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# **Social Media in the Workplace** *Risks & Rewards for Employers* & *New NLRB Guidance*

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The information contained in this outline is not intended to be a complete explanation of the material presented in this seminar. The information contained in this outline is for discussion purposes only. Users of this information should always contact an attorney when determining how to manage labor and employment issues.

# Social Media

The online forms of communicating that any individual can employ, which include blogs, microblogs, and social networking sites.

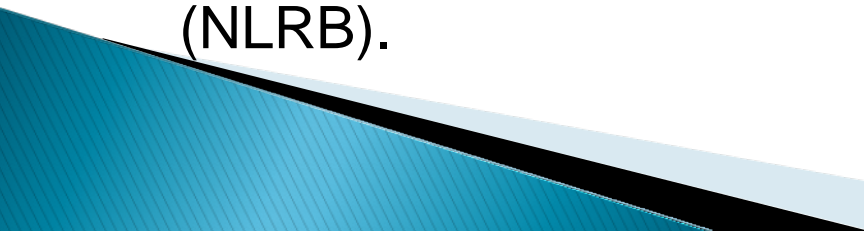
– *TechEncyclopedia*

Examples: Facebook, Twitter, MySpace, Blogger, YouTube, Flickr, Picasa, etc., etc.



Use of social media and electronic communications must be governed by clear guidelines that contain policy limitations and specific examples of prohibited conduct. The company policy must also openly disclose the rights of the employer concerning social media, company technology, and expectations of privacy.

## National Labor Relations Act (NLRA)

- 1935 federal law prohibits "unfair labor practices."
  - NLRA protects a wide range of activities and covers most private sector employers.
  - Prohibits interfering with, restraining or coercing employees regarding their rights under Section 7. These rights include freedom of association, mutual aid or protection, self-organization, to form, join, or assist labor organizations, to bargain collectively for wages and working conditions through representatives of their own choosing, and to engage in other protected concerted activities with or without a union.
  - NLRA is enforced by the National Labor Relations Board (NLRB).
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# Employee Rights Notice Posting Requirement

- As of January 31, 2012, most private sector employers are required to post a notice advising employees of their rights under the National Labor Relations Act.
- The notice should be posted in a conspicuous place, where other notifications of workplace rights and employer rules and policies are posted. Employers also should publish a link to the notice on an internal or external website if other personnel policies or workplace notices are posted there.



# EMPLOYEE RIGHTS

## UNDER THE NATIONAL LABOR RELATIONS ACT

The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board, the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

### Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

### Under the NLRA, it is illegal for your employer to:

- Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

### Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten you that you will lose your job unless you support the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take other adverse action against you based on whether you have joined or support the union.

If you and your coworkers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

**Illegal conduct will not be permitted.** If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's website: [www.nlrb.gov](http://www.nlrb.gov).

Click on the NLRB's page titled "About Us," which contains a link, "Locating Our Offices." You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or (TTY) **1-866-315-NLRB (6572)** for hearing impaired.

\*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).



# Employee Rights Notice Posting Requirement

- Posting requirement is controversial and may be subject to future legislative or court limitation.
- <http://nlrb.gov/poster>



## **NLRB and Social Media**

- Section 7 of the NLRA governs employer enforcement of employee communication policies in both union and non-union settings.



# NLRB and Social Media

- **Common provisions that draw scrutiny:**
  - Disparagement of the company, coworkers or clients
  - Discussion of internal procedures, personnel matters, and workplace issues
  - Discussion of wages and other terms and conditions of employment
  - Depiction of the employer, the workplace, or corporate logo, in a negative way



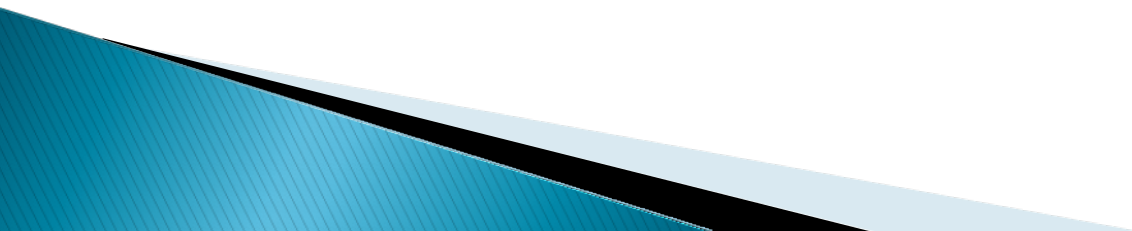
# NLRB and Social Media

- **NLRB General Counsel Report on Social Media Investigations**
  - Report addressed Employer conduct that is viewed as interfering with "protected concerted activity."



