

# Social Media and Employment Law: A New Paradigm for Employers

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The explosion in use of social media, both in and out of the workplace, has created exciting new opportunities and dangerous challenges for employers.

Many companies have embraced the use of new social media such as Facebook, LinkedIn, Twitter, and blogs to (1) host their own company sites; (2) encourage employees to actively promote their company, enhance business relationships, and foster the exchange of useful but non-confidential business information; (3) recruit, research and check references for potential new hires; and (4) investigate and terminate employees or to gain evidence to support a company's claims or defenses in trade secret and other employment-related cases.

Other companies view the ever-increasing level of use of social media as more of a liability than a business opportunity. For the past decade, employers have struggled to balance the benefits of employee use of e-mail, Internet "surfing," instant messaging, and texting with the costs of employee downtime and risks to the company. The exponential growth of new forms of social media is viewed by some as distractions to employees, increasing legal and business risks to the company.

## Legal and Business Dangers to Employers

Social media provides many ways to connect with friends and family, promote oneself personally and professionally, and have fun. However, employee use of social media also creates new potential legal liabilities and serious business issues for employers, such as employees' defamation of co-workers or others; trade libel of employers or competitors; postings that embarrass or harm the employee, co-workers, or employers; improper disclosure of trade secrets or confidential/proprietary business information; and harassing or discriminatory communications.

Furthermore, a Federal Trade Commission guideline effective December 2009 creates liability for companies whose employees, with or without the company's knowledge, publicly endorse or give testimonials about their employer's services/products on social media sites without disclosing that they work for the company which they are "advertising." Employers may similarly be liable under the federal Lanham Act for employees' "false advertising" on such sites.

Employers can also face significant liabilities under state or federal employment law by improperly using information discovered on social media sites to terminate





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employees or decline to hire them. For example, if an employer learns through Facebook that an employee or applicant has a disability or other protected characteristic such as sexual orientation, ethnicity, or religious affiliation, it may face liability for discrimination if it fires or declines to hire the individual soon afterward. Employers may also face liability for taking adverse action against employees, without a legitimate business reason, based on information about the employee's legal off-duty conduct made public through social media. California Labor Code Section 96(k) bars employers from terminating or disciplining employees for lawful off-duty conduct.

The challenges for employers and employees presented by social media use are compounded by the blurring of the line between business and personal communications. Employees may unintentionally or carelessly publicize information that should have been saved for a smaller audience. Social network postings can create a permanent record that may haunt individuals in job searches for years to come or cause business or legal problems for themselves or their employers. Even when certain privacy settings are used, there remains some risk of the information becoming public.

### Recommended Actions for Employers

With the increasing pervasiveness of social media, we recommend that companies consider carefully the business, legal and HR issues raised and take steps to maximize business opportunities while minimizing potential risks.

As an important first step, employers should develop a social media policy, coordinating it with any existing policies on e-mail, Internet and electronic media usage,

and codes of business conduct. The policies should include language reserving the company's right to monitor employee use while at work or using company electronic devices, and while off-duty using the employee's personal electronic devices where the employer's business interests are implicated. This is especially important in California, where employees have a right of privacy under the California Constitution, and employers' monitoring policies need to be published to employees to minimize their employees' expectation of privacy. Federal laws, such as the Computer Fraud and Abuse Act, Stored Communications Act, and Electronic Communications Privacy Act, create additional employee privacy rights.

The focus of an employer's social media policy will vary according to the company's business needs and culture.

Examples of issues, include:

- Requiring disclosure/approval of company-related content under certain circumstances.
- "Friending" of bosses, managers, subordinates and clients, whether of the same sex or opposite sex.
- Determining how much personal use of social media during work time, if any, is acceptable.
- Specifying uses of social media that violate company policy because they may create business problems or legal liability for the company.
- Emphasizing the use of common sense and good judgment as to what employees post or write when using social media, given that seemingly personal postings can have serious business implications.