Managing Employee Use of Social Media

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Employee use of social media creates a challenge for employers that impacts at least three important subject matters touching upon both use and content: (1) Employee productivity (use); (2) the employer's image to the outside world (content), and (3) the employer's obligation to prevent workplace harassment (content).

The first issue – productivity in the work place – is the easiest to tackle of the three. Similar to the problem of employees accessing internet sites, employees accessing social media sites during the work day, whether through a desktop computer or an employee's personal cell phone prevents employees from performing their job duties; whether those duties are focusing on resident care, preparing meals or other tasks. Most employers have already adopted Internet and other technology usage policies that limit personal activities during the workday to meal and rest periods. These policies, most likely, already cover, or could easily be expanded to cover, an employee's use of social media.

For example, imposing filters on employee computers that prevent access to social media and other dubious Internet sites is a good practice given the risk that some sites and downloads can threaten network security. Enforcing a comprehensive Internet and computer use policy is important for employees who use computers during their workday. That policy should explain how your organization manages network security and what type of personal usage is permitted and prohibited. It may be more difficult to control the use of personal cell phones and mobile devices, but at the very least, employers can impose restrictions on the use of such devices at any time other than rest breaks and meal periods. If an employee is provided such a device for work purposes, your policy should articulate how and when that device can be used for personal purposes.

The more troubling problem for employers regarding employee use of social media is the content of the social media use – that is, the impact that the employee posting could have on the Employer's image and its workplace. *What, if anything, can employers do about employee posts on social media sites, whether during or after work hours?*

Community Image

Employers spend a lot of time and effort marketing the image of their organizations. Most assisted living communities have web sites touting their services, their warm, family environments and their happy, contented residents. Negative employee postings and comments contradicting these images can threaten the reputation of an organization, obviously impacting the bottom line. What is an Executive Director to do if an employee posts to their Face book: "ABC Community cuts corners," or, even worse, if they post pictures of an unfortunate incident involving a resident to Flickr, or MySpace? What recourse does a Community have if an Executive Director expresses a controversial opinion in the comments section of a blog post on physician-assisted suicide and signs the comment "A Compassionate Executive Director at XYZ Community?" There is nothing new about these incidents--they are little different than an employee standing at the water cooler expressing his or her opinions to a co-worker or, after work, to a friend. In the past, quite often, the employer would never become aware of these comments. However, what has changed is the reach of the comment - social media technology dramatically magnifies the audience. Does that change the Employer's ability to control the conduct?

Negative or Inappropriate Co-worker Comments

Comments posted online outside the workplace easily find their way back into the workplace and could expose

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employers to liability for hostile work environment claims and result in inter-employee relations problems. When an employee posts a sexually harassing comment about another co-worker on Facebook the damage is done at work when other "friended" employees glance at Facebook on their cell phone at work, even if the actual posting took place outside of work hours.

1. Become informed.
Do a little research and develop an understanding of how social media works and how information is transmitted. The list of sites that fall within the general (and vague) term "social media" seems to grow by the month. While not all have the same function or purpose, nearly all of them can be viewed and updated on mobile devices.

Some sites, such as Twitter and Facebook allow users to post real time status updates of their current activities and post pictures and video. Other sites, such as Flickr allow users to share and comment on pictures. YouTube allows users to post and comment on video. Since many cell phones have still frame and video cameras, images can be posted instantaneously. Craigslist has an appropriately named "Rants & Raves" section that allows users to post rants and raves on any topic. At least one harassment claim has arisen from one employee's "rant" posted about a co-worker after the two ended a workplace romance. The "rant" was posted after hours and later circulated by another employee to co-workers. Text messaging and instant messaging among employees also allow employees to engage with co-workers or others outside the workplace in real-time. Most on-line news sites and blogs invite discussion in robust forums or comments sections, which function much like the letters to the editor pages of newspapers, except in real time and with little monitoring or oversight.

2. What can employers control, if anything?
Employers can control personal activity during work hours. Employers generally cannot control personal activity during non-work hours. But what about activity during non-work hours that has a negative impact on the employer's reputation or creates a hostile work environment for other employees?

a. Controlling activity outside the workplace.

Activities outside of the workplace that negatively impact employee job performance, the performance of co-workers, or the business interests of the employers may be a proper focus of employer action. For example, it is appropriate to have a policy that states that employees are not authorized to speak on behalf of their employer through social media venues. It is also appropriate to inform employees that they may not post images, footage, video feeds or other similar media that has been recorded on the employer's property, or that depict non-public or confidential information about the employer. This restriction is particularly important in residential care facilities for the elderly where private health information is ubiquitous. Employees must be instructed on how to avoid violating the privacy rights of the community's residents.

Usually, employers designate certain employees with a public-facing role to use Facebook and other social media sites to promote the community. The employer may even authorize them to monitor and take positions on issues important to the elder care industry. In that case, the employer clearly should articulate what authority such employees have and to remind employees that their conduct reflects directly on their professional reputation and that of the company. The employer should make clear that all other employees do not speak for the employer.