# NLRB and Social Media

- **NLRB General Counsel Report on Social Media Investigations**

- “Concerted activity” exists when an employee acts “with or on the authority of other employees, and not solely by and behalf of the employee himself.”
  - Except in limited circumstances, you can't discipline employees who discuss workplace responsibilities and performance together online.
  - You can't discipline any employee who seeks input online from a co-worker about a work dispute.
  - You can't prohibit employees from posting pictures of themselves online which depict the employer.
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# NLRB and Social Media

- Karl Knauz Motors, Inc., NLRB ALJ, No. 13-CA-46452, 9/28/11
- Hispanics United of Buffalo, 3-CA-27872, 5/9/11
- American Medical Response of Connecticut Inc., 34-CA-12576, 10/27/10

# Electronic Communications Privacy Act of 1986 [ECPA]

## Title I

- Illegal to intentionally intercept “wire, oral, or electronic communication”
- Includes telephone conversations and messages
- Does not include electronic storage of any such communication

## Title II

- Limits access to electronically stored information
  - Includes computer files
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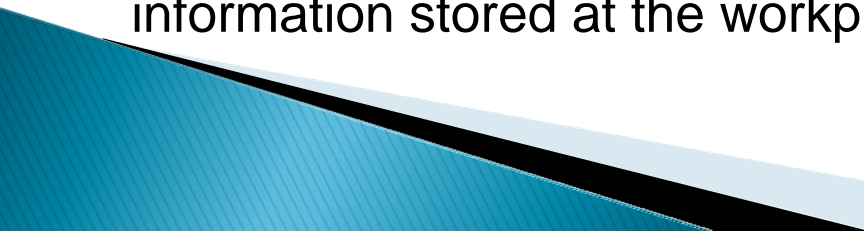
## **Both titles of the ECPA contain “consent” exceptions**

- Employee may voluntarily consent to allow monitoring

## **Both titles of the ECPA contain “provider” exceptions**

- Permits entity providing a wire or electronic communications service to intercept or access such information

## **These two exceptions have meant that the ECPA has not had much impact on privacy for employee computers**

- Include “consent” and “provider” language in electronic communications policy
  - Reserve right to intercept, monitor, or access e-mails
  - Note employer’s right to access computer files and other electronic information stored at the workplace
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# Public Sector - Fourth Amendment Right to Privacy

*Applies to public employees of governmental institutions*

- Only applies where employer's conduct violated a "reasonable expectation of privacy"
- Need clear employee policy that computers will be monitored

*These rules have little application to private employees*

- Nevertheless, any electronic communications policy should make it clear that the employee has no reasonable expectation of privacy as to information kept on its work-issued computer.

# Private Sector - Common Law Right to Privacy

Employer monitoring of personal e-mails or social media may give rise to a state common law action for the intentional tort of invasion of privacy.

South Dakota recognizes the intentional tort of “invasion of privacy”

- *Roth v. Farner-Bocken Co.*, 2003 S.D. 80, 667 N.W.2d 651.

**Must have clear statement in policy that employees do not have a reasonable expectation of privacy as to anything that occurs on their work equipment.**

In the employment context, employers are typically only found to have invaded their employees' privacy in the most extreme circumstances.

- *Shefts v. Petrakis, 758 F.Supp.2d 620 (C.D.Ill. 2010): personal e-mail account accessed on a company computer.*

If crafted properly, your employee manual and electronic communications policies can prevent roughly 90% of communications-related litigation.



These principles apply with even greater force to social media activity.

- “It strikes the Court as obvious that a claim to privacy is unavailable to someone who places information on an indisputably public medium such as the Internet, without taking any measure to protect the information.” *McLaren v. Microsoft Corp.*, 1999 WL 339015 (Tex.App. 1999).

