



ETHICS: PRESSING ISSUES IN TURBULENT TIMES

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PART 1: AVOIDING THE LEGAL PITFALLS OF SOCIAL MEDIA IN THE WORKPLACE

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What is Social Media

- Facebook

- ▶ 890 million daily active users on average in December 2014, an increase of 18% year-over-year
- ▶ 1.39 billion monthly active users as of December 31, 2014, an increase of 13% year-over-year

The Facebook logo, consisting of the word "facebook" in white lowercase letters on a dark blue rectangular background.The Flickr logo, featuring the word "flickr" in a lowercase, sans-serif font with "flick" in blue and "r" in pink.The YouTube logo, with the word "You" in black and "Tube" in white inside a red rounded rectangle.The LinkedIn logo, with the word "Linked" in black and "in" in white inside a blue square.The Twitter logo, featuring the word "twitter" in a lowercase, rounded, light blue font.

Something for Everyone: Risks of Unregulated Social Media Activity

Information Technology

Management/Operations

Communications/Public Relations

Employee Relations

Legal/General Counsel

Risks of Unregulated Social Media Activity

Information Technology:

- ▶ Stress on finite system and network resources
- ▶ Exposure to viruses and malware

Management/Operations:

- ▶ Lost productivity
- ▶ Abuse of time off/leave
- ▶ Compensable time questions
- ▶ Employee morale issues – favoritism, improper inquiries

Risks of Unregulated Social Media Activity

- **Communications/Public Relations:**
 - ▶ Public complaints about company or workplace
 - ▶ Potentially false information
 - ▶ Client and customer relations issues
- **Employee Relations:**
 - ▶ Morale issues
 - ▶ Circumvention of neutral reference policies
 - ▶ Discrimination, harassment, retaliation

Risks of Unregulated Social Media Activity

- Legal/General Counsel:
 - ▶ Document retention and electronic discovery issues
 - ▶ Exposure of confidential information/trade secrets/Protected Health Information
 - ▶ Vicarious liability for discrimination, retaliation, defamation, invasion of privacy, trademark & copyright infringement, obscene material, and otherwise illegal content

Use of Social Media to Attract and Screen Potential Employees

- Benefits

- ▶ Cost-Effective Means for Reaching Potential Candidates
- ▶ Fill Vacancies Faster
- ▶ Reach “Passive” Candidates
- ▶ Candidates Can Showcase Qualifications and Interest in Job Field

Use of Social Media to Attract and Screen Potential Employees

What Happens In Vegas Stays On:



Pre-Employment Screening - Benefits

- ▶ Important decision to hire someone, an investment
- ▶ Invaluable information about candidate that you might not get anywhere else
- ▶ Far easier to avoid a bad hire than to get rid of one
- ▶ Avoid negligent hiring claim and other potential liability

Pre-Employment Screening – Potential Risks

- ▶ May obtain information impermissible to consider (e.g., protected class status)
- ▶ May “taint” an otherwise well-based hiring decision
- ▶ Make decision on incorrect information
- ▶ Evidence of search may be revealed in subsequent litigation
- ▶ Bad publicity for company

Facebook At A Glance



- ▶ Basic Information (“About Me”)
- ▶ Status Updates
- ▶ Facebook “wall” containing comments by others
- ▶ Tabs for profile information, photos, videos, links, interests
- ▶ Links to other “Friends”

But You May Not Always Want What You Get

- ▶ Birth Date / Age
- ▶ Race / National Origin
- ▶ Religion
- ▶ Disabilities
- ▶ Sexual Orientation
- ▶ Political Affiliation
- ▶ Family and Relationship
- ▶ Smoking/Tobacco Use

