



## Employer Safeguards for Social Networking

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## Social Media is More Than a Fad



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## Items for Today's Discussion

- Social Media
  - What Is It?
  - The Major Players
  - Statistics You Will Not Believe
- Legal Implications Related to Social Media in the Workplace
- Things to Consider When Creating a Social Media Policy

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### The Major Players - YouTube® (cont.)

Davecarrollmusic.com

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### The Major Players - LinkedIn®

- Professional Networking
- Over 75 million members
- A new member joins LinkedIn® approximately every second
- Executives from all Fortune 500 companies are LinkedIn® members



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### The Major Players - LinkedIn® (cont.)

“If you don’t have a profile on LinkedIn, you’re nowhere.”

“If you’re serious about managing your career, the only social site that really matters is LinkedIn.”

- Fortune Magazine



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## The Major Players - Twitter®

- Micro-blogging and social networking service,
- More than 190 million users.
- Allows users to send and read free messages known as "Tweets" (140 characters)
- 65 million Tweets/day
- The Library of Congress archives all Tweets



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## The Major Players - Twitter® (cont.)



Terry Moran: Pres. Obama just called Kanye West a "jackass" for his outburst at VMAs when Taylor Swift won. Now THAT'S presidential.  
from Terry Moran - 8:39 PM (1 hour ago)

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## The Major Players - Twitter® (cont.)



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## The Major Players - Twitter® (cont.)

### YANITYFAIR

#### America's Tweenhearts

By Michelle Kung and Katherine Strohman. (Michelle Kung is a senior editor at Vanity Fair and Katherine Strohman is a senior editor at Teen.)

ENTERTAINMENT WEEKLY

10/17/2010



These five teenage Twitterers are social-media superstars in their own right. They're the most popular tweeters in the world, and their influence is growing. They're the most popular tweeters in the world, and their influence is growing. They're the most popular tweeters in the world, and their influence is growing.

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## The Major Players - Twitter® (cont.)

"For tweeples, e-mail messages are sonnets,  
Facebook is practically Tolstoy."

"Facebook is just way too slow," says Stefanie  
Michaels, a twilebrity from Brentwood, California.  
"I can't deal with that kind of deep engagement."

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## The Major Players - Twitter® (cont.)

- This is NO Fairy Tale
- Once upon a Twitter time at Yahoo!
- Yahoo employee Emily West was one of 1,500 employees who lost her job.
- Emily updated her Twitter account throughout the whole ordeal.

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## The Major Players - Twitter® (cont.)

- Managers are in early and TV crews are outside. Commence bloodbath.
- I checked the employee directory and a couple of people are gone from the East coast that I know.
- They have pretty pre-printed signs on doors of the rooms where they are telling people unlike the red sharpie signs from the last round.

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## The Major Players - Twitter® (cont.)

- Five people I trained were cut in NY, none from Boston. One girl in NY that started at the same time as me also got the axe.
- Four months of severance is the rumor. Plus they're herding people to an employment service after they're told the news.

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## The Major Players - Twitter® (cont.)

- FUU%&\*\*K, just saw my new hire trainee from October go into The Room with her manager. They are laying off an amazing employee 10 yards away.
- My work BFF Michelle who helped me get my training job and taught me so much is out. The tears are coming. I hate crying at work.

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### The Major Players - Twitter® (cont.)

- I'm kicking myself for not bringing some Bailey's for my coffee.
- The campus gym just sent an email offering 20 min. \$20 massages starting at 11. Doubt that's a coincidence. HAW!

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### The Major Players - Twitter® (cont.)

- Some haters say that bloggers are turning the layoffs into a sport. I think that's bullshit.
- I'm out.

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### Statistics You Will Not Believe

IT Manager estimate	% of IT that thought the app was being used	% of locations that showed app usage
Social networking	60%	100%
Instant Messaging (IM)	66%	100%
Web based IM	35%	97%
Streaming Audio/Video	80%	94%
P2P file share	54%	96%

The Collaborative Internet Usage Trends, End User Attitudes and IT Impact, FaceTime Communications, Inc., Fifth Annual Survey, March 2010  
http://info.facestime.com/Survey10Rquest.html

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## Statistics You Will Not Believe (cont.)

