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**Legal Issues with Social Media –
What Every HR Professional
Should Know**

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Let's Be Real

- Social media not going away
- Applicants & employees probably not going to change their attitudes and work habits
- Real focus should be on what we can legally do to control both without breaking the law or getting sued.

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Hired or Not Hired?

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The "Cisco Fatty"

- Connor, a Cisco applicant, posted the following "tweet" on Twitter:
 - 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.
- A Cisco employee tweeted back:
 - Who is the hiring manager. I'm sure they would love to know that you will hate the work. We here at Cisco are versed in the web.

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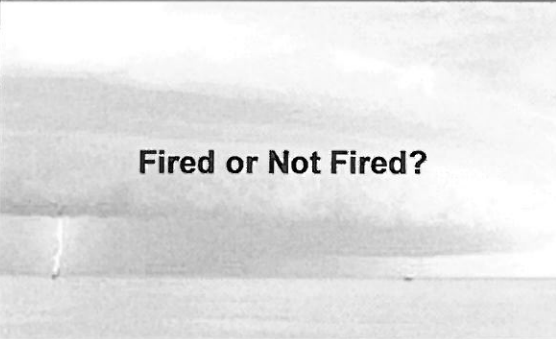
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Hired or Not Hired

- Recent quote in national magazine
 - We scan all applicants pre-hire and it has helped our selection process
- Recent RN candidate had on her Facebook that she practiced witchcraft. We did not hire as this would not sit well with our conservative area.

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Fired or Not Fired?

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**"The Drunken Pirate"
Student Teacher Posting on Myspace**



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Would You Like Fries with That?



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You Pick the Caption!



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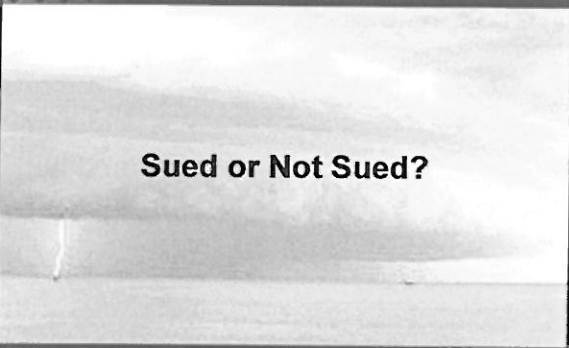
Congress Agreed on One Thing This Year



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Sued or Not Sued?



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Trouble in Paradise

- Hawaiian Airlines pilot maintained secure website where he posted bulletins critical of Hawaiian Airlines.
- Hawaiian's VP found out about website (concerned about potentially untruthful allegations on site) – used another pilot's username and password to access site under false pretenses.

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Creative Professor

- Professor applied to manage student planetarium.
- Astronomy department consulted with other disciplines (biology)
- Biologists took issue with information published in blogs and on-line discussing Christian beliefs and Creative Design
- Professor not hired
- \$125,000 settlement

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Let's Talk About the Good

- Internet Productivity Benefits (Recruiting)
 - Jobvite Social Networking Survey
 - LinkedIn – 78.3%
 - Facebook – 54.6%
 - Twitter – 44.8%
 - Blog – 18.7%
 - Youtube – 13.7%
 - MySpace – 5.4
 - No Social Media – 14.4%

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Let's Talk About the Good

- Employee efficiency
- Research
- Advertising (youtube)
- Company Blogging

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Let's Talk About the Good

- **Litigation**
 - Always check Plaintiff's and Witnesses out on Web at beginning of case
 - Cross-check employee's friends against list of employees/managers
 - Obtain permission to review private information through discovery process (EEOC v. Simply Storage Management)
 - Juror/Witness analysis during jury selection

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Let's Talk About the Bad

- Piracy/Theft/Copyright Infringement
- Theft of Time
- Harassment/Discrimination
- Litigation Discovery
- Negative Blogging
- Union Organizing
- Unauthorized content/representations attributed to or damaging to the employer

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Let's Talk About the Ugly



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Actually – I meant Lawyers in General


- Law not caught up with electronic world (reactive not proactive)
- Old statutes being stretched to fit (privacy, discrimination, NLRA, State "legal activity" statutes)
- Future truly still unknown
- So what are the limitations???

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The Law – Public Employers

- Public Comments (First Amendment)
 - To be protected speech it must involve "a matter of public concern." Essentially, must be speaking as a concerned citizen, not just an employee.
 - *Garcetti v. Ceballos*, 547 U.S. 410 (2006) no First Amendment protection from discipline based on statements made pursuant to official duties.



