



# SOCIAL MEDIA

*Employers' Liability for the Activities of their Employees*

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## *Employers' Liability for the Activities of their Employees*

Social media has evolved into an integral part of modern society. Social networking websites exist for just about every interest, allowing hundreds of millions of people worldwide to incorporate it as a way of communication and expression on a daily basis. Some social network

sites now have user bases larger than the populations of most countries. The number of users on the largest and most recognizable social media websites like Facebook, Twitter and LinkedIn continue to grow at a rapid pace, and terminology such as “status update,” “tweet”, and “friend” have taken on whole new meanings.

The social media explosion of the past decade may seem like it came out of nowhere but it has actually existed in our culture in some capacity for over 30

years. It evolved from the Bulletin Board Systems (BBSs) of the late 1970s to the Commercial Online Services of the early 1990s, to what we recognize it as today. The phenomenon has more recently migrated to the corporate world and has created much excitement and opportunity while at the same time exposing businesses to a new set of risks and potential legal issues.

Social media is defined as forms of electronic communication through which users create online communities to share information, ideas, personal messages and other content such as videos. The different types of social media applications include internet forums, weblogs, social blogs, microblogging, wikis, podcasts, photographs or pictures, videos, rating and social bookmarking. Businesses worldwide have incorporated social media strategies as a way to screen prospective employees, monitor current employees, improve client relationships, reach targeted audiences, increase sales and enhance brand awareness.

*Some social network sites now have user bases larger than the populations of most countries.*



As discussed in the first part of this three part series, “Social Media: A Business Gold Mine or Liability Landmine?”, organizations that implement social media strategies face a variety of liabilities for their online activities ranging from copyright infringement to invasion of privacy to consumer fraud law violations. However, the benefits of corporate use of social media often outweigh its risks. This is especially true when an organization implements risk management strategies to help minimize its exposure. Often the more difficult challenge a company faces is the adverse effects caused by the unsupervised activities of its employees while using social media. While it can be an effective business tool, social media also is an easy way for employees to communicate sensitive or inappropriate information outside the organization, enhancing the potential for legal implications. Organizations are now finding that they are exposed to an array of risks due to the use of social media by their employees.

*For example, the first believable report of Osama Bin Laden's death, according to many sources, was a Twitter “tweet.”*

## Employee Related Liability Exposures

Social media has been revolutionary in the way in which people communicate. For many it has become a primary source of news and information. It is increasingly credited with breaking major news stories before traditional media outlets. For example, the first believable report of Osama Bin Laden's death, according to many sources, was a Twitter “tweet.” It also increasingly is a tool for businesses to connect with clients and potential clients, nonprofits to spread their mission and acquire new donors, celebrities and athletes to speak with their fans and for the public sector connect with constituents.

Because social media has become ingrained as a part of everyday life, many employees use it in the workplace for both business and personal reasons, whether or not permitted by their employers. Employees also may take workplace issues home, where they find their way into social media activities outside the office. The phenomenon has blurred the traditional lines of employee and employer relationships and created never before contemplated issues.

Many employers feel that they have just recently learned how to effectively manage employee use of the internet and email and are only now beginning to grapple with how best to manage the use of social media. Since social media in the workplace is still a relatively new develop-

ment, the exposures that companies face from employee use are still being identified. Some of the more common exposures include:

- Harassment
- Defamation
- Violation of trademark, copyright or patent laws
- Failure to control references
- Revealing client information or proprietary information
- Endorsements and testimonials in advertising
- Damage to reputation

*In this case the court found in favor of Agilent Technology, citing the Communications Decency Act of 1996, which shields providers of interactive computer services from liability for the actions of the individuals using those services.*

**Harassment.** Employers are scrambling to implement effective social media policies to prevent employees from making harassing comments directed towards co-workers, business partners and customers. Harassment by way of social media exists in many of the same ways that it traditionally has been practiced, except it occurs through different channels. The relative anonymity of the Internet and the lack of face-to-face interaction, however, may make harassment in its various forms more common in the online world. Whether sexual harassment, cyber stalking or cyber-bullying, many employers are trying to understand their potential liabilities and how to protect themselves. The answers to some of these questions are only now being decided in the courts, but as in the brick and mortar world, if an employer is found to have turned a blind eye to harassment, they may find they have some degree of liability.

A case heard in California intermediate appellate court, *Delfino v. Agilent Technologies*, is a good example of harassment in an online environment. A series of anonymous messages were sent over the Internet via email and message boards that constituted threats against Michelangelo Delfino and an associate, Mary Day. As a result, Mr. Delfino brought suit against both the individual making the threats as well as the individual's employer, Agilent Technologies. He claimed that the threats were sent over Agilent's computer system and that Agilent was aware this was occurring and did not take action to prevent it. His claim was for intentional infliction of emotional distress.

