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"Like" It or Not:

New Legal Restrictions on Employer Controls of Social Media

Presented to

Silicon Valley Women in Human Resources

Presented by

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Rewards of Social Media

- Improved communications between employees
- No-cost marketing of the company and employees, creating “friends” and “fans”, promoting events via Twitter
- Immediate customer feedback
- Building referral networks

Problems of Social Media

- Interferes with work
  - Distraction of personal I-M's and text
  - Employees use working time
- Misuse of company computers
  - Using bandwidth, slows LAN
  - Posting of confidential information
  - Offensive or harassing postings
- "Referrals" or disparagement of business or co-workers
- Misuse of "private" postings

Using Social Media in Hiring

- Use of information subject to anti-discrimination laws
  - Facebook photos showing applicant dancing with same sex person
  - Applicant comments on a blog about breastfeeding
  - Applicant activities include support group for parents of cancer patients
- AB 1844. Effective 1/1/13, employers cannot:
  - Require or request disclosure of a username or password for personal social media
  - Force employees or applicants to access personal social media in the employer's presence
  - Require disclosure of content on any personal social media

The 21st Century Worker

Employees who are entering the workforce for the first time may have misconceptions of what is appropriate workplace conduct, based on what they see in the media (e.g., “The Office”), and at the same time are more likely to use e-mail, text messaging and social networking sites.

Applicable Laws Were Written Before the Internet Existed

Wage and Hour Laws – 1930's

- Employer can command services of employee during working hours

California Meal and Rest Break Laws, amended 2003

- Employee relieved of all duties during meals and breaks

California's Constitutional Right to Privacy – 1970's

- California citizens have a right to privacy, applies to personnel, financial, medical information

Applicable Laws Were Written Before the Internet Existed

California Fair Employment and Housing Act

- Prohibits discrimination based on protected classifications, actual and perceived – 1970s
- Requires employer to provide a workplace free of harassment based on protected classifications

Family Medical Leave Act – 1993

- Requires notice of rights, mandatory leave, prohibits discrimination and retaliation

Americans with Disabilities Act – 1990

- Protects confidentiality of information regarding disability

HIPAA – 2003

- Mandates segregation of medical and disability information from those who make employment decisions

Other Traditional Legal Doctrines That Affect Social Media

Respondeat Superior

- Employer liable for acts of employee in the course and scope of employment

Defamation

- Creates legal liability for false statements of fact that damages the reputation of another

Misappropriation of a Person's Name or Likeness

- New York Civil statute from early 20th Century
- California Civil Code

Securities Exchange Act of 1934

- Prohibits trading on inside information of publicly traded stocks – can result in civil and criminal liability

Applying Old Law to the New World of Social Media

- Posted information is publicly disclosed, and there is no privacy invasion, *but* beware of discrimination laws, e.g. refusing to hire employee because of protected classification disclosed on the web-site
- Posted information can be part of a harassment claim, e.g. false "blog" about sexual relationship
- Posted information can be used as evidence in criminal investigations and school expulsions, but arguments are made that use for employment is a "business use" prohibited by the access agreement

Policies Are Where Employers Apply the Law to the Workplace

- **Employers are at risk if their policies do not keep pace with technology**.
  - In June 2010, the U.S. Supreme Court held that a government employer's search of text messages stored on electronic devices provided by the employer was reasonable under the Fourth Amendment, but left standing a 2008 9th Circuit Court opinion that the service provider violated the Stored Communications Act by providing the text messages to the employer because the employer policies did not address text messaging.
- **Lessons learned:**
  - Court will apply law regarding employer searches to electronic devices
  - Employee's "expectation of privacy" will affect reasonability of the search
  - Private employers must expressly reserve the right to search employee text messages; employee written consent
  - Policies and acknowledgements must broadly define electronic devices and forms of electronic communications to cover new technologies and media

Stored Communications Act

- Federal law enacted in 1986 – 18 U.S.C. sections 2701-2711 applies to private companies
- Basis of Ninth Circuit holding against the ISP (Arch Wireless) for providing City with transcripts of Quon's text messages
- Prohibits access to electronic communications that is not authorized by the user
- Basis of 2009 jury verdict for employees (including punitive damages) in unpublished New Jersey case where employer pressured employee into providing password to employee chat room on MySpace, and accessed it repeatedly (*Pietrylo v. Hillstone Restaurant Group dba Houston's*)

Social Media Policies and the NLRB

- The National Labor Relations Act ("NLRA") protects the rights of ***all*** employees to engage in protected concerted activities including the right to discuss the pay, benefits, and other conditions of their employment with co-workers and others, ***even in a non-union workplace***.
- Starting in late 2010 the National Labor Relations Board ("NLRB") challenged employer social media policies, stating that postings on social media can constitute protected concerted activity.
- NLRB has challenged terminations of employees who use social media (posting and "liking") can be protected.

