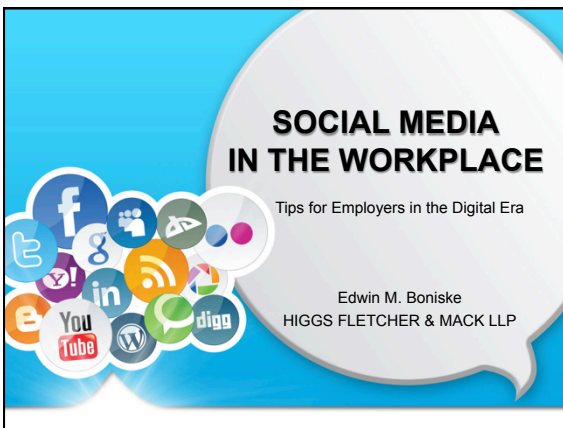




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**SOCIAL MEDIA
IN THE WORKPLACE**

Tips for Employers in the Digital Era

Edwin M. Boniske
HIGGS FLETCHER & MACK LLP

ABOUT THE PRESENTER

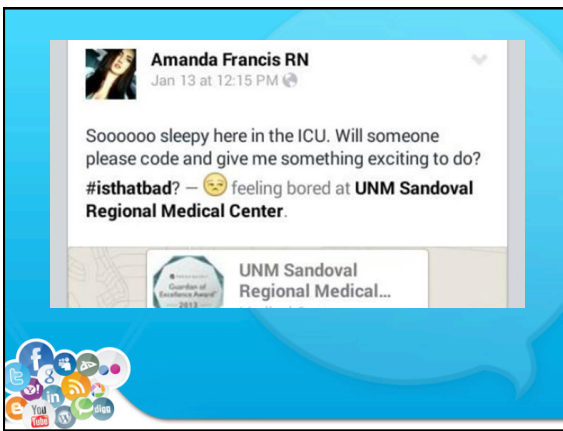
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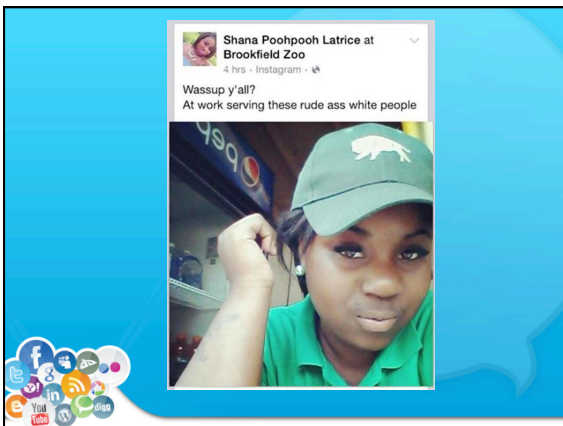
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Employer Liability For Employee Posts

- Employers can be held responsible for any liability arising out of their employee's social media use.
- Employers can be found liable for an employee's defamatory, discriminatory, or harassing social media post or if an employee leaks sensitive customer information or consumer health information online.



“Protected” Online Activity

- Some social media use by employees is protected by federal law
- Firing an employee or instituting social media policies or work rules that interfere with those rights can result in liability to the company



OVERVIEW OF PRESENTATION

- Social Media and Labor Law – An Overview
- Evaluating The Lawfulness Of Employee's Social Media Activity Under Federal Law
- Tips For Managing Social Media Use In The Workplace
- Acceptable Searches And Use Of Employee Social Media Use In Hiring And Firing Decisions



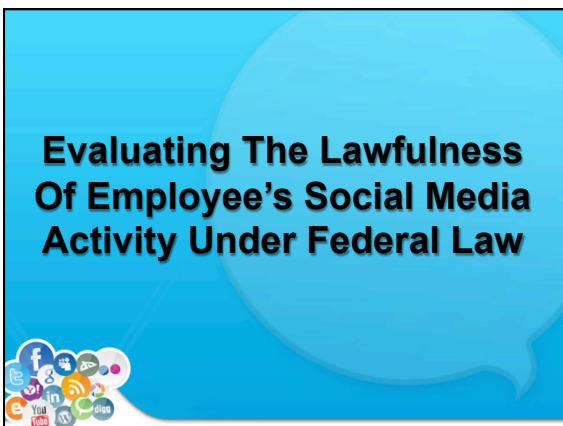













**THE NATIONAL LABOR RELATIONS ACT
ACT
("NLRA")**

- Most private-sector employees are covered by the NLRA
- Protects certain rights of employees by prohibiting labor and management practices that can harm the general welfare of workers, business, and the economy



**THE NATIONAL LABOR RELATIONS ACT
ACT
("NLRA")**

- Sections 7 affords employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection..."
- The nature of protected activity does not change if the employee's statements are communicated on the internet or through social media



CONCERTED SOCIAL MEDIA ACTIVITY

- Two or more employees taking action for their mutual aid or protection regarding terms and conditions of employment
- Test = Whether the activity is engaged with for the benefit of a group of employees, and not solely for the benefit of an individual employee



