conditions, arrest (and possibly conviction) history and sexual orientation. An applicant's public social media pages can reveal a pregnancy, arrest record, medical condition or other facts employers may not consider in making hiring decisions. Even seemingly innocuous information, such as food likes, music preferences and tattooing, can be argued to be related to a particular ethnic or religious group. Once an employer has knowledge of such matters, it loses the ability to argue that there is no possibility of discrimination in making an adverse employment decision because it was ignorant of the facts supporting the claimed discrimination,

In considering the use of social media as a hiring tool, therefore, employers must carefully weigh whether the likelihood of gleaning useful information that is legally usable is outweighed by the likelihood of learning information that is not lawful to use and thereby eliminating a possible defense to a discrimination lawsuit.

One way of avoiding this problem and still mining social media is to create a "Chinese Wall" between the person reviewing an applicant's social media pages and the employment decision-maker, with the former giving to the latter only permissible information. This can be accomplished internally, but many employers elect to engage a third party to conduct background investigations. In that case, the employer should have a carefully crafted agreement with the vendor limiting the employer's liability and providing indemnification, requiring the vendor to abide by privacy settings and user agreements when accessing social media sites, requiring that the report not include inappropriate information gleaned from social media and, above all, assuring accuracy in the report.

Although no statute requires an employer to inform an applicant that the employer will search social media as part of its background investigation, employers who conduct investigations through a credit-reporting agency need to consider the applicability of several federal statutes, at least one of which requires an applicant's written authorization for certain forms of investigation and imposes notification obligations on employers when an adverse employment decision is premised on the background check. These statutes include the Fair Credit Reporting Act, Fair and Accurate Credit Transactions Act, Fair Credit Billing Act and the Fair Debt Collection Practices Act.

## MANAGING, DISCIPLINING AND DISCHARGING EMPLOYEES

As with applicants, reviewing employee social media is a double-edged sword. An adverse employment decision made after an employer has done so runs the risk of being challenged as discriminatory if the social media contained information that lawfully may not be considered in making the adverse decision.

On the other hand, employers have legitimate interests in learning things such as whether their employees are disclosing the employer's confidential information, are harassing or bullying co-workers, are revealing information that brings into question an employee's claimed need for

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part of daily life, judges appear to be more accepting of evidence obtained on social networking sites. Documentation of a party's behavior that previously was not evident or easily obtainable by an opposing party is now accessible with the simple click of a mouse. Additionally, photographs, communications and postings by an individual on social networking sites offer extremely telling information that can be very harmful during the course of litigation — particularly divorce and custody proceedings.

In an ideal world, parties in the midst of litigation — particularly family law proceedings — would not maintain a personal presence on social networking sites. There is a great level of risk associated with postings that might seem innocuous and innocent when a person sends a simple statement or photograph into cyberspace. One small slip of the tongue, check-in or comment made in a moment of frustration or anger can land in the wrong hands and spiral out of control in the blink of an eye. It is up to family law counsel to educate our clients that protecting themselves, their children and their assets during the course of family law proceedings is more important than any status update, tweet or shared photograph will ever be.

Although an individual's social media speech is protected by the First Amendment, it is important to be aware that the potential negatives may outweigh the positives of this type of communication. Our children learn this difficult lesson through social interactions on a regular basis. Now, adults are learning this same lesson in litigated matters across the country. The message to the adults is to think before you post. However, don't be surprised if your clients put up a fight. There are many studies that indicate an ever-growing global addiction to social media interaction that is unlikely to disappear anytime soon. •

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portedly charged tenants fraudulent late fees for rent paid on time, according to the opinion.

In support of its subpoena, the landlord emphasized it was filing a defamation action in response to the fraudulent conduct allegation, and was not trying to chill tenants from offering opinions.

The court was not swayed by the landlord's argument. Rather, it found that despite the reviewer's seemingly specific factual allegations about improper collections, the entire post "when read as a whole" and "in context" constituted mere non-actionable opinion.

## 'THE DIRTIEST HOTEL IN AMERICA'

Other courts have seized upon "context" in rejecting online defamation claims. For example, in *Seaton v. TripAdvisor*, 2012 U.S. Dist. LEXIS 118584 (E.D. Tenn. Aug. 12, 2012), a hotel owner sued travel review website TripAdvisor (a reviewer of hotels, flights and vacation rentals) for posting a list rating his hotel as the "dirtiest hotel in America." The data supporting this list came solely from its user reviews. Nevertheless, the hotel owner posited that the list was defamatory because it "is put forth with an actual numerical ranking, with comments suggesting that the rankings are actual, verifiable and factual."

The U.S. District Court for the Eastern District of Tennessee disagreed, holding that a reasonable person would understand that the list was nothing more than the "opinions of TripAdvisor's millions of online users." The court arrived at this conclusion despite the suggestion that some of the user reviews came much closer to being considered fact than opinion. For example, one user noted that "there was dirt at least a half-inch thick in the bathtub." In defending its conclusion, the TripAdvisor court went on to observe such user reviews are "omnipresent" in today's commercial sphere, stating "everything is ranked, graded, ordered and critiqued."

## A TOUGH ROW TO HOE?

In light of the ubiquity of anonymous user-generated reviews, some courts appear to be adopting a presumption that statements on sites such as Yelp may be inherently unreliable assertions of opinion — even when the reviews themselves purport to state facts.

This is likely a response to Yelp's current business model, by which anyone can post a review without editorial oversight. In fact, an estimated 36 million reviews already exist on the site. And although reviews may have the power to inflict harm on businesses, the public may be cynical about the veracity of any particular individual's recitations of "facts."

