

THE GOOD, THE BAD AND THE INTERNET: Employment Law Aspects of Social Networking

Jacklyn J. Ford, Esq.
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, Ohio 43215
(614) 464-8230
jjford@vorys.com

© Copyright 2010 Vorys, Sater, Seymour and Pease LLP. All Rights Reserved.

VORYS

Too Much Information?

“Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices have made good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.” To satisfy a prurient taste, the details of sexual relations are spread in the columns of the daily papers.”

-- Louis Brandeis, *The Right to Privacy* (1890)

© Copyright 2010 Vorys, Sater, Seymour and Pease LLP. All Rights Reserved.

VORYS

Issues to be Discussed Today Include:

- Web 2.0 – what is it?
- Social Networking Sites – what are they and why should you care?
- Talking the talk: Twitter, Facebook, LinkedIn
- Forums and Wikis and Blogs – oh my!
- Intersection of Employment Law and Social Networking
- Overview of other legal issues posed by social networking
- Policy recommendations

© Copyright 2010 Vorys, Sater, Seymour and Pease LLP. All Rights Reserved.

VORYS

So – What Is All This Stuff Anyway?

Introduction: A Brave New World Wide Web 2.0



© Copyright 2010 Vorys, Latta, Rouse and Fierman LLP. All Rights Reserved.

VORYS

Social Networking – Part of Web 2.0

- Web 2.0 (since @ 2002) – new model for sharing and exchanging information.
- Involves Websites, Web applications, or Web services that allow users to create content, control content, or interact and collaborate with one another.
- Web 2.0 includes blogs, forums, social networking sites, wikis, and virtual communities.

© Copyright 2010 Vorys, Latta, Rouse and Fierman LLP. All Rights Reserved.

VORYS

Social Networking 101

- What is a “social network?”
- “Social network services allow people to come together online around shared interests, hobbies, or causes.” Wikipedia.org (visited 6/4/09)
- Examples:
 - Instant Messaging: Chat rooms, Internet Forums, bulletin boards, *Twitter*
 - Social Network Sites: *MySpace*, *Facebook*, [*Twitter*]
 - Social Guides that recommend real world places / services: *TripAdvisor*
 - Social Reputation (and Networking) Network: *LinkedIn*
 - Blogs: Weblogs, Blogs, Podcasts, Vlogs/Videocasts
 - Peer-to-Peer Social Networks for file sharing for photos, videos, games: Flickr, YouTube
 - Virtual Presence (meeting in online worlds): *Second Life*, Massively Multiplayer Online Games (MMOGs) like *World of Warcraft*

© Copyright 2010 Vorys, Latta, Rouse and Fierman LLP. All Rights Reserved.

VORYS

Social Networking Sites

- Broadly focused on connecting people and built on user-generated content in three general categories: personal social networks, videosharing, and photograph sharing.
- Allows users to create personal profiles (which may or may not be accurate) that may include blogs, messaging networks, forums, and music, videos, and photos.
 - Personal social networks: MySpace.com, Bebo.com, BlackPlanet.com, Classmates.com, Facebook.com, Friendster.com, LinkedIn.com, Match.com, Orkut.com, OurStory.com, Tagged.com, and Xanga.com.
 - Videosharing: YouTube.
 - Photosharing: Flickr.com.

© Copyright 2010 Vorys, Latta, Riegman and Paine LLP. All Rights Reserved.

VORYS

Twitter: The Latest Big Thing?

- “Twitter is a service for friends, family, and co-workers to communicate and stay connected through the exchange of quick, frequent answers to one simple question: **What are you doing?**”
- “Tweets” can’t be longer than 140 characters and are shared among designated friends, colleagues - and strangers - who “follow” one another.



© Copyright 2010 Vorys, Latta, Riegman and Paine LLP. All Rights Reserved.

VORYS

Why bother to get yourself “Facebook fired” when Twitter can do it for you instantly?



© Copyright 2010 Vorys, Latta, Riegman and Paine LLP. All Rights Reserved.

VORYS

"The Cisco Kid"

A lucky job applicant tweeted the following 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.

This posting caught the attention of someone who apparently works with Cisco, who responded as follows:

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.

© Copyright 2010 Vorys, Limer, Tennen and Fenn LLP. All Rights Reserved.

