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FEATURE: DID YOU TWITTER MY FACEBOOK(R) WALL? SOCIAL NETWORKING, PRIVACY AND EMPLOYMENT LAW ISSUES

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TEXT:

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In the beginning, accessing the Internet was not an interactive activity. Instead, people used it primarily to view Web sites and gather information. This type of one-way communication was easy for employers to track and relatively easy to limit. However, new social networking sites (SNS) are interactive and encourage two-way communications between an unlimited number of individuals. This has introduced a plethora of new issues, including those with legal repercussions for employers and employees alike.

E-mail constituted the first prolific form of interactive communication on the World Wide Web, but, very soon after its introduction, other faster forms of Internet communication because popular. Those forms included sending instant messages, blogging, social networking, wikis and forums. In the last five years, social media web sites have proliferated at such a rapid speed that they have surpassed the development of the rules designed to regulate them.

The most popular SNS, MySpace and Facebook, were founded in 2003 and 2004, respectively. Twitter, which at this point may have become the most popular SNS, was founded in 2007. Thousands of other sites geared toward social networking, including LinkedIn. com, Flickr.com, Bebo.com, Tagged.com, BlackPlanet.com, Goodreads.com, Friendster.com, Plaxo.com and Classmates.com, are available to the public. That number does not include a variety of other Internet-based technologies that connect people together electronically.

Regardless of the specific technology, the information communicated and stored on these sites is being used in a myriad of ways by employers and employees. For instance, employers are using information found on these sites in pre-employment decisions; lawyers are using information saved on these sites as evidence; and employees are using these avenues to complain about their companies, leak confidential information and disparage employers.

Currently, under the Federal Rules of Civil Procedure, electronically stored information (ESI) is discoverable material and is defined as any type of information that can be generated on the computer, including but not limited to

e-mails, instant messages, text messages, documents, spreadsheets, databases, file fragments, metadata, digital images and digital diagrams.

SNS also can become a potential problem for employers if employees use them in a manner that is unhealthy to the company. As SNS like Twitter and Facebook (13 billion minutes a year) grow at alarming proportions, employers are faced more and more with deciding whether to allow employees access to these kinds of sites while at work. Employers also are encountering situations in which employees may be held liable for what is said on these sites.

An employer should notify its employees that:

. they should have no expectation of privacy in the use of the company e-mail system;

. all use of the e-mail system may be monitored at any time with or without notice;

. any and all messages sent, relayed or received with the company's e-mail system are the property of the company; and

. the electronic communications sent or received on the company's system may be subject to company review at any time.

To avoid liability for an unlawful employment decision, an employer should establish and follow these guidelines:

. Update the electronic-use policies in the company handbook to specify that data from blogs or social networking sites may be used in employment decisions. State specifically in the policy that this information will not be used for any unlawful purpose.

. Dedicate specific personnel, who are not decision-makers, to research the background of potential employees and to look for information that raises red flags, *e.g.*, information that suggests the potential employee may be violent or have a substance abuse problem. Those researchers should always comply with the third-party terms-of-use agreements.

. Train the dedicated personnel to know and understand what information cannot be used in an employment decision. Isolate decision-makers from all **[*28]** information except findings brought to their attention by the dedicated personnel.

. Update permission statements and acknowledgements regarding background checks of potential and/or existing employees to include reviews of blogs and SNS.

While many companies have adopted an Internet and e-mail policy over the past 15 years, a Media Communications Policy, also known as an Internet Social Media Policy that encompasses SNS, blogs and other forms of interactive communities, will become necessary for all employers in the future. The employer who begins the process of updating its technology policies to be ready for this need will be ahead of a large number of employers who will do so only when prompted by an incident, a lawsuit or legislation.

As an initial matter, such a policy should include an introduction that explains the purpose of the policy. A practical Social Networking Policy or Media Communications Policy takes into account the employer's culture as well as its objectives in creating the policy. It should also contain a statement of the employer's and employee's responsibilities, a list of the SNS at issue (such as MySpace, Facebook, Twitter, Yahoo Groups and YouTube) and a statement that the policy may apply to other types of SNS besides those specified in the policy. The increase of new media communications tools creates new opportunities for communication and collaboration between the company and the employees. It also creates new responsibilities for employees.