In this case the court found in favor of Agilent Technology, citing the Communications Decency Act of 1996, which shields providers of interactive computer services from liability for the actions of the individuals using those services. A few similar state cases also have been decided in favor of employers, typically concluding that an employer should not be held li-

*Social media sites provide a platform for employees to communicate their discontent and vent their frustration.*

able simply for providing access to the Internet, especially if the egregious behavior of the employee could not have been reasonably foreseen. This area of the law, however, is still evolving and slightly different circumstances may have resulted in different outcomes. Additionally, companies can incur significant costs defending these suits, and can be exposed to reputational damage.

Cyber-bullying is a hot button issue receiving increased attention from the government and media, and is typically referred to in situations involving young people. Cyber-bullying is “the use of the internet and related technologies to harm other people, in a deliberate, repeated, and hostile manner.” Schools are especially vulnerable to lawsuits arising from charges of cyber-bullying among students, but other types of organizations can find themselves entangled in employment related claims as a result of this type of activity.

**Defamation.** Social media sites provide a platform for employees to communicate their discontent and vent their frustration. This can lead to false statements that can damage the reputation of co-workers, former employees and third parties. The employee posting the comments may be directly liable, but employers can be found vicariously liable for providing a forum for publishing the comments, or may be accused of negligent supervision for failing to prevent the defamatory statements from occurring.

In one example, *Blakey v. Continental Airlines, Inc.*, Tammy Blakey was Continental's first female pilot to fly an Airbus A300 aircraft. During the course of her employment she claimed she was sexually harassed and that fellow pilots posted harassing messages about her that were both false and defamatory. The messages were posted on an on-line computer bulletin board that was utilized by Continental pilots. The New Jersey Supreme Court found in favor of Ms. Blakey in deciding that the airline was liable for defamation based on comments posted by its pilots on the online bulletin board system.

**Violation of Trademark, Copyright or Patent laws.** One attraction of social media websites is the ability to post comments, share photographs, videos and other content. Organizations that incorporate elements of social media in their own websites in the form of blogs or message should understand that they may be held responsible for unlicensed material posted on the site. Social media policies and training should be implemented, and procedures should be in place for identifying and removing infringing material.

Many companies utilize established social media outlets like Facebook to relay messages or share their work. Because communication through social media tends to be more interactive and informal than communications through more traditional channels, companies that use

Facebook and other form of social media may find they have less control over what information is being disseminated, including protected materials. The fact that companies often have little control over infringing material being posted to their social media pages makes it all the more imperative that they take steps to assure that their pages remain free of unlicensed material. Monitoring and quick response is the most effective way to protect against accusations of intellectual property infringement.

Most of the popular social media sites have well established processes and procedures for removing protected material. For example, on Facebook users can report copyright infringement by completing an automated DMCA (Digital Millennium Copyright Act) form and YouTube will remove infringing material upon notification from the copyright or trademark owner. Companies, however, should not wait for social media site owners to respond to complaints – they should police their own pages.

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**Failure to Control References.** Providing an employment recommendation to a former colleague may seem like a harmless gesture of good will, but that act of kindness can expose an organization to potential liability. An organization can find itself being accused of defamation or wrongful termination based on the reference provided by one of its employees. For this reason many employers have implemented a policy that prohibits employees from providing references. However, social media websites such as LinkedIn (a business focused social networking site where individuals make connections with business contacts) have created a new means by which an employee can make a recommendation that is easy but often against company policy and without employer control over the content of the reference. The website provides the ability to recommend other professionals and comment on their skills and expertise.

The potential for a company to be involved in a lawsuit alleging defamation from a negative reference is fairly clear; however positive recommendations are not without risk as well. For example, if an employer terminated an employee for poor performance and was currently being sued by that employee for discrimination or wrongful termination a positive recommendation by a supervisor or manager could hinder its defense that the termination was in fact for poor performance.

**Revealing Client Information or Proprietary Information.** Through the use of social media, employees may accidentally or deliberately reveal confidential information. Confidential information includes intellectual property, trade secrets, corporate secrets, medical and financial information, privileged communications, social security numbers, driver's license num-



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bers, customer addresses and credit or debit card numbers. In the event that an employee released classified information, for example through a “tweet” on Twitter or a “post” on Facebook, the organization can find itself in violation of certain federal and state regulations such as HIPAA (the Health Information Portability and Accountability Act), Sarbanes-Oxley Act or the Right to Financial Privacy Act to name a few. The organization can also find itself exposed – not legally, but economically – if an employee reveals its trade secrets or other proprietary information.

**Endorsements and Testimonials in Advertising.** Most respected organizations go to great lengths not to use false or misleading statements while advertising their products or services. Governments have imposed strict regulations on false or deceptive advertising to protect consumers from entering into a transaction that they would have otherwise stayed away from. As of December 1, 2009 the FTC (Federal Trade Commission) has revised its guides to include social media postings by company employees. It states that a company can be held liable for social media postings by its employees that include endorsements or testimonials about its products or services without disclosing their relationship with the employer.

