Social Media: Employer and Employee Concerns

by

Robert B. Fitzpatrick, Esq.
Robert B. Fitzpatrick, PLLC
Universal Building South
1825 Connecticut Ave., N.W.
Suite 640
Washington, D.C. 20009-5728
(202) 588-5300
(202) 588-5023 (fax)
fitzpatrick.law@verizon.net
http://www.robertbfitzpatrick.com (website)
http://robertbfitzpatrick.blogspot.com (blog)

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by: Robert B. Fitzpatrick, Esq.[1]

1. **Initial Inquiries:**

    a. Does the employee have a blog?

    b. Does the employee have a Twitter account?

    c. Does the employee have a MySpace account?

    d. Does the employee have a Facebook account?

    e. Is the employee on LinkedIn?

    f. Is there a video of the employee on YouTube?

2. **Employee's Lawyer's Obligations:**

    a. Duty to inquire regarding digital evidence, including social media sites.

    b. Duty to take reasonable steps to assure that digital evidence, including social media sites, is preserved.

    c. Improper to recommend to client that sites be taken down without first preserving evidence, e.g., screenshots that can be properly authenticated.

3. **Employer's Counsel:**

    a. Duty of employer to preserve, and duty of counsel to follow through on implementation of litigation hold.

    b. Upon receipt of notice of claim, immediately communicate to employee or employee's counsel regarding employee's duty to preserve evidence.

    c. In all communications, reference duty to preserve evidence on social media sites.

    d. In discovery, seek relevant evidence on social media sites.

    e. Rather than a fishing expedition, lay the groundwork for document requests at deposition.

[1] This article was prepared with assistance by Donald R. McIntosh, an associate with Robert B. Fitzpatrick, PLLC. Mr. McIntosh is a May 2008 graduate of Georgetown University Law Center and a member of the Virginia State Bar.

4. **What Employer Ought Not Do:**

    a. Violate terms of service in accessing employee's social media site.

    b. Adopt an alias to attempt to "friend" employee and thus access social media site.

    c. *Pietrylo v. Hillstone Rest. Group*, 2008 U.S. Dist. LEXIS 108834 (D.N.J. July 24, 2008) (affirming jury finding that the employer violated the federal Stored Communications Act and the New Jersey Wiretapping and Electronic Surveillance Control Act, by secretly monitoring employees' postings on a private password-protected Internet chat room).

5. **DoD Policy on Use of Social Media**

    a. Deputy Secretary of Defense, *Responsible and Effective Use of Internet-based Capabilities*, Directive-Type Memorandum (DTM) 09-026 (Feb. 25, 2010), *available at* http://www.defense.gov/NEWS/DTM%2009-026.pdf.

    b. Policy. It is DoD policy that:

        The [Non-Classified Internet Protocol Router Network] shall be configured to provide access to Internet-based capabilities across all DoD components.

        Commanders at all levels and Heads of DoD Components shall continue to defend against malicious activity affecting DoD networks (e.g., distributed denial of service attacks, intrusions) and take immediate commensurate actions, as required, to safeguard missions (e.g., temporarily limiting access to the Internet to preserve operations security or to address bandwidth constraints).

        Commanders at all levels and Heads of DoD Components shall continue to deny access to sites with prohibited content and to prohibit users from engaging in prohibited activity via social media sites (e.g., pornography, gambling, hate-crime related activities)

6. **OMB Guidance on Agency Use of Social Media**

    a. Cass R. Sunstein, *Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act*, White House Office of Information and Regulatory Affairs (Apr. 7, 2010), *available at* http://www.whitehouse.gov/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

        "To engage the public, Federal agencies are expanding their use of social media and web-based interactive technologies. For example, agencies are

increasingly using web-based technologies, such as blogs, wikis, and social networks, as a means of 'publishing' solicitations for public comment and for conducting virtual public meetings.

. . . . . .

Under current OMB policy, agencies do not trigger the [Paperwork Reduction Act's ("PRA")] requirements by hosting a public meeting. For purposes of the PRA, OMB considers interactive meeting tools—including but not limited to public conference calls, webinars, blogs, discussion boards, forums, message boards, chat sessions, social networks, and online communities—to be equivalent to in-person public meetings.

. . . . . .

Wikis are an example of a web-based collaboration tool that generally does not trigger the PRA because they merely facilitate interactions between the agencies and the public. However, some uses of wiki technologies are covered by the PRA, such as using a wiki to collect information that an agency would otherwise gather by asking for responses to identical questions (e.g., posting a spreadsheet into which respondents are directed to enter compliance data)."

