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PERSONNEL TESTING COUNCIL - SOUTHERN CALIFORNIA

Social Networking or Notworking: Do's and Don'ts in Building Relationships in Social Media

2/23/2012

PRESENTED BY:

Pilar Morin

Networking on Not Working Do's and Don'ts In Building on Relationships in Social Media

Personnel Testing Institute - February 23, 2012


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Personnel Testing Council –Southern California

Presented By:
Pilar Morin, Partner, Liebert Cassidy Whitmore



AGENDA

- Overview of Social Networks
- Overview of Legal Framework
 1. Privacy: What rights of privacy exist?
 2. First Amendment Speech: What is protected?
 3. Pre-Employment Background Checks: Can you use social media?
 4. Concerted Activity on the Internet
 5. Regulating Employee Conduct: Is it limited to work hours?
- Case Studies
- Social Networking Guidelines

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OVERVIEW OF SOCIAL MEDIA

- Social Networking
 - Facebook
 - LinkedIn
 - Blogging
 - Twitter – micro-blog
- Video Sharing
 - YouTube
 - Flickr

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TOP 10 SECTORS BY SHARE OF U.S. INTERNET TIME

Rank	SubCategory	Share of Time June 2010	Share of Time June 2009	% Change in Share of Time
1	Social Networks	22%	15%	43%
2	Online Games	10.2%	9.3 %	10%
3	Email	8.3%	11.5%	-28%
4	Portals	4.4%	5.5%	-19%
5	Instant Messaging	4.0%	4.7%	-15%
6	Videos/Movies	3.9%	3.5%	12%
7	Search	3.5%	3.4%	1%
8	Software Manufactures	3.3%	3.3%	-0%
9	Multi-category Enter.	2.8%	3.0%	-7%
10	Classifieds/Auctions	2.7%	2.7%	-2%
	Other	34.3%	67.3%	-8%

Source: The Nielsen Company

WHY ISSUES ARISE IN SOCIAL MEDIA

- Personal life overlaps with professional life
- Misunderstanding the technology
ex: privacy settings, groups, being tagged
- Misunderstanding legal rights and obligations
 - Discipline of off-duty conduct
 - First Amendment Protection

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Why Issues Arise In Social Media

- Harm to Reputation of the Employer
- Inappropriate Communications with Clients/Student/ Employees
- Liability:
 - Harassment/Discrimination/Retaliation; Defamation;
 - Violation of Third Party Privacy (ex: Students)

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Legal Framework:
Sources of the
Right to Privacy

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SOURCES OF THE RIGHT TO PRIVACY

- Common Law
- U.S. & California Constitutions
- U.S. & California Statutes

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SOURCES OF THE RIGHT TO PRIVACY

- United States Constitution
 - No express right to privacy in text of United States Constitution
 - First, Fourth, and Fourteenth Amendments imply a right to privacy

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SOURCES OF THE RIGHT TO PRIVACY

“All people are by nature free and independent and have inalienable rights. Among these are ...*privacy*.” (emphasis added)

Article I, Section 1, of the California Constitution
(Cal. Const. art. I, § 1.)

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STANDARD OF REVIEW

Balancing Test:

Employee's Reasonable
Expectation of Privacy
vs.
Employer's Legitimate
Business Needs

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When Does an Employee Have a Reasonable Expectation of Privacy

- Objective standard
- Recognized by social norms as private
- Realities of the workplace

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Legitimate Business Needs

- Productivity
- Efficiency
- Supervision
- Control
- Prevent improper or illegal use
- Prevent liability

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STORED COMMUNICATIONS ACT ("SCA") 18 U.S.C. § 2701

- Prohibits intentional and unauthorized access of wire or electronic communications while in electronic storage
- Does not apply to:
 - Provider of wire or electronic communications service
 - User of that service

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Case Study

Ocean City life guards created a Facebook group page. Leila, a female supervisor makes several sexist comments men she supervises. Several employees, both males and females, who read her wall make a harassment complaint.

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Case Study con't

May the HR Director use the identity of one of the female employees who is a "Friend" and is authorized to access Leila's Facebook pages, to get access to the subject communications?

No

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Penal Code § 528.5

- "Malicious E-personation"
– Effective January 1, 2011
- Unlawful to impersonate another person through or on an Internet Web site or by other electronic means
- Intent to harm, intimidate, threaten or defraud another person
- Brings law addressing false impersonation up to date with technologies of 21st century

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First Amendment:
What is protected speech?

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WHAT IS FIRST AMENDMENT PROTECTED SPEECH?

First:

Determine whether the public employee's is speaking as a *citizen* on a "*matter of public concern*"? If no, stop here:

- Employee *does not* have a claim under the First Amendment for speech that is not matter of public concern
- Speech pertaining to a private dispute/private matter is not protected

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WHAT IS FIRST AMENDMENT PROTECTED SPEECH?