CONCERTED SOCIAL MEDIA ACTIVITY

- Examples:
 - Two or more employees discussing seeking an increase in their pay
 - Two or more employees discussing shared concerns about terms and conditions of employment



UNPROTECTED SOCIAL MEDIA ACTIVITY

- Activities are not protected if they do not seek to involve other employees, or do not relate to shared terms or conditions of employment
 - “Personal gripes” not protected
- Even if it is concerted activity, Section 7 does not protect actions that are carried out in a reckless or malicious manner




REAL-WORLD HYPO – No. 1

- Employee in dispute with co-worker about job performance, staffing levels, and how well the employer was servicing its clients
- One of the employees, off-duty and on a personal computer, posts on Facebook:

“[Co-Worker] feels that we don’t help our clients enough at [Company]. I about had it! My fellow coworkers how do u feel?”
- Four other off-duty co-workers respond by posting “comments” defending their work performance
- All five employees (the poster and the 4 commenters) were fired






REAL-WORLD HYPO – No. 1

PROTECTED ACTIVITY


- NLRB found employer violated NLRA by discharging the five employees because there was “no question that the activity engaged in by the five employees was concerted for the ‘purpose of mutual aid or protection.’”

Hispanics United of Buffalo, Inc. & Carlos Ortiz, NLRB Case No. 03-CA-027872, Dec. 14, 2012




REAL-WORLD HYPO – No. 2

- Employee, a salesman at BMW dealership, observes an accident at the Land Rover dealership next door (owned by the same person who owned the BMW dealership)
- Employee posts pics and comment on Facebook:
 “This is what happens when a sales person sitting in the front passenger seat (Former Sales Person, actually), allows a 13 year old boy to get behind the wheel of a 6000 lb truck build and desgined to pretty much drive over anything. The kid drives over his father’s foot and into the pond in all about 4 seconds and destroys a \$50,000 truck. OOOPS!”



REAL-WORLD HYPO – No. 2

- Co-workers post comments about incident:
 - “How did I miss all the fun stuff?”
 - “Finally, some action at our Land Rover store”
 - “I love this one ... The kids pulling his hair out... Du, what did I do? Oh no, is Mom gonna give me a time out?”
- Owner gets calls from other Land Rover dealers (who had seen the pictures / comments), fires employee who posted the picture / comments




REAL-WORLD HYPO – No. 2

NOT PROTECTED ACTIVITY


- NLRB found that the termination decision was lawful because the employee was *NOT* engaged in concerted, protected activity
- Employee's "posting of the Land Rover accident on his Facebook account was neither protected nor concerted activities... It was posted solely by [employee], apparently as a lark, without any discussion with any other employee of the [dealership], and had no connection to any of the employee's terms and conditions of employment."

Karl Knauz Motors, Inc. db/a Knauz BMW & Robert Becker. NLRB Case No. 13-CA-046452, Sept. 28, 2012.




REAL-WORLD HYPO – No. 3

- Employee worked for full-service catering company. In January 2011, employees expressed interest in union representation (Union ultimately adopted in October 2011 election)
- In March 2011, employees complained about managers who take "job frustration [out on] the staff" and "don't treat the staff with respect."
- On October 25, 2011, 2-days before the election, one of the managers about whom the employees had complained was harsh to a banquet server



REAL-WORLD HYPO – No. 3

- Employee (server) complained to the head of the employee's organizing efforts about treatment by manager, was told to take a break to calm down and "stay strong" until the election
- During a rest break, the employee used his phone to post to Facebook:
 "Bob is such a NASTY MOTHER F***** don't know how to talk to people!!!!!! F*** his mother and his entire f***** family!!!! What a LOSER!!!!!! Vote YES for the UNION!!!!!!!"
- Employee fired because his Facebook comments "violated company policy"



REAL-WORLD HYPO – No. 3

PROTECTED ACTIVITY


- NLRB found that the employer violated the NLRA by terminating the employee because the post was concerted protected activity
 - The comments were “part of a sequence of events involving the employees’ attempts to protest and ameliorate what they saw as rude and demeaning treatment on behalf of [manager].”
 - Employee’s “impulsive relation ... reflected his exasperated frustration and stress after months of concerted protesting disrespectful treatment by managers”
 - Use of profanity did not strip his post of protection because there was evidence of widespread use of profanity on the job – “we do not view [employee’s] use of this profanity to be qualitatively different from profanity regularly tolerated by the [company].”

PIER SIXTY LLC & Herman Perez and Evelyn Gonzalez, NLRB Case Nos. 02-CA-068612 and 02-CA-070797, March 31, 2014.

WHERE DOES THIS LEAVE US?


- Employees will be protected if they are discussing employment policies or practices that apply or affect more than one employee
- Protection is more likely if employees are having an online discussion that is consistent with complaints to management
- The more personal and severe the post, the less likely the action will be considered “protected”
 - However, even if the post contains expletives and name-calling, may still be protected if it is a complaint about employment practices affecting more than one employee





WHY DOES IT MATTER?

- Consequences for wrongful discipline
 - Section 8 of the NLRA prohibits employers from retaliating against employees for participating in protected activities
 - Section 8 also prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their rights under the NLRA



WHY DOES IT MATTER?

