

A Practical Look at Social Media Policies

By Richard Raysman

A bank intern claiming a family emergency only to be seen on Facebook at a Halloween party in a winged fairy costume holding a drink, flight attendants posting unflattering comments on a social network site about their airline and its passengers—there are many anecdotes about employees being terminated (or “dooxed”) because of postings on social networks. Beyond the social networking woes of employees, employers can face potential liabilities and reputational harms stemming from the social networking activities of their employees, both during and after work hours.

Market research reports have noted that the time spent on social network sites has exploded in recent years and that users spent more time on social network sites than for email. As such, it is likely that, at any given office, most employees are members of social networks. Thus, it is prudent for a company to have a written corporate social media policy because, without one, employees will not learn proven methods to moderate risky communications and will not be on notice about which behaviors and disclosures are prohibited or require pre-approval.

Beyond such personal material, there is the potential for users to post views or blog on work-related topics, make derogatory comments about competitors or customers, or inadvertently reveal customers and confidential sources; therein lies the concern for employers.

This article will discuss social networks generally, the risks to companies from employee social networking activities, and the important considerations that companies should consider in fashioning a social media policy.

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Social Networks Generally

Broadly speaking, an online social network is a structure that allows its members to share personal information and enables personal contacts through a Web site or other Internet portal. Member pages of “core” social network sites usually contain information and audio and visual content of a personal nature, though such information may vary widely among individual users. Other interactive sites that allow for the viewing and sharing of media or bring together a community of like-minded users often contain social networking features. Often, this data includes the age, gender, and personal interests and hobbies of the individual and is shared, depending on the privacy settings of a particular user, with others whom the member determines to be “friends” or with a wider audience. Beyond such personal material, there is the potential for users to post views or blog on work-related topics, make derogatory comments about competitors or customers, or inadvertently reveal customers and confidential sources; therein lies the concern for employers.

Risks for Employers

The use of social networks by employees or company officials can create a multitude of legal concerns for an employer, from network security to legal and marketing concerns:

- **Data security:** An employee could unwittingly click on links to spam and phishing schemes or download malicious code onto the company network.
- **Confidentiality:** The ease of posting creates opportunities to let slip client confidences, trade secrets, copyrighted materials, or time-sensitive information about ongoing transactions.
- **Defamation:** Inappropriate posts about competitors by employees could bring business tort liability.
- **Harm to Reputation:** A company could suffer a harm to its reputation from the creation of false profiles, “name squatting,” and “brandjacking,” or any other time a third-party uses a company name in social media fraudulently or without authorization.
- **Violation of securities laws:** Loose communication about public companies might violate securities

laws that regulate material misstatements, public disclosures, and solicitations made by or on behalf of a company. For example, in 2007, the Securities Exchange Commission opened an informal inquiry into Whole Foods CEO John Mackey's "sock puppeting" activities, that is, his anonymous posts and commentary to online financial message boards praising Whole Foods and offering other opinions about competitors.¹

- **PR nightmare:** Reports of employee mischief comprise much of the negative reporting of any company. While employees may view a humorous online post or video as a harmless prank, an employer may find the public relations fallout vexing. For example, in 2009, Dominos Pizza suffered an unfortunate episode when a video prank posted by two employees on YouTube went viral and showed the restaurant chain in a bad light.²

Additional Concerns

Beyond the most common risks from employee social networking activities, companies should understand other concerns that touch on the public nature of social network postings and the limitations on an employer's ability to access private employee online content.

Generally speaking, a social media policy is a written document that describes the do's and don'ts of employee behavior when communicating within the various new media platforms, including blogs, Web site comment boards, online encyclopedias, and social network sites, which typically contain many of the foregoing functionalities.

In general, once content is posted on an open network, it becomes available to the wider public, and often removing every last trace from the Internet can be notoriously difficult, even after deletion. Thus, confidences that are anonymously leaked online or employee rants on social networks or comment pages may end up unexpectedly before a wider audience, leaving an employer with limited legal remedies. For example, in *Moreno v. Hanford Sentinel, Inc.*,³ a California appeals court ruled that the author of a provocative essay posted to a social network Web site cannot state a cause of action for invasion of privacy against the person who copied

and submitted it to a newspaper for republication. The court declined to dismiss the intentional infliction of emotional distress claim, however, concluding that it was a question of fact since reasonable people might differ on whether the defendant's actions were extreme and outrageous. While the *Moreno* case involved private individuals and a newspaper publisher, it is not inconceivable that an employer might encounter an incident involving the online posting of corporate documents or trade secrets.⁴