Even so, some authorities are pushing for more protections for employees’ use of social media



# Social Media in Employee Screening

*A 2010 survey found that 70% of HR managers have rejected a job applicant based on information found on-line (social media, Google search, etc.).*

Title VII of the Civil Rights Act of 1964 lists several “protected factors”:

- Race
- Color
- National Origin
- Religion
- Gender

*Hiring decisions may not be made based on any of these criteria, but often a simple internet and/or social media search can reveal this information about a person.*

# **Genetic Information Nondiscrimination Act of 2008 [GINA]**

**Expressly prohibits an employer from acquiring genetic information (including family medical history) through internet and social media sites.**

Prohibited Searches:

- Searches of social media platforms with “limited access”
- Searches of websites focusing on genetic information and testing
- Searches intended to obtain genetic information (targeted search)

## **State-Specific Statutes**

There are several states that have enacted legislation governing these issues at a more local level. Contact counsel to ensure compliance with out-of-state laws applicable in areas of your operation.

# Recommendations for Applicant or Pre-Employment Internet Screening

1. Inform applicants that they may/will be “Googled”
2. Only conduct internet searches late in the hiring process
3. Give task to HR personnel - typically more familiar with applicable law
4. Ultimate decision-maker should (ideally) not be seeing the information obtained
5. Create practical list of limited questions to guide all such searches

*Note: Consistency and full disclosure are key.*



# Recommendations for Applicant or Pre-Employment Internet Screening

**DO NOT “friend” any applicant (or current employee) under false pretenses**

- Disguised or obscure identity assumed in order to gain access to a greater amount of information about the person.
- Courts have viewed such conduct as legitimate grounds for an “invasion of privacy” claim.

**DO consider treating pre-employment internet screenings as you would a background check under the Fair Credit Reporting Act:**

- Obtain permission from the applicant to conduct an internet search
- Give the applicant notice of any adverse decision and the basis for that decision
- Provide the applicant with an opportunity to dispute the findings and conclusions

# Crafting Your Social Media Policy

## Unionized Workplaces

- Social media policy is mandatory subject of bargaining
- Surveillance of unionized employees is also a mandatory subject of bargaining
- New requirements effective January 1, 2012 will require posting of social media policies in the workplace



# General Guidance - *Policy Within the Workplace*

- **Employees should be granted reasonable personal use of employer internet systems**

- Enforcement of a “no personal use” policy is difficult
- Smart phones and tablets PCs have made it almost impossible
- Lack of consistent enforcement is a source of major problems

- **Craft reasonable rules defining prohibited on-line activity**

- Excessive internet use
- Transmission of offensive or harassing material
- Visiting pornographic or obscene websites

- **Clearly list disciplinary consequences for violating the policy**

- Consistent enforcement
- Make clear that discipline could be levied for inappropriate use of company systems and/or electronic communications

# General Guidance – *Employer Monitoring*

- **Full disclosure of monitoring practices**

- Policy should eliminate any “reasonable expectation of privacy”
- Employer will monitor any and all workplace systems
- Expectations as to confidentiality and trade secrets

- **Any use of company systems will be subject to monitoring**

- Use of company property for personal communications is included
- E-mails sent from personal accounts via company property are subject
- Social media activity on company property will be included

- **Policies to govern those who monitor**

- A policy should be in place to govern administrative and HR staff
- Applicants and employees should be notified of the possibility
- Screening may not occur as to a “protected class” or “genetic information”
- Consider “no coercion” rules (e.g. managers seeking to “friend” staff)

# General Guidance

## - Discussion of Workplace Activity

### **NLRA controls employees' "concerted, protected activity"**

- Your social media policy cannot interfere with discussions of workplace issues among employees
- NLRA language and enforcement practices change regularly
- Use of company systems for these discussions is likely protected
- Social media is still uncertain

**Any social media policy that restricts employee communications online should expressly recognize employee rights to discuss workplace issues and concerns, consistent with Section 7 of the NLRA.**

- Employees are still not permitted to "egregiously or recklessly" disparage the employer, its products, or its services.

# **General Guidance – *Electronic Communications***

- **Prevent overlap in employee policies**

- Computer/internet/e-mail usage
- Cell phone
- Safety - distracted driving
- Privacy/confidentiality/trade secrets
- Harassment/retaliation

- **Harassment in electronic communications**

- Employee code of conduct
- Anti-harassment policy applicable to social media
- No harassment sent using company property

- **Use of company property and systems outside of work**

- Same general policies apply (i.e. monitoring of activity)
- There is no “reasonable expectation of privacy” on company systems



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# Questions?

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