7. **<u>Public Sector Employees—Constitutional Issues:</u>**

a. *Spanierman v. Hughes*, 576 F. Supp. 2d 292 (D. Conn. 2008).

Following an investigation of a non-tenured teacher's MySpace™ profile, through which the teacher was communicating with his students, and following a subsequent hearing regarding said profile and communications, Connecticut state school officials decided not to renew the teacher's employment contract.

The teacher brought a Section 1983 action alleging that the school officials violated his Fourteenth Amendment procedural due process, substantive due process, and equal protection rights and the teacher's First Amendment rights to freedom of speech (the teacher authored and published a "political" poem on his MySpace.com account) and freedom of association by failing to renew his employment contract.

The court held the following:

That the non-tenured teacher did not have a protected property interest in the renewal of his employment contract, as there was nothing in the applicable collective bargaining agreement or the Teacher Tenure Act (Conn. Gen. Stat. § 10-151), indicating that the non-renewal of a non-tenured teacher's contract had to be based on just cause.

That the teacher's freedom of speech claim failed because there was no causal connection between the decision not to renew the teacher's contract and a poem expressing the teacher's political views, and that the school officials would have taken the same adverse action in the absence of the poem given that the teacher's unprofessional interactions with students through his MySpace™ profile was disruptive to school activities.

8. **Potential Third-Party Disputes:**

   a. Federal Trade Commission's Endorsement Guidance. See Federal Trade Commission, "FTC Publishes Final Guides Governing Endorsements, Testimonials" (Oct. 5, 2009), *available at* http://www.ftc.gov/opa/2009/10/endortest.shtm; *see also* Federal Trade Commission, "Guides Concerning the Use of Endorsements and Testimonials in Advertising," *available at* http://www.ftc.gov/os/2009/10/091005revisedendorsementguides.pdf.

9. **Background Checks of Employees and Job Applicants:**

   a. Survey data indicates substantial percentages of employers are doing so. *See, e.g.,* CareerBuilder.com, *Forty-Five Percent of Employers Use Social Networking Sites to Research Job Candidates, CareerBuilder Survey Finds*, Aug. 19, 2009, *available at* http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr519&sd=8%2f19%2f2009&ed=12%2f31%2f2009&siteid=cbpr&sc_cmp1=cb_pr519_&cbRecursionCnt=1&cbsid=6a40c4a869044991bf9c6f933cdf930a-319894625-we-6.

   b. Negligent Hiring – Failure During Background Investigation to Access Social Media Site.

   c. Legal profession seems, percentage-wise, to be most frequent user.

   d. When is FCRA written consent required?

   e. Do's and Don'ts for employee sites to enhance marketability.

10. **Employer Social Media Policies:**

   a. Doug Cornelius, Chief Compliance Officer at Beacon Capital Partners, has collected some 144 social media policies. So, if you need a sample, *see* http://www.compliancebuilding.com/about/publications/social-media-policies/.

   b. Posting of Kris Dunn to The HR Capitalist, *The HR Capitalist Social Media Policy—All You'll Ever Need . . .*,

http://www.guardian.co.uk/football/2010/jun/17/world-cup-2010-greece-nigeria (June 24, 2009).

c. Posting of Molly DiBianca to The Delaware Employment Law Blog, *Are You Monitoring Your Employees' Facebook Pages?*, http://www.delawareemploymentlawblog.com/2010/06/are_you_monitoring_your_employ.html (June 15, 2010).

d. Posting of Kris Dunn to The HR Capitalist, *A Tale of Two Social Media Policies: "Vader's Death Star" v. "Don't Embarrass Your Mom"*, http://www.hrcapitalist.com/2010/06/a-tale-of-two-social-media-policies-vaders-death-star-vs-dont-embarrass-your-mom.html (June 4, 2010).

e. Posting of Molly DiBianca to The Delaware Employment Law Blog, *Judge Shows Why Employers Should Consider Prohibiting Employees From Posting Anonymously Online*, http://www.delawareemploymentlawblog.com/2010/04/judge_shows_why_employers_may.html (Apr. 8, 2010).

f. Posting of Molly DiBianca to The Delaware Employment Law Blog, *Sure, You Can Use Facebook at Work . . . We'll Just Monitor What You Post*, http://www.delawareemploymentlawblog.com/2010/03/sure_you_can_use_facebook_at_w.html (Mar. 31, 2010).

g. Posting of Molly DiBianca to The Delaware Employment Law Blog, *Sample Social Media Policy*, http://www.delawareemploymentlawblog.com/2010/03/sample_socialmedia_policy_1.html (Mar. 16, 2010).

h. Posting of Molly DiBianca to The Delaware Employment Law Blog, *5 Non-Negotiable Provisions for Your Social-Media Policy*, http://www.delawareemploymentlawblog.com/2010/02/5_nonnegotiable_provisions_for.html (Feb. 4, 2010).

i. Posting of Molly DiBianca to The Delaware Employment Law Blog, *Why the Philadelphia Eagles (Still) Need a Social-Media Policy*, http://www.delawareemploymentlawblog.com/2010/01/why_the_philadelphia_eagles_st.html (Jan. 7, 2010).