Moreover, employers who investigate their employees' social networking behavior must ensure that they do not run afoul of privacy laws, or even professional ethical rules.⁵ In one recent case, a jury ruled that an employer violated federal and state computer privacy laws and was liable for back pay and damages for terminating two employees after gaining unauthorized access to a private MySpace page that was created by the employees to be used as a forum for criticism of the company.⁶ The jury found that the company violated the federal Stored Communications Act and the New Jersey state computer privacy law when a manager asked another employee, presumably under the duress of maintaining her employment, for the password to the private MySpace page and then shared its contents with upper management, resulting in the termination of the plaintiffs.

Social Media Policies—Initial Considerations

There are many considerations in choosing what to include and proscribe in a corporate social media policy. Generally speaking, a social media policy is a written document that describes the do's and don'ts of employee behavior when communicating within the various new media platforms, including blogs, Web site comment boards, online encyclopedias, and social network sites, which typically contain many of the foregoing functionalities. It also typically enunciates an overall code of behavior so employees honor the values of the company.

As an initial consideration, a company must determine whether it wants to encourage or discourage employee participation in social media. Besides having an online presence of their own, some businesses also want their employees to contribute to the online public discourse within the company's particular industry and enhance the company's brand with meaningful interactions. Other businesses and government institutions understand the ubiquity of social networks and simply want to have in place a coherent employee social media policy to restrict certain behaviors that would be contrary to the company's image.⁷ Such a balancing

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varies with different industries. For example, while a Web 2.0 technology venture might be expected to have a more moderate social media policy, other industries, like newspaper publishing or public relations that generally seek to maintain an unbiased image, might have in place more far-reaching policies. For example, the Associated Press's social networking guidelines state that "employees also should avoid including political affiliations in their profiles and steer clear of making any postings that express political views or take stands on contentious issues."⁸ Moreover, the employee social media and blogging policy of public relations firm Porter Novelli plainly prohibits "paid blogging," that is, being paid for posting articles or reviews about an advertiser's product for compensation.

A company must then decide whether it wants to block social media sites from its own corporate network during work hours and to what extent it wishes to regulate off-hours discussions of work-related topics. Restrictions must be tempered in certain cases, however, because some federal whistleblower and employment laws and regulations protect discussion of work terms and union organizing activities,⁹ and some states, including New York and Colorado, have more extensive laws that, with certain exceptions, bar employers from discriminating against employees that engage in lawful off-hours activities.¹⁰ In addition, a company should settle on who has the authority to speak for the company in online posts or what the procedures will be for obtaining permission to speak on behalf of the company. For example, Cisco's Internet Postings Policy takes a commonsense approach: "[I]f you are writing about Cisco business where you have responsibility, you may wish to make sure your manager is comfortable with your taking that action."¹¹

Social Media Policy—Content Rules

Once a company has decided on the larger focus of its social networking policy, there are some other important content rules to consider in advising employees on specific practices while they are communicating online.

- **Transparency:** When employees engage in any discussion in an online community that relates to their employment or the employer's area of business, employees should be transparent about their actual identity and affiliation with the company. Industry-related discussions ideally should be factual in nature and opinions should be identified as the personal views of the employee. [Example: IBM Social Computing Guidelines: "If you publish content to any Web site outside of IBM and it has something to do with work you do . . . use a disclaimer such as this: "The postings on this site are my own and don't necessarily represent IBM's positions, strategies, or opinions.""]¹²
- **Tone:** A social media policy should prohibit the disparagement of others in an online forum, especially of competitors, though factual comparisons of products or services are generally acceptable. If an employee discovers an inaccurate or defamatory comment about the company, a supervisor and public relations contact should be alerted to avoid an unpleasant, unproductive exchange between an untrained employee and a disgruntled consumer. [Example: Dow Jones Social Media Interaction Policy: "Don't disparage the work of colleagues or competitors or aggressively promote your coverage. Don't engage in any impolite dialogue with those who may challenge your work—no matter how rude or provocative they may seem."]¹³
- **General Prohibitions:** A social media policy should prohibit certain unlawful communications and uses of information, including the authorized use of third-party copyrighted materials, discriminatory or other offensive conduct, and discussion of other employees' personal lives in a public forum. The policy should state that an employee is responsible for his or her own postings and can be personally liable for defamatory or infringing behavior. [Example: Cisco Internet Postings Policy: "Because you are legally responsible for your postings, you may be subject to liability if your posts are found defamatory, harassing, or in violation of any other applicable law."]¹⁴
- **Confidentiality:** Employees should be prohibited and educated about the dangers of releasing any confidential, trade secret, or sensitive information or photographs on a social network. Similarly, an employee should not undercut or "scoop" the company's advantage in a particular industry. For example, a news reporter should be prohibited from releasing information on a social network about a breaking story. [Example: Dell Online Communications Policy: "Dell employees . . . must maintain the confidentiality of information . . . including company data, customer data, partner and/or supplier data, personal employee data, and any information not generally available to the public."]¹⁵
- **Online Encyclopedias:** Online encyclopedias, the most popular being Wikipedia, contain entries on many companies and notable persons. There have been multiple media reports of companies deleting unfavorable portions of Wikipedia entries about them, however, resulting in negative publicity. With