VORYS

Cisco Kid (cont'd)

"It is pretty funny and in a way I feel like I should have been a little bit more careful. I was using Twitter in a way that didn't jibe with how Twitter really works. I was using it more like I was on Facebook. I was posting status updates to people who are my friends, not realizing or caring that everybody in the whole world could see my updates because I wasn't thinking my updates were interesting to anybody outside my group. Yup, I certainly learned the hard way."

- Connor Riley, 22, who is working on a masters degree in information management at UC Berkley (and not working at Cisco)

© Copyright 2010 Vorys, Limer, Tennen and Fenn LLP. All Rights Reserved.

VORYS

Other Than The Obvious: What Can We Learn From The Cisco Kid's Story?

- Social networking sites are not all created equal
- *Privacy* is a concept which should be inherently foreign to *social* networking sites
- Employers (and potential employers) sometimes do see what's on social networking sites
- Neither the law nor the business culture has fully kept pace with the implications of widespread social networking

© Copyright 2010 Vorys, Limer, Tennen and Fenn LLP. All Rights Reserved.

VORYS

SCREENING APPLICANTS BY USING WEB 2.0?

© Copyright 2012, Vorys, Lattin, Renshaw and Paetz LLP. All Rights Reserved.

VORYS

No One Wants to Be Part of These Headlines

- “Alabama Professor Denied Tenure, Goes on Shooting Spree, Kills Three Colleagues, Say Police”
- “Alabama Professor Has Killed Before, Shot Her Brother in 1986”
- “Alabama Professor Questioned in 1993 Bomb Plot at Harvard”

© Copyright 2012, Vorys, Lattin, Renshaw and Paetz LLP. All Rights Reserved.

VORYS

Dean at M.I.T. Resigns, Ending a 28-Year Lie

- Marilee Jones: “I misrepresented my academic degrees when I first applied to M.I.T. 28 years ago and did not have the courage to correct my résumé when I applied for my current job or at any time since.” (NYT 4/27/07)
- MAccording to Clay, MIT *now* checks the credentials of its new hires.



© Copyright 2012, Vorys, Lattin, Renshaw and Paetz LLP. All Rights Reserved.

VORYS

Screening Applicants: the Hazards of Too Much Information

- What happens if an applicant discloses in his Facebook profile that he is suffering from AIDS, is gay, is Muslim, and is from Somalia?
 - What if the hiring manager knows this information prior to interviewing the applicant and either decides not to invite him for an interview or not to hire him?
 - If the applicant later alleges he was denied employment based on a protected category and files a lawsuit claiming discrimination, the employer will have to prove there were legitimate, nondiscriminatory reasons for not hiring him.
 - It may be difficult for the employer to prove it did not consider any of the applicant's protected categories in making its hiring decision.

© Copyright 2015 Vorys, Latta, Rouse and Evans LLP. All Rights Reserved.

VORYS

Be Careful What You Ask (For)

- EEOC and parallel state agencies prohibit asking applicants questions about most of these subjects
- Example: Ohio Civil Rights Commission Guidance – “Questioning Applicants”
<http://crc.ohio.gov/publications/QuestioningApplicantsTrifold.pdf>

© Copyright 2015 Vorys, Latta, Rouse and Evans LLP. All Rights Reserved.

VORYS

Screening Applicants

- Federal and state laws prohibit you from asking applicants certain questions during interviews or on applications. Those same prohibitions should guide your trolling of Web 2.0 content for information on applicants.
- So don't go looking for information on the applicant's:
 - Religion
 - Nationality, Citizenship
 - Age
 - Or Any Other Protected Characteristic
 - Sexual Orientation
 - Disability
 - Race, Color, or Ethnicity

© Copyright 2015 Vorys, Latta, Rouse and Evans LLP. All Rights Reserved.

VORYS

Is it OK For Me to Know – As Long As I Don't ASK You?

- So, are discrimination laws violated when the employer “finds” information that it would otherwise be barred from asking about directly on an application?
- Is it any different than a reference check?

© Copyright 2010, Vorys, Latta, Rouse and Proulx LLP. All Rights Reserved.

VORYS

Don't Ask, But Look Anyway?

- There's generally no duty for an employer to conduct a background check before hiring someone.
- However, OPRA members are subject to regulations that specifically DO require BCII/FBI checks.
- But whether your agency decides to search for Web 2.0 information on an applicant may depend on the position.
- For example, it may be reasonable – and more job-related - to expect a more thorough vetting process for the Executive Director than for the average employee.