11. **Social Networking Sites and GINA**

a. Posting of Megan J. Erickson to the Social Networking Law Blog, *Final GINA Regs Delayed: GINA & Social Media Considerations for Employers*, http://www.socialnetworkinglawblog.com/2010/06/title-ii-of-genetic-information.html (June 6, 2010):

"With respect to social media issues specifically, GINA makes the mere acquisition of genetic information illegal. Because the Act broadly defines the term 'genetic information' (including even medical conditions of family members), checking out an employee's or applicant's Facebook profile could easily result in a violation. For example, if an employer found an employee's status update saying he is raising money for multiple sclerosis in honor of his father who is suffering from it—just getting that information could be a violation."

12. **Termination for Violation of Employer Social Media Policy:**

a. *See, e.g.,* Delaware Employment Law Blog, *MySpace Post Results in Termination of Nursing Student*, Posted on Mar. 22, 2009 by Molly DiBianca, *available at* http://www.delawareemploymentlawblog.com/2009/03/myspace_post_results_in_termin.html.

b. Posting of Molly DiBianca to The Delaware Employment Law Blog, *Employee Fired When Her Sex Blog is Discovered by Her Boss*, http://www.delawareemploymentlawblog.com/2010/05/employee_fired_when_her_sex_bl.html (May 13, 2010).

13. **Social Network Discovery**

a. On May 11, 2010, Magistrate Judge Lynch of the Southern District of Indiana entered an order in *EEOC v. Simply Storage Mgmt., LLC*, No. 09-1223 (S.D. Ind. May 11, 2010) (relying heavily on Canadian law), in which she permitted broad discovery by the defense of plaintiff's social network sites. The EEOC brought suit on behalf of two female employees of a self-storage firm, the property manager and the associate manager, contending that the two and other similarly situated female employees were subjected to unwelcome sexual groping, sexual assault, and sexual comments by a male property manager. The two females alleged that the sex harassment resulted in severe emotional distress. Judge Lynch ordered them to disclose to the defense extensive information from their MySpace and Facebook accounts, including all profiles, status updates, wall posts, groups joined, causes supported, photos, applications, and the like that "reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state."

b. Judge Lynch held that any privacy concerns were overridden by the fact that plaintiffs had already shared the information "with at least one person." In support of this proposition, Judge Lynch cited to two Canadian cases—*Leduc v. Roman*, 2009 CanLII 6838, at ¶31 (ON S.C.) ("Facebook is not used as a means by which account holders carry on monologues with themselves."), *available at* http://www.canlii.org/en/on/onsc/doc/2009/2009canlii6838/2009canlii6838.pdf; and *Murphy v. Perger*, [2007] O.J. No. 5511 (S.C.J.) (Ontario Superior Court of

Justice)—as well as *Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc.*, 2007 U.S. Dist. LEXIS 2379 (D. Nev. 2007), for the proposition that "merely locking a profile from public access does not prevent discovery" under the auspices of privacy.

c. In *Murphy*, the Ontario Superior Court of Justice ordered a plaintiff in a motor vehicle suit to produce copies of her Facebook pages. The defendant successfully argued that the pages were likely to contain photographs relevant to the plaintiff's damages claim, and was buttressed by the fact that the plaintiff had served photographs showing herself participating in various forms of activities pre-accident. The court concluded:

> "Having considered these competing interests, I have concluded than any invasion of privacy is minimal and outweighed by the defendant's need to have the photographs in order to assess the case. The plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site." [Thanks to Dan Michaulk for the preceding synopsis and quotation.]

d. In *Leduc*, the Ontario Superior Court of Justice overturned the trial court's holding that the existence of the plaintiff's Facebook was not reason to believe it contained relevant evidence about his lifestyle. In so doing, the court stated:

> "With respect, I do not regard the defendant's request as a fishing expedition, Mr. Leduc exercised control over a social networking and information site to which he allowed designated 'friends' access. It is reasonable to infer that his social networking site likely contains some content relevant to the issue of how Mr. Leduc has been able to lead his life since the accident . . . a court can infer, from the nature of the Facebook service, the likely existence of relevant documents on a limited-access Facebook profile." *Leduc*, 2009 CanLII 6838, at ¶32 & 36.

e. Going Paperless Blog, *Discovery of Social-Media Profiles*, *available at* http://goingpaperlessblog.com/2010/06/15/discovery-of-social-media-profiles/ (June 15, 2010).

f. Posting of John Hyman to the Ohio Employer's Law Blog, *More on Discovery of Social Networks: Subpoenas to Websites Proving to be Difficult*, http://ohioemploymentlaw.blogspot.com/2010/06/more-on-discovery-of-social-networks.html (June 10, 2010).

    i. The blog post discusses *Crispin v. Christian Audigier, Inc.*, 2010 U.S. Dist. LEXIS (C.D. Cal. May 26, 2010), in which the court confronted the issue of the discovery, via subpoena, of social network sites themselves.

ii. In *Crispin*, the court delineated the three types of information contained on social network sites, as follows:

1. Information made public via a social network—e.g., Facebook or Twitter postings.

2. Information not readily available to the general public via option privacy settings.

3. Private messages between users of the sites, with the site serving merely as a conduit for the private communications.

iii. The court continued, noting that of the above three, only the first may be discoverable via subpoena:

"With respect to webmail and private messaging, the court is satisfied that those forms of communications media are inherently private such that stored messages are not readily accessible to the general public…. Those portions of the … subpoenas that sought private messaging are therefore quashed. With respect to the subpoenas seeking Facebook wall postings and MySpace comments, however, the court concludes that the evidentiary record … is not sufficient to determine whether the subpoenas should be quashed. The only piece of evidence adduced was a Wikipedia article stating that Facebook permits wall messages to 'be viewed by anyone with access to the user's profile page' and that MySpace provides the 'same' functionality. This information admits of two possibilities; either the general public had access to plaintiff's Facebook wall and MySpace comments, or access was limited to a few."

iv. *See also* Posting of Eric Lipman to Law.com Legal Blog Watch, *Plaintiff's Exhibit 1: Your Facebook Wall*, http://legalblogwatch.typepad.com/legal_blog_watch/2010/06/plaintiffs-exhibit-1-your-facebook-wall.html (Jun9, 2010); Technology & Marketing Law Blog, *Facebook Messages/Wall Posts, Civil Discovery, and the Stored Communications Act*—Crispin v. Audigier, http://blog.ericgoldman.org/archives/2010/06/post_1.htm (June 2, 2010).

g. Posting of Sharon D. Nelson, Esq. to "Ride the Lightning: Electronic Evidence Blog," *The Defensible Collection of Social Media Data in Electronic Discovery*, http://ridethelightning.senseient.com/2010/04/the-defensible-collection-of-social-media-data-in-electronic-discovery.html (April 29, 2010).

14. **LinkedIn: An Offensive Weapon for Employees:**

a. How should employer policy address manager's response to requests from employee or former employee for LinkedIn recommendation?

b. Posting by Molly DiBianca to The Delaware Employment Law Blog, *Breach of Noncompetition Agreement Via LinkedIn*, http://www.delawareemploymentlawblog.com/2010/04/breach_of_noncompetition_agree.html (Apr. 3, 2010).

c. Tresa Baldas, *Lawyers warn employers against giving glowing reviews on LinkedIn*, Nat'l L. J., July 6, 2009, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202432039774&src=EMC-Email&et=editorial&bu=National%20Law%20Journal&pt=NLJ.com-%20Daily%20Headlines&cn=20090707NLJ&kw=Lawyers%20warn%20employers%20against%20giving%20glowing%20reviews%20on%20LinkedIn&slretu&slreturn=1.

d. Connecticut Employment Law Blog, *"Be Afraid of Social Networking" – Why the Conventional Wisdom is Overblown*, Posted on July 21, 2009 by Daniel Schwartz, *available at* http://www.ctemploymentlawblog.com/2009/07/articles/hr-issues/be-afraid-of-social-networking-why-the-conventional-wisdom-is-overblown/.

e. Delaware Employment Law Blog, *Warnings Against LinkedIn Recommendations: Justified or Propaganda?* Posted on July 20, 2009 by Molly DiBianca, *available at* http://www.delawareemploymentlawblog.com/2009/07/warnings_against_linkedin_reco.html.