the easy availability of online software applications, such as WikiScanner, which uncover seemingly anonymous edits to Wikipedia and track them to their source via IP address, any correction or derogatory comment posted to Wikipedia made from a company computer can be traced back to its source. [Example: BBC Guidance, Personal Use of Social Networking and other third party Web sites: “If staff members edit online encyclopedias at work the source of the correction will be recorded as a BBC IP address. When correcting errors about the BBC, we should be transparent about who we are. We should never remove criticism of the BBC. Instead, we should respond to legitimate criticism. We should not remove derogatory or offensive comments but must report them to the relevant administrators for them to take action.”]¹⁶

- **Friending and Recommending:** A social media policy should include protocols on “friending,” that is, asking a fellow member of a social network to be your “friend,” which typically invites that person into your inclusive network within the site. To avoid the appearance of harassment, a company may want to prohibit supervisors from sending friend requests to subordinate employees who might feel pressured to accept the request. Regarding becoming “friends” with outside individuals, employers should educate employees of the dangers of friending customers, confidential sources (in the case of news reporters), or other sensitive contacts, since such an action is akin to publishing your Rolodex online for competitors to see. [Example: Greteman Group Social Media Policy: “Use Facebook and MySpace (and similar sites) as your personal network. If you don’t want to friend coworkers, vendors or clients, don’t feel pressured to.”]¹⁷

As for recommending, some professional networking Web sites, such as LinkedIn, allow users to post online letters of recommendations as part of their profile. To avoid discrepancies with internal company evaluations, however, and the potential for future legal issues arising in connection with workplace promotions, dismissals or disciplinary actions, a social media policy should prohibit supervisors from writing online recommendations of any employee.

- **Legal:** Employees should be educated about avoiding discussion of ongoing litigation involving the company, merger negotiations, and disclosures and actions that implicate Securities laws. [Example: Intel Social Media Policy: “Please never comment on anything related to legal matters, litigation, or any parties we are in litigation with without the appropriate approval.”]¹⁸

Conclusion

Given the rapid growth of social networks and the fact that employees from tech-savvy Generation X and Y comprise a large percentage of employees, social networking appears to be a long-term reality. With social networks’ multiple functionalities, an office’s email use policy is typically not wide-reaching enough to also cover employees’ social media interactions. Therefore, it would be prudent for a company to set forth a policy to educate its workforce and avoid the legal and reputational risks that come from employees’ involvement in online communities.