- Employers who violate the act may be ordered to:
 - Reinstatement of the employee
 - Readjust the employee's seniority and status
 - Repay lost benefits
 - Pay damages, including back pay
 - Pay the employees attorneys' fees and costs

Managing Social Media Use In The Workplace





Effective Social Media Policies

- An effective social media policy may help limit liability and deter frivolous lawsuits by placing employees on notice of what types of social media activity is prohibited
- However, a lawful social media policy must not prohibit employees from engaging in protected and concerted social media activity




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Effective Social Media Policies

- GOALS:
 - Communicate legal and organizational rules to employees of the company regarding use
 - Convey a clear understanding of what use is appropriate and lawful, and that which is prohibited



EXAMPLE – Common Policies

- A policy forbidding statements that are slanderous or detrimental to the company
- A rule prohibiting employees from disclosing private and confidential information.



EXAMPLE – Common Policies


- A policy forbidding statements that are slanderous or detrimental to the company
- A rule prohibiting employees from disclosing private and confidential information

EACH OF THESE POLICIES IS POTENTIALLY UNLAWFUL




Drafting Effective Policies

- UNLAWFUL
 - A policy forbidding statements that are slanderous or detrimental to the company
- LAWFUL
 - A rule forbidding social media posts which are “slanderous or detrimental to the company,” which then includes a list of prohibited conduct, including discrimination, harassment, and sabotage




Drafting Effective Policies

- UNLAWFUL
 - A rule prohibiting employees from disclosing private and confidential information about their employment
- LAWFUL
 - A rule prohibiting employees from disclosing private and confidential information and which provides examples of prohibited disclosure including “personal health information” and trade secret information.





LAWFUL POLICIES

- Requiring an employee to receive prior authorization before posting a message in the employer's name or which could reasonably be attributed to the employer
- Prohibiting harassment, bullying, or discrimination between co-workers online, even when done after hours and on home computers



IMPLEMENT THE POLICY






IMPLEMENT THE POLICY

- Distribute the policy to all employees and have them acknowledge receipt in writing
- Train employees on permissible and prohibited social media activity and consequences for failing to comply with the policy
- Maintain records of distribution and training
- Enforce the Policy consistently

Acceptable Searches and Use of Social Media Information By Employers




ACCEPTABLE SEARCHES




- In the past, company investigations were conducted by interviewing witnesses, searching lockers, purses, etc.
- Now, critical evidence about workplace incidents may also be stored via email, cellular phones, text messages, or other social media outlets

ACCEPTABLE SEARCHES



- Generally, employers may engage in reasonable workplace searches so long as the employee has notice such that there is no expectation of privacy in the searched data
- Thus, in the digital age, policies should be expanded to clarify that, in certain situations, the employer may search emails, phone records, and any other records evidencing communications between employees



SOCIAL MEDIA IN HIRING DECISIONS

To what extent can an employer search and use online social media information in making hiring or firing decisions?

It is generally OK to use publically available information from social media websites in conducting pre-hiring investigations



SOCIAL MEDIA IN HIRING DECISIONS

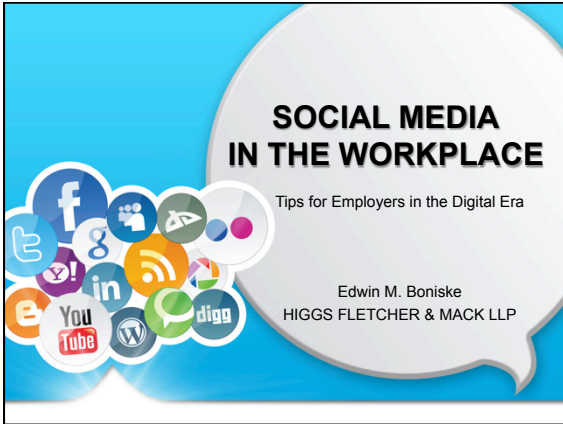
EMPLOYERS CANNOT:

- Use information obtained from social media in a manner that is otherwise unlawful
 - i.e., Decisions based on an applicant's age, race, religion, pregnancy, sexual preference, etc.
- Require an employee to provide his/her password or otherwise access social media that is not available to the public

QUESTIONS?

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IN THE WORKPLACE**

Tips for Employers in the Digital Era

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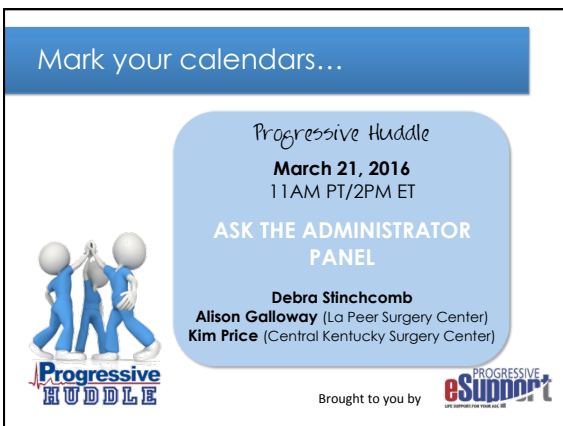
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