Lawyers are using SNS to evaluate clients, witnesses, jurors and others involved in legal situations. Plaintiffs' lawyers are now using these sites to get background information on potential clients. This tactic allows them to find

information that may affect the outcome of a case early in the matter. Evaluating clients also allows plaintiffs' lawyers to determine the type of information that may be available to the defense to use against their clients.

Similarly, both plaintiff and defense lawyers are using these sites to evaluate jurors. SNS allow attorneys to assess potential jurors, learn their backgrounds and learn about matters that may influence their decisions. Information gleaned can reveal a person's political leanings, biases and prejudices. Several documented cases establish that SNS are being used more and more for these purposes.

In one case, after an Internet search, an investigator found that a juror had a personal injury claim similar to the plaintiff's. That juror was struck as a result of that information. In another case, the defense team searched the background of a potential juror in a criminal case and found that one of the jurors who said she had no personal experience in the criminal system was under investigation for malfeasance. After the judge was informed, she was dismissed.

Instead of, or in addition to, random Internet searches, some lawyers are styling specific questions on the jury questionnaires about SNS. Those questionnaires generally ask if the potential juror blogs, if the juror has participated in SNS and, if so, which ones. Often the information a juror discloses on the questionnaire is drastically different from that posted on Web pages and blogs. This information can be invaluable in jury selection for all types of cases.

[*29] Lawyers are limited in their use of SNS by the Louisiana Rules of Professional Conduct. The rules require lawyers to refrain from certain communications with parties to a lawsuit or third parties. Because of the way in which SNS are set up, these rules can be implicated. If a person is not careful, the rules can be violated. Specifically, lawyers should keep in mind Rules 4.1 and 4.2 when a case calls for a venture into the cyber-world. Rule of Professional Conduct 4.1 covers "Transactions with Persons Other Than Clients" and states:

> In the course of representing a client, a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

For some, but not all, SNS, one must become a "friend" to gain complete access to that person's Web page. Misrepresenting oneself to become a friend can be considered a violation of the professional rules. Likewise, gathering information on a party can violate Rule 4.2 of the Rules of Professional Conduct, which provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Requesting to become a friend on an SNS of a person represented by counsel can be considered "communicating with a party without counsel" and may arguably violate the rules. Likewise, a communication by a representative of opposing counsel may violate the rules as well. Because these issues are new, lawyers do not have concrete guidance concerning the communications that could violate the professional rules. Accordingly, all parties should be mindful that these rules exist when attempting to gather information from SNS to use in a case.

SNS will continue to grow in the coming years. Because they have become an integral part of society, they will eventually become a fundamental part of the workplace. In spite of the rapid proliferation of these sites, employers have options that will allow them to maintain some control over their effect on the company's business profile. These options include embracing the sites, limiting their use or banning them altogether. However, the employer who begins to find creative ways for social media to become useful to its business will likely put itself in the best position to avoid

potential problems, improve employer-employee relations and better equip itself to smoothly transition into this ever-changing digital world.

The Top 5 Don'ts for Employers

1. DON'T routinely comment to employees about the contents of posts, comments or blogs. This could create an impression of surveillance.

2. DON'T interrogate employees about the contents of blogs.

3. DON'T forbid an employee from discussing an employer at all on his/her blog or social networking site. This is almost certainly an unlawful act.

4. DON'T start recording the contents of a blog, forum or social networking site every day without consulting an attorney.

5. DON'T use aggressive tactics to learn the identity of anonymous bloggers or people who speak out against a term or condition of employment.

The Top 5 Dos for Employers

1. DO encourage dialogue about interactive Web applications with employees if it can be used as a possible tool for the employer.

2. DO prepare a social networking policy and stick to it.

3. DO think of ways to deal effectively with employee Internet blogging or posts if they affect your workplace.

4. DO visit non-secure social networking sites or blogs periodically but not routinely.

5. DO identify a person who will be responsible for any review of Web sites and to whom bloggers can direct questions, if blogging is allowed at work.

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawPrivacy & SecurityCompany CommunicationsCriminal Law & ProcedureJuries & JurorsJury DeliberationsCollective & Personal ExperienceEvidencePrivilegesAttorney-Client PrivilegeWaiver

GRAPHIC:
PICTURE 1, 2 and 3, no caption; PHOTO, Michelle D. Craig