Notes

1. Mackey was eventually cleared of any wrongdoing. See John Mackey, The CEO’s Blog, “Back to Blogging,” (May 21, 2008), available at <http://www2.wholefoodsmarket.com/blogs/jmackey/2008/05/21/back-to-blogging/> (last accessed Aug. 1, 2011).
2. See Bee, “Pizza-Polluting YouTube Plonkers Soil Domino’s,” *The Register* (Apr. 16, 2009), available at http://www.theregister.co.uk/2009/04/16/dominos_vidiocy/ (last accessed Jan. 16, 2012).
3. 172 Cal.App.4th 1125 (2009).
4. See, e.g., *O’Grady v. Superior Court of Santa Clara County*, 44 Cal. Rptr.3d 72 (Cal. App. 2006) (online publishers that posted alleged trade secret information of a technology company was entitled to protection under California’s Reporter’s Shield, which prevents the compelled disclosure of sources and unpublished materials in their possession); *Religious Technology Center v. Lerma*, 897 F. Supp. 260 (E.D. Va. 1995) (works had escaped into the public domain and onto the Internet and thus the plaintiffs failed to rebut the claim that the works were “not generally known” as required under the state trade secrets statute).
5. See, e.g., The Philadelphia Bar Assoc. Prof. Guidance Committee, Op. 2009–02 (Mar. 2009) (the act of hiring an investigator to mislead a potential witness by becoming social network “friends” with the witness in order to obtain access to personal pages for future impeachment would be deemed a violation of ethical rules); San Diego County Bar Assoc., Legal Ethics Opinion No. 2011–2 (May 24, 2011) (an attorney may not send a friend request to an unrepresented witnesses without disclosing the purpose of the request).
6. *Pietrylo v. Hillstone Restaurant Group*, No. 06–5754 (Jury verdict) (D. N.J. June 16, 2009).
7. See, e.g., Sandomir, “ESPN Limits Social Networking,” *New York Times* (Aug. 5, 2009), available at <http://www.nytimes.com/2009/08/05/sports/05espn.html> (last accessed Jan 16, 2012); Barnes, “What’s on the Pentagon’s mind? Facebook,” *Los Angeles Times* (Aug. 5, 2009), available at <http://www.latimes.com/news/nationworld/nation/la-na-pentagon-facebook5-2009aug05,0,3998956.story> (last accessed Jan. 16, 2012).
8. For a copy of the AP’s social networking guidelines, see Strup, “New AP ‘Social Media’ Policy Draws Union Fire,” *Editor &*

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- Publisher* (June 23, 2009), available at <http://www.editorandpublisher.com/Archive/New-AP-Social-Media-Policy-Draws-Union-Fire> (last accessed Jan. 23, 2012). Recently, political comments posted on social networks were at the center of one reported incident that resulted in the exit of a political aide from the office of the Manhattan borough president. See Chan, "Facebook Postings Prompt Quick Exit of a City Politician's Aide," *New York Times* (July 28, 2009), available at <http://www.nytimes.com/2009/07/29/nyregion/29fired.html?scp=1&sq=stringer%20aide&st=cse> (last accessed Jan. 16, 2012).
9. For example, Section 7 of the National Labor Relations Act, 29 U.S.C. §157, defines the rights of employees to organize and to bargain collectively with their employers through representatives of their own choosing or not to do so.
 10. See N.Y. Labor Law § 201-d(2)(c) (protects "an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property legal recreational activities," subject to certain exceptions including, among others, behaviors that are "a material conflict of interest" to the employer's trade secrets and proprietary business interests); Colo. Rev. Stat. §24-34-402.5 ("It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours . . . [absent certain exceptions].")
 11. The CISCO Internet Postings Policy is available at http://blogs.cisco.com/news/comments/ciscos_internet_postings_policy/ (last accessed Aug. 5, 2011).
 12. The IBM Social Computing Guidelines are available at <http://www.ibm.com/blogs/zz/en/guidelines.html> (last accessed Aug. 5, 2011).
 13. For a copy of the Dow Jones Social Media Interaction Policy, see Roderick, "WSJ Staffers Told to be Nice Online," *LA Observed* (May 12, 2009), available at http://www.laobserved.com/archive/2009/05/wsj_staffers_told_to_be_n.php (last accessed Aug. 5, 2011)
 14. The CISCO Internet Postings Policy is available at http://blogs.cisco.com/news/comments/ciscos_internet_postings_policy/ (last accessed Aug. 5, 2011).
 15. The Dell Online Communications Policy is available at <http://www.dell.com/content/topics/global.aspx/policy/en/policy?c=us&l=en&s=gen&~section=019> (last accessed Aug. 5, 2011).
 16. The BBC Guidance, Personal Use of Social Networking is available at <http://www.bbc.co.uk/guidelines/editorialguidelines/page/guidance-blogs-personal-full> (last accessed Aug. 5, 2011).
 17. The Greteman Group Social Media Policy is available at <http://gretemangroup.com/social-media-policy/> (last accessed Aug. 5, 2011).
 18. The Intel Social Media Policy is available at http://www.intel.com/sites/sitewide/en_US/social-media.htm (last accessed Aug. 5, 2011).

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