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The Law – Public Employers

City of Ontario v. Quon Ontario provided pagers to police officers. City acquired transcripts and discovered Quon had used the pager for personal purposes and that some messages were sexually explicit. Quon sued claiming an unlawful search in violation of the 4th amendment. The Supreme Court held that the search of Quon's text messages was reasonable and did not violate the 4th amendment. The search was motivated by a legitimate work-related purpose, and it was not excessive in scope. (The Court assumed - without deciding - that Quon had a reasonable expectation of privacy.)

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Snyder v. Millersville University (E.D. Pa. 2008) "The Drunken Pirate"



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Back to the Drunken Pirate: Snyder

- Plaintiff employee was student-teacher through public college and was placed at local high school.
- Posted picture of herself on her Myspace page with caption that read "drunken pirate" – also indicated that students had accessed the page.
- She was not awarded teaching certificate and Court ruled that there was no First Amendment violation.

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The Law

- **Electronic Communications Privacy Act of 1986**
 - Prohibits
 - Unauthorized and intentional interception of wire, oral or electronic communication while being transmitted
 - Unauthorized and intentional access and disclosure of electronically stored communication

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The Law

- **Electronic Communications Privacy Act of 1986**
 - **Exceptions**
 - Business extension
 - Service Provider
 - Consent

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The Law

- **Stored Communications Act**
 - **Prohibits**
 - Accessing electronic communication while in storage without authorization
 - *Pietoyla v. Hillstone Restaurant Group (D.N.J. 2008)* No reasonable expectation of privacy on Myspace but employer violated SCA by getting password and accessed through another employee's account.

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The Law

- **Title VII/Discrimination Statutes**
 - Must control employee activity at work and supervisor activity at all times related to use of our systems and information they may discover on Internet
 - Must control use of information obtained on the Internet (careful what you know about an applicant/employee)
 - Litigation holds and mining for gold - almost all employment lawsuits begin with request for electronic information
 - If is is on your system they will find it.

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The Law

- State statutes prohibiting employment action based on legal activities away from work.
- Missouri law prohibits employers from taking action based on lawful use of alcohol or tobacco products (others are more broad)
- What if employee places picture of himself on Facebook smoking prescribed marijuana while on vacation in California?

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The Law

- The Genetic Information Non-Discrimination Act of 2008 ("GINA")
 - Inadvertent acquisition of genetic information, i.e., family medical history, through online searches is ok if inadvertent
 - But beware of intent and use of information

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The Law: NLRA Blast from the Past

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *concerted activities* for the purpose of collective bargaining or other mutual aid or protection..."

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NLRA - Blast from the Past

- Applies to nearly all private sector employers
- Protects “concerted activity” not “free speech” – most misunderstood fact from NLRB actions.

What is protected concerted activity?

- Actions must be concerted in nature and pursued either for union related purposes aimed at collective bargaining OR for other mutual aid and protection.
- Individual action can be sufficient if spoken on behalf or as representative for the group.

Facebook Case: Souza v. AMR

Policy Prohibited: “Making disparaging, discriminatory or defamatory comments when discussing AMR or the employee’s superiors, co-workers and/or competitors”; rude or discourteous behavior to a client or coworker; and the use of language or action that is inappropriate in the workplace whether racial, sexual or of a general offensive nature.

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What was said?

- **The FB exchange on employee's home computer while off duty:**
 - DS: looks [sic] like I'm getting some time off. Love how the company allows a 17 to be a supervisor!
 - Commenter: What happened?
 - Commenter: What now?
 - DS: Frank being a [expletive deleted].
 - Commenter: I'm so glad I left there!
 - Commenter: Ohhh, he's back, huh?
 - DS: yep has a [expletive deleted] as usual [sic]
 - Commenter: I am sorry, hon! Chin up!

Note: A "17" is the employer's code for a psychiatric patient.

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What did the NLRB Say?

- **Facebook modern equivalent of water cooler**
- **Communication protected regardless of forum as long protected concerted in nature and not opprobrious or grossly disloyal, reckless or maliciously untrue.**
- **Social Media policy that prohibited employees from making disparaging remarks about company or company supervisors and from depicting the company in any way on the Internet without permission were overly broad and violated the NLRA**

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Twitter Twerps

- **Employee tweeted that company was not being fair during union negotiations and said some colorful words.**
- **Company disciplined**
- **NLRB says Twitter policy and discipline overbroad.**

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Twitter Twerp Part Two

- Employee tweets very offensive language and comments in violation of Twitter policy
- Board say Policy is overbroad but underlying action so offensive employer can act anyway.