- 74% of employees say it's easy to damage a company's reputation using social media
- Only 15% of executives consider these risks at the board level
- Only 17% have a risk mitigation policy/program

Social Networking and Reputational Risk in the Workplace, Deloitte LLP, 2009 Ethics & Workplace Survey Results  
[http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us\\_2009\\_ethics\\_workplace\\_survey\\_220509.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2009_ethics_workplace_survey_220509.pdf)

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## Statistics You Will Not Believe (cont.)

- 60% of business executives say they have the "right to know"
- 53% of employees said their social networking pages are none of their employers' business

Social Networking and Reputational Risk in the Workplace, Deloitte LLP, 2009 Ethics & Workplace Survey Results  
[http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us\\_2009\\_ethics\\_workplace\\_survey\\_220509.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2009_ethics_workplace_survey_220509.pdf)

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## Statistics You Will Not Believe (cont.)

- Employee utilization:
  - 55% visit social networking sites at least once per week
  - 21% admit visiting social networking sites during work hours

Social Networking and Reputational Risk in the Workplace, Deloitte LLP, 2009 Ethics & Workplace Survey Results  
[http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us\\_2009\\_ethics\\_workplace\\_survey\\_220509.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2009_ethics_workplace_survey_220509.pdf)

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## Statistics You Will Not Believe (cont.)

- Executive utilization:
  - 31% of CEOs are on Facebook®
  - 30% use social networking as part of their business and operations strategy
  - 23% use social networking for recruiting purposes

Social Networking and Reputational Risk in the Workplace, Deloitte LLP, 2009  
Ethics & Workplace Survey Results  
[http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us\\_2009\\_ethics\\_workplace\\_survey\\_220509.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2009_ethics_workplace_survey_220509.pdf)

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## Statistics You Will Not Believe (cont.)

- Social media and Web 2.0 applications have been adopted by 99% of end users to support business processes
- 53% of end users indicated that newer Web 2.0 tools are "better than those provided by my employer"

The Collaborative Internet Usage Trends, End User Attitudes and IT Impact, FaceTime Communications, Inc., Fifth Annual Survey, March 2010  
<http://info.facestime.com/Survey10Request.html>

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## Legal Implications

- Fair Labor Standards Act
- National Labor Relations Act
- Discrimination/Harassment
- Defamation/Libel
- Safety
- Wrongful Termination
- Lifestyle Discrimination Statutes
- Intellectual Property
- Federal Trade Commission Guidelines
- Stored Communications Act

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## Fair Labor Standards Act

- FLSA
  - Requires employees to be paid a minimum wage and overtime premium
    - Federal minimum wage is \$7.25/hour
  - Requires overtime pay for hours worked over 40 per workweek (some states require daily overtime), at a rate not less than one and one-half times the regular rate of pay



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## National Labor Relations Act

- NLRA
  - Section 7 protects employees' right to form, join and assist labor organizations, engage in collective bargaining and engage in other concerted activities for mutual aid or protection

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## National Labor Relations Act

*Cintas Corp.*, 344 NLRB 943 (June 30, 2006)

“We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners [defined as employees], new business efforts, customers, accounting and financial matters.”

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## Discrimination/Harassment

- Title VII
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- USERRA

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## Discrimination/Harassment (cont.)

- Delta Airlines fired flight attendant for posting “revealing” pictures while wearing her uniform
- Self-dubbed “Queen of the Sky” discovered that Delta Airlines had not disciplined male employees who posted pictures engaged in “unsuitable conduct” while in uniform
- Sued for gender discrimination



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## Discrimination/Harassment (cont.)

- Sexual harassment complaints to the EEOC increased 11 % from 2007 to 2009
- Nothing to LOL about!