© Copyright 2010, Vorys, Latta, Rouse and Proulx LLP. All Rights Reserved.

VORYS

Legal Issues When Trolling in the Applicant Phase

- Does the employer ever have a duty to research employees (beyond the legally required BCII/FBI check)?
 - Negligent Hiring: injured person must prove there was a duty to conduct a background search, the company failed to conduct the search, that failure was the proximate cause of his injury (i.e., the company would not have hired or could have prevented the harm based on the information the search would have revealed), and the person was injured as a result.
 - When the bad employee's act is a crime, the injured Plaintiff generally must show that the bad employee had a propensity for criminal violence and therefore a criminal act was foreseeable. Absent such knowledge, criminal acts are not considered foreseeable (and therefore the employer can't be liable for negligently hiring or retaining someone with such propensities).

© Copyright 2010, Vorys, Latta, Rouse and Proulx LLP. All Rights Reserved.

VORYS

Employee Privacy

- Could employers be subject to potential liability for invasion of privacy for trolling the Web 2.0 for information on employees?
- To be successful on an invasion of privacy claim, the employee typically would have to prove he had a reasonable expectation of privacy in the content posted - for example, in his Facebook profile.
 - Difficult to show "expectation of privacy" if hundreds or thousands -- or more -- had access to his profile.
- This may be different if the employee had made his Facebook profile "private" or for his "friends" only, and the employer gained access to the profile by becoming "friends" with the employee simply to obtain information for making personnel decisions.

© Copyright 2009 Vorys, Sater, Seymour and Paine LLP. All Rights Reserved.

VORYS

Remember:
"What happens in Vegas, stays in Vegas."



But:
**What happens in the virtual Vegas is
known all over the world.**

© Copyright 2009 Vorys, Sater, Seymour and Paine LLP. All Rights Reserved.

VORYS

RECURRING LIABILITY ISSUES FROM EMPLOYEE USE OF WEB 2.0

© Copyright 2009 Vorys, Sater, Seymour and Paine LLP. All Rights Reserved.

VORYS

Discrimination, Harassment, and Defamation

- Many cases deal with postings that defame, disparage, or falsely accuse others of crimes, misconduct, or unfitness for duty. These kinds of statements can be defamatory.
- Publishing such statements on a blog meets the "publication" requirement for defamation cases.
- Under defamation law, if a republication of the remarks is reasonably foreseeable, the defamer is liable not only for the damage done to reputation in the eyes of the presumably small and sympathetic group of, say, Facebook "friends," but also for any foreseeable broader republication.

© Copyright 2010 Vorys, Latta, Riegman and Pines LLP. All Rights Reserved.

VORYS

Threats and Intimidation



- There have been numerous reports of blogspeech that is hostile, threatening, or violent in content.
- Example: A police officer in northwest Ohio was recently charged with making a threat on his Facebook page against an animal rescue group. Authorities say police officer Shaun Harder wrote online that the Arabian Rescue Mission "needs to be slaughtered like livestock." He's now facing charges of aggravated menacing and is on an unpaid administrative leave.

© Copyright 2010 Vorys, Latta, Riegman and Pines LLP. All Rights Reserved.

VORYS

Blog Postings that Indicate Violations of Company Policy

- Blogspeech that is disloyal, critical, or insubordinate often may be found amid employees' venting and ranting.
 - In *Blakey v. Continental Airlines, Inc.*, the plaintiff posted remarks critical of a co-employee on an Internet chat site called "Crew Members Forum." The co-employee sued Continental. A New Jersey court held that the employer has a duty to stop harassment "in settings related to the workplace" where the speech is part of a pattern of harassment in the workplace – but also ruled that the employer has no general duty to monitor its employees' private communications.
 - Notice makes a difference - *De v. NYC Corporation*: Employee used company computer to forward nude pictures of his own daughter to a child porn site. Employer allegedly knew that employee was using his work computer to view child porn. Court held that wife could proceed with her claim that employer breached its duty to exercise reasonable care to report and/or take effective action to stop employee's activities regarding child pornography.

© Copyright 2010 Vorys, Latta, Riegman and Pines LLP. All Rights Reserved.

VORYS

What if Criticism of the Boss is Protected Activity?

- Emerging (National Labor Relations Act) NLRA issues -- Can blog-related communications be a form of concerted activity?