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What does this mean?

- This is the first real legal limit on taking action against a private-sector employee based on social media comments while off duty and using own device (i.e. issue is what was said not when (work-time) or on who's equipment.
- This case does not nor does any existing law provide a blanket free speech protection but it can protect many work-related conversations unless they meet the exception
- However, you must re-write your social networking and blogging policies and you must not terminate for protected concerted activities unless exception applies.

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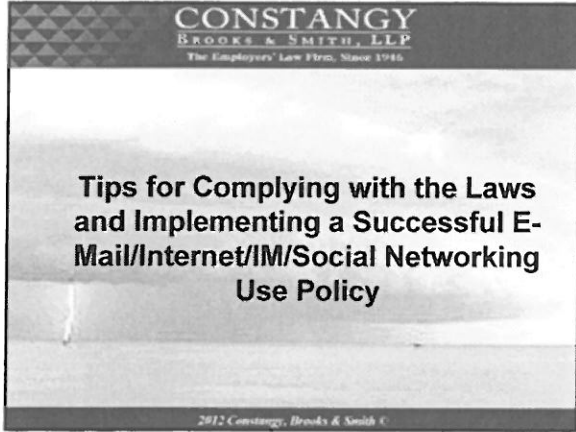
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What does this mean?

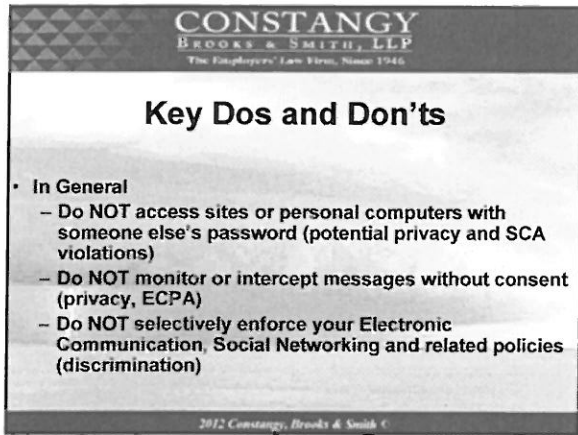
There is still no reason an employer has to tolerate blogging or social networking that violates confidentiality, reveals trade secrets or other confidential information, or that is grossly disloyal to the Company.

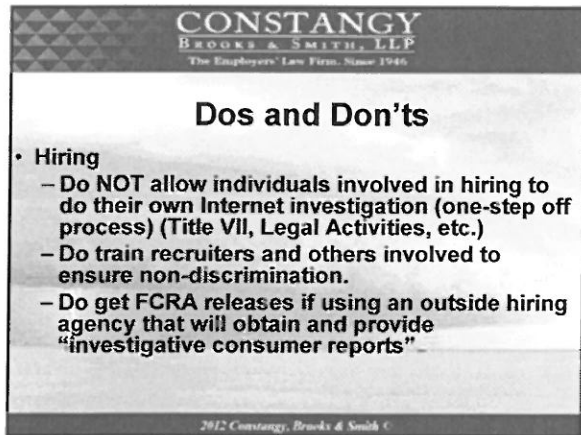
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Remove workplace
from Harassment
Policy. Cover harassment
in general



Supervisor training on
recruiting,





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Dos and Don'ts

- **Employees**
 - Do NOT allow discrimination based on protected characteristics or activity
 - Do NOT say things you don't want to be part of the litigation record ("could cost us millions")
 - Do NOT friend employees and advise supervisors to do the same or at least think about this issue in advance!!!!

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Dos and Don'ts

- **Employees**
 - DO draft a comprehensive and legal electronic communications and social networking policy that:
 - advises employees you own equipment and will monitor so no privacy
 - prohibits harassment/discrimination
 - prohibits piracy
 - prohibits release of confidential or trade secrets
 - prohibits non-business related activities during working time
 - prohibits solicitation
 - prohibits individual passwords
 - prohibits inappropriate social activity (must meet NLRA standard)
 - requires a signed acknowledgment
 - DO coordinate policy with related policies (ethics, HIPAA, Harassment/Discrimination)

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Dos and Don'ts

- **Employees**
 - DO monitor Internet and computer usage (public employers issue)
 - Do enforce your policy and rules consistently
 - DO add training on electronic policy to your harassment and other annual training (avoid lawsuits)

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Questions???

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