Professor Eric Goldman, a frequent legal commentator and director of Santa Clara University School of Law's High Tech Law Institute, subscribes to this view. "Any individual review is not credible, but the aggregate effect of the reviews ... tends to paint a pretty accurate picture," Goldman told NPR. Likewise, Gawker.com, a media website that has itself been embroiled in a number of high-profile online defamation cases, had a more humorous take on the *Brompton* court's decision when it published a post titled, "Hilarious Yelp Review Helps Cement Precedent of Not Taking Internet Seriously."

Efforts to remove a particularly salacious post may also be stymied by constitutional protections afforded anonymous posters. For example, in *Thomas M. Cooley Law School v. John Doe 1*, 2013 Mich. App. LEXIS 610 (Mich. Ct. App. Apr. 4, 2013), the Michigan Court of Appeals reversed a trial court's decision to deny a protective order seeking to keep Doe 1's identity secret after finding his criticisms of Cooley (such as calling it "one of the three worst law schools in the United States") under the pseudonym "Rockstar05" constituted defamation per se. Relying on the First Amendment and the Michigan Constitution, the *Cooley* court reserved and remanded to the lower court. It then instructed the trial court to consider whether Michigan law did, in fact, entitle Doe 1 to an order protecting his identity.

Businesses have also had little success in suing user review websites like Yelp directly. As mere public forums, Section 230 of the Communications Decency Act generally protects such sites from individual liability based on user content.

This is not to say that businesses have been entirely unsuccessful in pursuing online defamation claims, however. Courts seem to be more willing to entertain such claims outside the user review context. For instance, if a scholarly journal with a rigorous publishing process posted an allegedly defamatory article on its website, a court may be more receptive to such a claim based on a perceived notion about the journal's credibility.

Even with respect to online review sites, some businesses have been able to go after individual users. In Virginia, for example, a contractor survived a motion to dismiss and is currently proceeding to trial against a user who noted the contractor stole her jewelry in a review published on Angie's List (a Yelp-like website that allows users to rate contractors).

In light of the perceived cynicism regarding anonymous user reviews, businesses will likely face an uphill battle in proceeding with defamation claims absent a demonstrably false assertion of fact. And, even then, courts still consider whether the medium itself could make the difference in imposing liability. •

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FMLA leave or ADA accommodation, or are disparaging the company or its goods and services.

In this last area, employers must exercise caution in disciplining or retaliating against employees who voice concern or complain about the company's wages or working conditions in their social media. The National Labor Relations Act, which applies to both union and non-union employers, permits employees to engage in concerted action regarding terms and conditions of employment. Prohibiting employees from discussing such things in social media or taking adverse action for doing so could constitute an unfair labor practice. Even requiring employees to deal "respectfully" with such issues in their social media likely would be considered by the NLRB as an unfair labor practice.

Employers understandably wish to know and, in some cases, might have an obligation to be aware of what employees say in social media about co-workers and about the employer's goods, services, finances and future plans. Employers can be held liable for unfair trade practices or breach of federal securities and financial disclosure laws based on an employee's social media comments if the employee can be deemed to have spoken on behalf of the employer. Accordingly, any social media policy should limit who speaks on behalf of the company and require other employees to include disclaimers when discussing the company. Similarly, employers are obligated to provide a safe workplace, free from harassment that would be in violation of anti-discrimination laws. Employee social media pages can be a valuable source of information for employers conducting an investigation into charges of discrimination. Statutes that prohibit employers from demanding social media passwords carve out exceptions, in some cases very large exceptions, when the employer is conducting such investigations.

Many employers create social media sites for their employees as a marketing tool. Questions arise as to whether the employee or employer owns those sites and the information contained on them, who determines, controls and updates that information and the employer's obligation to change or take down a site when an employee leaves. This is an area of law for which there are few clear answers at this time. Employers are wise, however, to have a policy statement in this regard; it is better still to provide for it in an employment agreement.

## COMMUNICATING WITH THE PUBLIC

Social media can be a valuable and, in some instances, an indispensible tool for marketing and communicating with customers, suppliers, shareholders and the public at large. As in the employment context, employers must be cognizant of risks in using social medial for these purposes.

False claims about either the employer's products and services or those of a competitor can spawn litigation for trade defamation or unfair competition, both under the Lanham Act and at common law.

In a similar vein, a seemingly innocuous congratulatory post by one employee acknowledging another employee's accomplishment in securing significant new business for a publicly traded company can cause the employer to violate the securities laws. Regulation FD requires companies to distribute material information in a manner calculated to give the general public simultaneous access to material information. Limited disclosure of material information via social media can result in charges of insider trading.

Likewise, the financial services industry is subject to regulations that require companies to maintain a record of communications with customers. Social media sites do not have native archiving capability. Companies in that industry should establish a social media policy that takes account of this archiving obligation.

As with most new inventions, use of social media can be both a blessing and a curse. To better assure the blessings and avoid the curse, employers should adopt a well-thought-out social media policy designed to meet each particular company's needs and goals. Although this is an area where one size does not fit all, every good social media policy, at a minimum, should:

- Inform employees of the employer's expectations regarding what may and may not be posted.
- Prohibit harassing, bullying, defaming and discriminatory postings.
- Permit only authorized spokespersons to make claims about the employer or competitor's products and services and use the employer's trade or service marks.
- Require non-authorized employees discussing the employer to disclaim that they speak for the employer.
- Inform employees of the employer's legal obligations as they relate to the use of social media.
- Advise employees of potential consequences for violation of the policy. •