Unfortunately, when an employee is posting negative opinions about their employer, there is little an employer can do unless the opinions rise to the level of "fact" and are false; then perhaps a slander claim might be possible. In fact, an employer risks liability for a retaliation/whistleblower claim if it terminates, or otherwise negatively impacts, an employee's employment because that employee was complaining about deficiencies at the community where they work.

Another difficult situation arises when one employee claims to her supervisor that another employee is creating a hostile work environment by posting harassing comments about her on Facebook or MySpace. Anytime an employee complains about harassment or a hostile work environment based upon comments outside the workplace, the employer should respond and investigate the claim. What action the employer may take, if any, depends upon the facts. The employer should consult with legal counsel for help in evaluating the actual impact of the comments on the workplace; whether there is merit to any harassment or hostile work environment claim and whether it can proceed to take action.

b. Employers' right to inspect activity on company-provided technology.

For the past several years, most employers have taken the position that employees have no expectation of privacy in their company email or Internet usage so long as they were warned ahead of time that management has reserved the right to review such information. However, mobile devices and social media create a new dilemma. It is increasingly common for employers to provide Blackberries or cell phones that serve both as an employee's work and personal cell phone. Further, employees may maintain a Facebook page or blog where they post negative information about their employer, but restrict access to a small set of friends and family. Recent case law has given us some guidance.

On April 19, 2010, the United States Supreme Court heard argument in Ontario v. Quon, U.S., No. 08-1332. In Quon, the City of Ontario police department gave certain of its employees' pagers to use on the job. The pagers included a

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texting function. A private company Arch Wireless charged the police department a flat fee per employee, up to a certain text limit. The City did not have a written policy regarding the use of text messages, although it did have a policy regarding the use of city-owned electronic communications systems, which restricted employee use to job-related use. The policy stated that communications over city-owned systems would be monitored and that they were not confidential. Plaintiff Quon admitted that he was aware that the policy applied to the pagers. It was also not disputed that Quon's supervisors told him that he could pay any text overage charges on the pager and avoid any inquiry about non-job-related texts. Quon had done so on at least four occasions and the City never inquired whether the overage was for personal use.
Quon and other employees regularly exceeded the text limit and eventually Quon's superiors conducted an audit into the use of texts. With regard to Quon, auditors found sexually suggestive texts. The City did so by contacting the network provider Arch Wireless and asking for a record of all text messages sent on the pager for a certain time period. Upon discovering that the County had viewed his personal text messages, Quon sued the City and the provider arguing the City's viewing violated his Fourth Amendment right to be free of unreasonable searches. The Ninth Circuit agreed with Quon based upon the specific and unusual facts of the case. It held that even though the employees were using a work-provided pager, Quon had a reasonable expectation of privacy because he reimbursed the City for his personal use of the device and it had never looked into his personal use. The court held that, while the City could look into his usage, it could no look into the content of the text.

The Quon case, discussing governmental action under the fourth amendment, applies to public employers and decided on the specific facts of the case is limited in scope. However, despite the limited nature of the Quon ruling, some parts of the decision address the private nature of text messages and could serve to guide rulings in future cases. Also, in California, employees of private employers may seek redress under the California Constitution's right of privacy and thus we can look to the Quon case for some guidance. In fact, early in the case (2004) the trial Court concluded that Quon stated a sufficient claim for invasion of privacy under the California Constitution and denied Arch Wireless's motion to dismiss the claim for invasion of privacy under the California Constitution. The case, at best, teaches us the need to clear, concise policies that are not diluted by supervisor inaction and vague, inconsistent policies.

3. Adopt a Policy.

Most employers have an Internet Usage Policy, but not all have incorporated guidelines on using social media into that or a separate policy. Whether these policies should be combined depends a lot on how community staff uses technology in the workplace.

Implementing a concise but comprehensive policy that sets clear expectations for employees is essential. A social media policy should address the following topics: 1) an acknowledgment and definition of what falls within the broad category "social media;" 2) guidelines on accessing social media venues in the workplace and outside the workplace; 3) guidelines on when and whether employees can represent or invoke the employer; 4) guidelines on communicating about residents or other employees; and 5) limitations on using work time for non-work activities.

In the policy, include some reminders and guidelines to employees on the public nature of their posts, the potential impact on unintended viewers, and that employees are personally responsible for the content they publish on user-generated social media sites.

CCL Clarifies "Unstageable Wound" Policy

During the recent CALA Conference, CCL clarified that the policy classifying an "unstageable wound" as a stage 3 or 4 and therefore a prohibited condition applies to pressure sores and not all wounds. CALA is advocating that the CCL update further clarify that "pressure sores that have been deemed unstageable will be considered to be a stage 3 or 4" in order to eliminate any further confusion.