© Copyright 2010 Vorys, Sierke, Benjamin and Pines LLP. All Rights Reserved.

VORYS

Protected Activity?

- Under Section 7 of the NLRA, employees have the right to choose to engage in union activities and in “protected concerted activity” – activity involving two or more employees to effect changes in “terms and conditions of employment.”
- This includes the right to discuss wages, benefits and other terms and conditions of work with other employees.

© Copyright 2010 Vorys, Sierke, Benjamin and Pines LLP. All Rights Reserved.

VORYS

Blogs and Concerted Activity

- Section 7 protects concerted activity; are blogs and other websites unilateral/solo activities? Could they in certain circumstances be seen as a means to foster employee discussion and therefore be viewed as concerted activity?
- Before taking action on this kind of on-line activism, consult your counsel

© Copyright 2010 Vorys, Sierke, Benjamin and Pines LLP. All Rights Reserved.

VORYS

Inappropriate Blogs

•Ellen Simonetti ("Queen of the Sky"), a flight attendant for Delta Airlines, was terminated last September because she discussed Delta's financial difficulties on her blog, and also because "she posed suggestively" in her uniform in a Delta plane (and put the photos on her blog).

•Her claim: males with equally "offensive" blogs not terminated.

•Bottom line: What's good for the goose....



VORYS

© Copyright 2013, Vorys, Sater, LeVine and Pines LLP. All Rights Reserved.

Diary of a Flight Attendant



VORYS

© Copyright 2013, Vorys, Sater, LeVine and Pines LLP. All Rights Reserved.

Overview of Intellectual Property Risks

- **Risks include:**
 - Employee disclosure of trade secrets or other confidential information.
 - Employee misuse of company trademarks and logos.
 - Unauthorized use of copyrighted materials.
- These same risks exist in the offline world, but social media and other online forums make improper disclosure/use easier and tend to amplify the adverse impact of employee mistakes and misconduct.
 - mobile devices, email, blogs and social media foster a general lack of formality.
 - employees tend not to be as mindful of company policies and procedures when they are sitting at home accessing Facebook on their iPhones.

VORYS

© Copyright 2013, Vorys, Sater, LeVine and Pines LLP. All Rights Reserved.

How Significant is the Risk?

- According to a 2009 survey of U.S. companies with more than 1,000 employees conducted by Proofpoint, Inc.:
 - 18% of companies had investigated exposure of confidential or private information on video sharing sites like YouTube.
 - 17% of companies had investigated exposure of such information on sites like Facebook and LinkedIn.
 - These statistics reflect only those instances in which the company became aware of the potentially unauthorized disclosures...

© Copyright 2010 Vorys, Sater, Seymour and Pease LLP. All Rights Reserved.

VORYS

INTELLECTUAL PROPERTY RISKS ASSOCIATED WITH USE OF SOCIAL MEDIA AND OTHER ONLINE ACTIVITIES

© Copyright 2010 Vorys, Sater, Seymour and Pease LLP. All Rights Reserved.

VORYS

Risks of Trade Secret Disclosure in the Online World



- Intentional Disclosure – disgruntled current or former employees.
- Inadvertent Disclosure – employees may unintentionally disclose trade secret information in the course of discussing their work lives on sites like Facebook or on their personal blogs.
- Impact of Disclosure - key issue is whether the disclosure is a small leak, and thus rather limited in scope, or whether it led to or could lead to a broader distribution, possibly destroying the secret status of the material.

****Remember, with trade secrets, you can't put the cat back in the bag.**

© Copyright 2010 Vorys, Sater, Seymour and Pease LLP. All Rights Reserved.

VORYS

Trademark Pitfalls

- Unauthorized employee use of employer's trademarks – employees should not be using company trademarks in their personal online activities.
 - Want to avoid any implication that the employee is speaking on behalf of the company or that the company is otherwise sponsoring the employee's communications.
 - Employees should not be posting pictures online of themselves or others in company uniforms.
 - Avoid use of company trademarks in virtual worlds such as Second Life.

© Copyright 2010 Vorys, Limer, Boyer and Pines LLP. All Rights Reserved.

VORYS

Other Types of Problematic Disclosures

- Disclosures in violation of SEC regulations – material information regarding the business that has not yet been made public. (Public companies)
- Disclosures in violation of industry-specific privacy regulations – HIPAA, FERPA, etc.
- Disclosures of information that is just generally embarrassing to the employer – in violation of the employee's duty of loyalty.