A scenario by which this can occur is not very difficult to imagine. For example, an over exuberant employee of a golf ball manufacturer sends out a “tweet” on Twitter that his company makes the longest flying golf ball ever developed. That simple “tweet” can expose the corporation to liability because he failed to disclose he was an employee of the golf manufacturer and the statement has not proven to be true or substantiated.

**Damage to Reputation.** While not a legal risk, employee use of social media may either purposely or inadvertently tarnish an employer’s reputation. A businesses reputation can be adversely affected if an employee posts a picture, video or comment that goes viral and makes the company appear negligent, insensitive, arrogant, discriminatory, or noncompliant.

For example, Kentucky Fried Chicken (KFC) customers were alarmed to learn that three KFC employees bathed themselves in a sink that was used to clean dishes. The employees posted pictures, videos and comments of their sink bathing escapade on the social networking site MySpace, subsequently ending up on another social media site, YouTube. The captions and comments in the video specifically described that they were employees of the popular fast food chain. In an effort to minimize the damage to public perception a company spokesman released a statement saying, “KFC has zero tolerance for violations of our operating standards, and our franchisee has taken immediate action by terminating the employees who were involved.”

*No magic formula will completely eliminate an organizations exposure, but a social media policy in combination with employee training and a comprehensive insurance program will provide a solid line of defense.*

## Protecting Against Employee Related Liability Exposures

For many companies, the first line of defense against social media-related liability is to limit or forbid employee access to social networking sites at work. With the ease that employees can access social media through their personal mobile devices, however, the reality is that it will be part of the workplace for the foreseeable future. Employers have even less control over social media activities outside the workplace. Developing organizational policies regarding the use of social media in and out of the workplace is the first step in limiting an organizations liability. Employers should adopt social media policies that are clear and concise and that address the organizations expectations and consequences. No magic formula will completely eliminate an organizations exposure, but a social media policy in combination with employee training and a comprehensive insurance program will provide a solid line of defense.

**Social Media Personnel Policies.** To properly address exposures that are a result of employee use of social media, the following personnel policies should be considered as part of an employee handbook.

- *Use of Internet and Related Technology* - Guidelines as to the extent that an employee can use the internet, social media and related technologies for personal use during working hours.
- *Privacy* – Clearly explain that employee use of employer technology offers them no privacy rights and that monitoring will occur.
- *Discrimination and Harassment* – Employer harassment and discrimination policies remain consistent even if they occur through employee use of internet, social media and related technologies.
- *Confidential Information* – Prohibit release of confidential information of co-workers, clients and other third parties.
- *Personal online communications* – Prohibit use of employers name, logo and email address.
- *Violation of laws* – Prohibit any use that violates local, state or federal laws.
- *Questions* – Questions about the use of technology should be directed to management.
- *References* – Prohibit employee recommendations via social media sites without approval from Human Resources.
- *Discipline* - Advise that discipline will occur for violation of company policies and can include termination of employment.



## NOTES:

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3. Delfino v. Agilent Technologies, Inc. (2006), CalAPP4th (<http://fsnews.findlaw.com/cases/ca/caapp4th/slip/2006/h028993.html>)

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6. Kristin D. Anger & Sofia D'Almeida Mabee "Legal Ramifications of the Social Media Explosion: An Employers Guide (April 2010)" (<http://legaladmin.info/wp-content/uploads/2010/05/Legal-Ramifications-of-Social-Media.pdf>)

7. Kristin D. Anger & Sofia D'Almeida Mabee "Legal Ramifications of the Social Media Explosion: An Employers Guide (April 2010)" (<http://legaladmin.info/wp-content/uploads/2010/05/Legal-Ramifications-of-Social-Media.pdf>)

**Employee Training.** A social media policy that is included as part of the organizations personnel manual can be helpful in a legal defense. However, training employees on these policies and the risks associated with social media will help prevent losses from occurring. Employee social media training should include reminders that:

- Any electronic communication is never permanently deleted.
- Whether a communication is electronic or face to face they adhere to the same standards and expectations.
- Personal communications with co-workers on non employer devices including social media are covered by the employer's anti-harassment and discrimination policies.
- Employees should use caution when identifying themselves as an employee of the company on the Internet.
- Supervisors should use caution when interacting with employees on social media sites.
- Official business should not be conducted through social media.
- False, misleading or fraudulent content is prohibited.

**Insurance.** In the event that a lawsuit does occur, a comprehensive insurance program is an essential element to any risk management program. Rarely will only a commercial general liability policy provide the necessary protection. The combination of a commercial general liability, cyber liability and employment practice liability (EPLI) policies usually offers the broadest and most comprehensive coverage. Consultation with an insurance advisor is recommended to help identify exposures, determine which policies provide the best coverage, and explain how they would be triggered in the event of a loss.

## Conclusion

The reality is that social media use by employees in the workplace is here to stay. Whether employers embrace the technology or discourage its use is up to them, but the potential liability will exist either way. Social media technology is constantly evolving, for this reason it is important that an employer understands its exposures, stays on top of the trends and issues and makes educated decisions about how best to protect itself.