You Can't "Unring" The Bell

The image shows a screenshot of Barack Obama's Facebook profile page. The page is titled "Barack Obama" and includes a profile picture of him. Below the picture is a "Suggest to Friends" button. The main content area is divided into sections: "Basic Info", "Current Office", and "Detailed Info". The "Basic Info" section includes "Race" (highlighted in yellow) and "Political Affiliation". The "Current Office" section includes "Office" (highlighted in yellow) and "President of the United States". The "Detailed Info" section includes "Website" (with links to www.barackobama.com and www.whitehouse.gov), "Relationship Status" (highlighted in yellow, "Married to Michelle Obama"), "Age" (highlighted in yellow, "34"), "Religion" (highlighted in yellow, "Christian"), "Marital Status / Sexual Orientation", "Familial Status / Responsibilities", "Birthday" (highlighted in yellow, "August 4, 1961"), "Religious Views" (highlighted in yellow, "Christian"), "Interests" (highlighted in yellow, "Basketball, writing, spending time w/ kids"), "Favorite Music" (Miles Davis, John Coltrane, Bob Dylan, Stevie Wonder, Johann Sebastian Bach (cello suites), and The Fugees), "Favorite Movies" (Casablanca, Godfather I & II, Lawrence of Arabia and One Flew Over the Cuckoo's Nest), and "Favorite Books" (Song of Solomon (Toni Morrison), Moby Dick).

facebook

Search

Barack Obama The Small Business Jobs Act will do two big things: It's go available for small business. It's a great victory for America's entrepreneurs. I v so hard to get the this passed. 3 hours ago

Wall Info OFA Store Photos Join OFA Video

Race

Basic Info

Current Office

Office: President of the United States

Detailed Info

Website: <http://www.barackobama.com>
<http://www.whitehouse.gov/>

Relationship Status: Married to Michelle Obama

Age

Religion

Marital Status / Sexual Orientation

Familial Status / Responsibilities

Birthday: August 4, 1961

Religious Views: Christian

Interests: Basketball, writing, spending time w/ kids

Favorite Music: Miles Davis, John Coltrane, Bob Dylan, Stevie Wonder, Johann Sebastian Bach (cello suites), and The Fugees

Favorite Movies: Casablanca, Godfather I & II, Lawrence of Arabia and One Flew Over the Cuckoo's Nest

Favorite Books: Song of Solomon (Toni Morrison), Moby Dick

This page is run by Organizing for America, the grassroots organization for President Obama's agenda for change. To visit the White House Facebook page, go to WhiteHouse.gov. OFA is a special project of the Democratic National Committee.

Information

Tweeted Out of a Job Offer

- Recent Job Applicant Posts News of Job Offer on His Twitter Account (@theconner)
 - “Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.”
- Tweet catches attention of Cisco’s “channel partner advocate,” to which he responds:
 - “Who is the hiring manager. I’m sure they would love to know that you will hate the work. We here at Cisco are well versed in the web.”
- @theconner quickly takes Twitter account private but Twitter search and Google “cache” retained the “tweet” and job offer rescinded.

<http://www.msnbc.msn.com/id/29796962/>

Current Employees – Overview

- Current Employees & Social Media
 - ▶ Positive Aspects of Social Media and Current Employees
 - ▶ Risks Associated With Social Media and Current Employees
 - ▶ Addressing the Risks: Regulating and Monitoring Employee Use of Social Media

Current Employees - Positives

- Social Media As A Positive In The Workplace:
 - ▶ Building Bonds
 - ▶ Another avenue for fruitful discourse
 - ▶ Developing Business

Current Employees – Risks Driven to Distraction?

One Study Concluded:

- ▶ Employers are losing 1.5 workers per 100 in employee productivity to social networking
- ▶ Nearly two-thirds of those who have Internet access visit social networking sites during working hours
- ▶ Of those who visit social networking sites at work, 87% could not define a clear business reason for it
- ▶ Of those who visit social networking sites at work, 6% never use it anywhere else, meaning one in every 33 workers do all of their social networking during work hours

Current Employees - Risks

- Negative co-employee or supervisor/employee interactions
 - ▶ Actual or potential harassment issues
 - ▶ Discrimination
 - ▶ Defamation
- Disclosure of confidential information.
- Misrepresentations made by an employee about a competitor
- Embarrassing the Company: Misusing Its Logos/Branding

Former Employees – Potential Risks

- Employee Recommendations And References

- ▶ Recommendations on LinkedIn or similar sites
- ▶ Limit recommendation and reference requests to the basics, such as start and stop date and job titles
- ▶ Consider routing these requests to a central source
- ▶ Policy regarding not providing references