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## Defamation/Libel

- False negative statement
- Published/communicated to another
- Damages in social media scenario could be large

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## Safety

- Distraction from cell phone use while driving (hand held or hands free) extends a driver's reaction as much as having a blood alcohol concentration at the legal limit of .08 percent. (University of Utah)
- The No.1 source of driver inattention is use of a wireless device. (Virginia Tech/NHTSA)

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## Safety

- Drivers that use cell phones are four times as likely to get into crashes serious enough to injure themselves. (Insurance Institute for Highway Safety)

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**Safety**

- Driving while distracted is a factor in 25 percent of police reported crashes.
- Driving while using a cell phone reduces the amount of brain activity associated with driving by 37 percent (Carnegie Mellon)

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**Safety**

- Push to ban texting while driving
  - Federal employees prohibited
  - Federal contractors next?
  - Employees should be trained about the risks of use of cell phones / smart phones while engaged in driving or other dangerous activities

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**Wrongful Termination**

- In “at-will” states, can hire or fire for any reason or no reason, so long as it is not an illegal reason
  - Can you terminate someone’s employment for something you learn about on a social media site?
    - Depends on what you learn

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## Lifestyle Discrimination Statutes

- Be wary of “Lifestyle Discrimination Statutes,” which prohibit discrimination upon lawful, off-duty conduct
  - California
  - Colorado

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## Intellectual Property

- Trademark
- Copyright
- Confidential and Proprietary Information

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## Federal Trade Commission ("FTC") Guidelines

- FTC Guidelines protect consumers from deceptive endorsements and advertising
  - Employees who comment on employer's products or services
  - Requires use of disclaimers

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## FTC Guidelines (cont.)

- Employer Liability Under FTC Endorsement Rules
  - Companies may be liable where their endorsers fails to disclose material connections.
  - Employees endorsing their employer's products or services have a "duty to disclose" to their audience their relationship to the employer

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## FTC Guidelines (cont.)

- This disclosure duty may even apply when the employee's endorsement is posted on a site that is *not* maintained by the employer, and *without* the employer's request

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## Stored Communications Act ("SCA")

- In general, the SCA provides a cause of action against any person or entity who:
- (1) intentionally and without authorization accesses a computer; or
- (2) exceeds the authorized access to that computer

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## SCA (cont.)

- **Konop v. Hawaiian Airlines, Inc.**
- A pilot posted website bulletins critical of his employer.
- The pilot controlled access to the site by limiting its use to certain individuals, mostly pilots and other employees of the airline.
- Two pilots included on the list of authorized users gave Hawaiian's vice president permission to login site.



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## SCA (cont.)

- Hawaiian Airlines violated the SCA
- There was no evidence that the authorized employees had ever accessed the site themselves, and thus were not "users" who could authorize Hawaiian Airlines' access



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SCA (cont.)

- **Van Alstyne v. Elec. Scriptorium Ltd.**
  - Employer intentionally and without authorization accessed the employee's personal e-mail account
- **Pietrylo v. Hillstone Restaurant Group**
  - Employer intentionally and without voluntary permission accessed group site critical of company

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Things To Consider When Creating A Social Networking Policy

- Focus on the “do’s” versus the “do not’s”
- Must align with Code of Conduct
- Keep policy up to date

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Things To Consider When Creating A Social Networking Policy (cont.)

- Hours of Work Policy
  - When may nonexempt personnel work?
  - How is time reported?
  - What happens when work not authorized?

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**Things To Consider When Creating A Social Networking Policy (cont.)**

- E-mail Policy
  - Property of the Company
  - No expectation of Privacy – including personal email accounts accessed through company equipment
    - Must monitor and restrict without discrimination
    - Use caution when monitoring private e-mail accounts accessed from work

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**Things To Consider When Creating A Social Networking Policy (cont.)**

- Confidentiality/Nondisclosure Policy
- Anti-Discrimination/ Harassment Policy
- Public Relations Policy

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**Things To Consider When Creating A Social Networking Policy (cont.)**

- Educate employees regarding social media
  - Require use of disclaimers
  - Encourage employees to use their real name and identify themselves
  - Advise employees to tell the truth and not disparage
  - Advise employees not to identify customers, partners or clients without their consent
- Require training before posting on behalf of Company

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