Controlling Use of Social Media

NLRB disapproves of social media policies that are perceived of limiting "protected concerted activity", including:

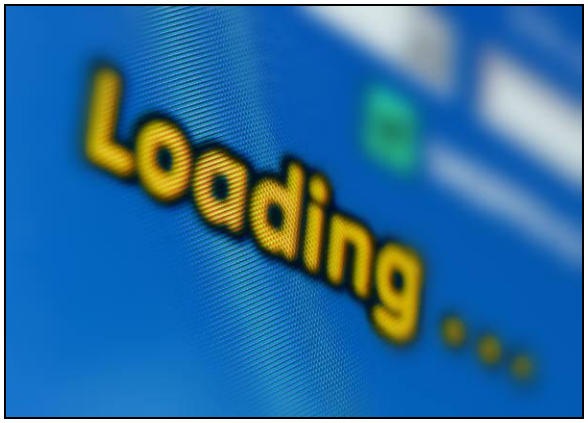
- Policies prohibiting "disparaging remarks" about company, managers or co-workers
- Broad prohibitions on "inappropriate posts"
- Prohibitions on use of company name or posting of photos of company or co-workers
- Broad prohibitions on discussion of confidential information about co-workers (trade secret protections allowed)

Social Media Policies and the NLRB

- In *American Medical Response of Connecticut Inc. and International Brotherhood of Teamsters, Local 443*, NLRB Case No. 34-CA-12576, the NLRB issued a complaint based on the discharge of an employee for disparaging Facebook postings about her supervisor.
- The NLRB alleged that the company maintained overly-broad rules in its employee handbook regarding blogging, Internet posting, and communications between employees; the policies stated employees were "prohibited from making disparaging, discriminatory or defamatory remarks when discussing the Company or the employee's superiors, co-workers and/or competitors."
- In February 2011 the matter settled and the company agreed to revise its internet and blogging policies to ensure that they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others outside of work.

Is This Your Company Policy?

"Employees are prohibited from posting messages on the internet via any website, network site, or blog that damage the company, defame any individual or damage any person's reputation or violate the policies outlined in the Company Employee Agreement."



Specific Policies to Address Social Media Use

- Whether, and to what extent, access to social media sites is permitted on company time or using company equipment
  - Be consistent with meal and rest break policies
  - Avoid "overly restrictive" prohibitions on outside of work postings
- Employees should have no "expectation of privacy" with regard to their own postings.
- Employees should be cautioned that company policies about electronic communications, monitoring of computer use, and restrictions on creation, storage or transmittal of material apply to postings and consent to employer search of content on company-owned servers to avoid SCA problems.

Policies to Address Legal Concerns

- Specific policies can caution about insider trading, trade secrets, confidential patient information.
- Can prohibit a poster from falsely claiming to be another person, e.g. “an anonymous executive within XYZ Corp.”
- Do not give job references or recommendations that purport to be on behalf of the company.
- Do not violate copyright, trademark and proprietary rights laws.

Avoiding Harassment and Discrimination

- Company harassment and electronic communication policies should ban the use of any electronic device, internet access, website posting or messaging service for the purposes of discriminatory harassment on any protected basis, including sex, race, age, disability, religion.
- Company policies should make clear that information obtained by an individual "casually" through social networking sites is not considered to be notice to the company – but in practice, treat it as if you are "on notice."

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Ms. Hayashi has over twenty-five years experience representing and advising Silicon Valley employers in employment and business litigation. She has trial experience in wrongful termination, discrimination, and misappropriation of trade secrets and proprietary information actions in both state and federal court. In June 2003, she was named one of the "Top 50 Women Litigators" in California by *The Daily Journal*, and named as a 2009 Woman of Influence by the *Silicon Valley/San Jose Business Journal*. She was also named the 2009 Professional Lawyer of the Year by the Santa Clara County Bar Association.

She is a frequent speaker on employment law and legal ethics. She is a faculty member at Lincoln Law School on employment law, past president of the Santa Clara County Bar Association and the Law Foundation of Silicon Valley, and a member of the Santa Clara County Superior Court, Alternative Dispute Resolution Committee and Bench/Bar/Media/Police Committee.

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