PART 2:

Trade Secret Protection: Hiring Competitors' Employees and Protecting the Company When Competitors Hire Yours

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Worst Practices

- Interview

- The Interviewer
 - Fails to steer the interview away from customer specifics and potential trade secrets
 - Accepts bad mouthing of current employer
 - Encourages the applicant to start in a mere 4 days
 - Tells the applicant to “give a shout out to his customers”
 - Does not press the applicant for copies of his previous agreements
 - Encourages the applicant to solicit fellow employees
 - Effectively provides offer before vetting agreements



Worst Practices – Interview

- The Applicant
 - Offers to announce his move to customers and co-workers before leaving his old job
 - Shares specific confidential information about customers
 - Bad mouths current employer
 - Plans to leave his old job with little to no notice
 - Announces that he will bring his old employer's materials along with him in order to “hit the ground running”
 - Hopes to bring “his team” with him to his new job



Worst Practices –Employee’s Last Day

- Employee’s Actions on Last Day
 - Takes company hard copy documents
 - Emails electronic documents to personal account
 - Takes company data on thumb drives
 - Maintains company information in cloud storage
 - Deletes files from company computer
 - Provides little to no notice

Worst Practices

- Resignation/Exit

- The Applicant's former employer
 - Failed to create “culture of confidentiality”
 - Fails to conduct an exit interview
 - Allows employee to clean out office without HR present and take material without reviewing content
 - Authorizes wiping of employee's computer which will destroy evidence that the employee forwarded files and customer contacts to his personal e-mail account
 - Generally appears unconcerned about the abrupt and unexpected departure of an employee who had access to confidential and trade secret information





Best Practices

- Interviewing a Competitor's Employees

- Discuss general skills and talents, not former employer's customers or trade secrets
- Control interview and put employee at ease
- Make clear that the employee should not, under any circumstances, use or bring any of his former employer's information or solicit any former co-workers
- Focus on making the transition as smooth as possible for the former employer
- Consider reaching out to the employee's employer.
- Check if the employee has any ***existing agreements*** with former employers before making an offer



Best Practices

- Assessing Restrictive Covenants

- Are the restrictive covenants enforceable?
- Even if enforceable, can the employee be placed in a position in which he/she will not violate the covenants?
- If so, does the employee still have value to the company?
- Does this particular competitor regularly enforce its restrictive covenants?
- If the employee is worth the effort, consider a declaratory relief action.
- Even if the covenant is subject to challenge, always remember to ensure that the employee returns its former employer's property and does not misuse trade secrets
- Be prepared to communicate with former employer about the employee's job responsibilities



Best Practices

- Hiring A Competitor's Employees

- Create a ***culture*** where employees understand confidentiality and what information that the company considers confidential
- Conduct new hire training on the importance of protecting company trade secrets and confidential information
- Emphasize the importance of non-disclosure and trade secret protection agreements
- Put in place continuing training
- For sensitive hires, routinely follow-up with employee to ensure that he/she is honoring restrictive covenants



Best Practices

- Key Agreements For New Employees

1. Non-disclosure and trade secret protection agreements
2. Non-solicitation of employee agreements
3. Agreements relating to former employer's trade secrets
4. Computer use and access agreements
5. Social media ownership and policies
6. Invention assignment agreements



Best Practices

- Exit Interviews

- Prepare for the interview, identify the trade secret and confidential information the employee accessed/used, consider having in-house counsel or HR and employee's manager present
- Question the departing employee in detail
- Ask employee why he is leaving
- Ask employee what his new position will be
- Check employee's computer activities and work activities in advance of the meeting
- Ensure that all Company property, hardware, and devices have been returned, including e-mail and cloud data, and social media accounts; consider using an inventory list
- Ensure that arrangements are made to have all company data removed from any personal devices



Best Practices

- Exit Interviews

- Disable access to company computer networks
- Make sure you obtain user names and passwords for all company social media accounts
- Inform the employee of his continuing obligations under agreements with the Company
- Consider letter to new employer and employee with reminder of continuing obligations
- Consider having departing employee's emails preserved and electronic devices forensically imaged
- Consider using an exit interview certification