© Copyright 2010 Vorys, Limer, Boyer and Pines LLP. All Rights Reserved.

VORYS

Problematic Disclosures (cont'd)

Michael Hanscom

- Hanscom, a temporary employee at Microsoft, noticed some Apple Power Mac G5s being unloaded at the Microsoft campus. He took pictures and posted them on his personal website with the caption "It looks like somebody over at Microsoft land is getting some new toys."
- He was terminated the next week for violating Microsoft's security and confidentiality policies, including a no photos policy.

© Copyright 2010 Vorys, Limer, Boyer and Pines LLP. All Rights Reserved.

VORYS

Accuracy, Reliability, and Predictability: Sorting the Wheat from the Chaff

- Web 2.0 technologies are varied and unregulated so how can the employer know the pictures are accurate, the data are true or verified, or the data were in fact posted by the employee at issue? Mistakes happen.
- Is the information you uncover really a predictor of employee success? Is there a difference between an applicant who posts "I'm getting wasted tonight" and an applicant who posts "I like to blow things up?"
- Should such posts be asked about in interviews?

© Copyright 2007 Vorys, Linn, Frerking and Piro LLP. All Rights Reserved.

VORYS

Some Considerations for Social Networking Policies

- Remind employees that information published on their blogs, forums, social networking sites, or elsewhere in the internet must comply with the organization's confidentiality and ethics policies.
- Protect the organization's intellectual property by requiring employer consent before using logos or trademarks, or copyrighted material.
- Remind employees to respect others' intellectual property and to respect copyright laws.
- Inform employees that their online presence reflects on the organization

© Copyright 2007 Vorys, Linn, Frerking and Piro LLP. All Rights Reserved.

VORYS

Sample policies – from the web!

- Wall Street Journal policy on "online activities:"
http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1003972544
- IBM "social computing guidelines:"
<http://www.ibm.com/blogs/zz/en/guidelines.html>
- IBM "virtual world guidelines:"
http://domino.research.ibm.com/comm/research_projects.nsf/pages/virtualworlds.IBMVirtualWorldGuidelines.html

© Copyright 2007 Vorys, Linn, Frerking and Piro LLP. All Rights Reserved.

VORYS

Overarching Policy Considerations – What Employees Need to Understand

- The public might consider an employee's postings to be official communications or the organization, rather than expressions of personal opinion.
- Confidential information — your organization's or a third party's — might be inadvertently or intentionally disclosed.
- The organization, its employees, business partners, or consumers/families could be disparaged.
- Harassment/discrimination/defamation concerns and liability issues are just as real on the web as they are in the office.
- Employees may have no idea that their Web activity could have copyright issues, deceptive trade practices, or other legal landmines.

© Copyright 2010, Vorys, Latta, Rouse and Pines LLP. All Rights Reserved.

VORYS

Policy Considerations

- Key policy elements may include the following:
 - Misuse of online media can be grounds for discipline, up to and including termination.
 - Reminder that violating company policy via the web can be just as serious as violating it in person.
 - Prohibition against using your trademarks or logos on employee blogs, websites, social media profiles, etc.
 - Instruction that employees use good judgment, take responsibility for what they publish, and generally think before posting.
 - Employees with personal blogs that identify the employer should expressly state that the views expressed are solely those of the employee and not those of the employer.
 - Provide employees guidance for any endorsement of your products or services on websites (including yours)

© Copyright 2010, Vorys, Latta, Rouse and Pines LLP. All Rights Reserved.

VORYS

Summary: Key Issues for Employee Use of Web 2.0

Final considerations regarding employee use of Web 2.0:

- Deny or filter employee access to Web 2.0 content when appropriate
- Educate employees about the risks and liability associated with Web 2.0 and how they might affect your business
- Have policies regarding acceptable use — and make sure those policies reflect your company culture
- Develop systems to update policies to adapt to changing business and technological realities
- Take appropriate disciplinary measures when necessary
- Carefully weigh risks and benefits of reviewing websites as part of your hiring process

Above All:

DON'T IGNORE POTENTIAL ISSUES – LIABILITY ISN'T VIRTUAL

© Copyright 2010, Vorys, Latta, Rouse and Pines LLP. All Rights Reserved.

VORYS