Second:

Balance the interests of the employee, as a citizen, in commenting upon matters of public concern against the interest the public employer in promoting the efficiency of the public services

- Interference
- Disruption

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GARCETTI v. CEBALLOS

Even if the speech pertains to a matter of public concern, if the employee is speaking in his or her official capacity, the speech is not protected by the First Amendment.

Garcetti v. Ceballos, 547 U.S. 410 (2006)

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Case Study 2

- Leila's derogatory comments and sexist slurs about men are printed out by an employee and attached to a harassment complaint. An independent investigator concludes Leila made several sexist comments.

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Case Study 2 con't

The City seeks to discipline Leila but she argues that the City violated her rights under the Stored Communications Act and the First Amendment.

Is Leila correct?

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**Pre-Employment Background Checks:
Can You Use Social Media?**

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PRE-EMPLOYMENT BACKGROUND CHECKS USING SOCIAL NETWORK INFO

Case Study:
Blue Ocean City's Police Department requires that all applicants provide the City with their social media user names and passwords during job interviews. Nancy Lawless objects to this process and considers suing the City.

Have her rights been violated?

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PRE-EMPLOYMENT BACKGROUND CHECKS

- Prospective employer may legally use this tool because most of the time:
 - Information obtained online is publicly available/not password protected
 - It is posted by the job applicant (ex. MySpace or Facebook)

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BACKGROUND CHECKS

- View only sites that are readily available to the public
- Know the terms of service posted on the sites
- Remember the information may not be true/unverified
 - Parody or bullying/harassment sites

Ex: Fake supervisor page

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BACKGROUND CHECKS

- Never create an alias to gain access to avoid liability
- Never provide false information to gain access to sites
- Never use information for discriminatory purposes in violation of federal, state, or local law
- Remember the information is unverified

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BACKGROUND CHECKS

If your District does online checks:

- Identify which social networking sites will be checked for all applicants (be consistent)
- Only lawful information considered for applicants (nexus to job)
- Have non-decision maker or third party agency conduct search
- If your District uses a third-party (consumer reporting agency) to conduct background checks, the information found on social networking sites may require disclosure and notice

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**Concerted
Union
Activity On
Social Networking Sites**

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Concerted Activity? Case Study 3

- What if Sally, a Community College employee, complains on Facebook and discusses with her colleagues health and safety concerns due to reductions in maintenance and security staff. She further uses profanity to describe the Vice President because he refused to allow her to attend a disciplinary meeting with her union representative.

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Concerted Activity? Case Study 3

The District disciplines Sally. She filed a complaint with the NLRB. Is this protected activity?

Yes

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Concerted Activity via Social Media

- *American Medical Response and Int'l Brotherhood of Teamsters*
 - Private employer discharges employee for complaining on Facebook about supervisor infringing labor rights
 - NLRA, Section 7 – protects employee conduct in “mutual aid or protection”
 - Regardless of whether unionized
 - NLRB issued a complaint
 - Case was widely followed, and subsequently settled

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NLRB complaint re protected activity on Facebook

Settlement:

- Employer agreed to revise overly-broad policy to ensure employees are not restricted from discussing their wages, hours and working conditions with other employees
- Employees are not disciplined for such concerted activity
- Employer will provide union representation and will not deny it or threaten employee with discipline when employee asserts rights to speak to a union representative

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Lesson of the NLRB Facebook complaint

- Your policy, guidelines or practice should not be construed or applied in a manner that interferes with the employees' rights to engage in concerted activity, including the discussion of the terms and conditions of employment.

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Regulating Employee Conduct: Is it Limited to Work Hours?

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LIMITATIONS ON DISCIPLINE FOR OFF DUTY CONDUCT

- Job Nexus
 - Type of Off-Duty Conduct
 - Type of Job Duties
 - Effect on the Employer
- Labor Code sections 96(k) and 98.6 May Provide Administrative Remedy for Adverse Employment Action Based on Lawful Off-Duty Conduct of Public Employees

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**SOCIAL NETWORKING:
Disciplinary Grounds**

Employee conduct in social media may give rise to discipline to the extent it violates District rules and policies (nexus):

- Anti-Harassment Policy
- Anti Workplace Violence Policy
- Electronic Communications Resources Policy
- Collective Bargaining Agreement/MOU
- Job Descriptions
- Drug and Alcohol Policy
- Personnel Rules/ Department Policies
- California Education Code/FERPA

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**Social Networking
Guidelines:
Best Practices**

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SOCIAL NETWORKING GUIDELINES FOR EMPLOYEES

- Employees should not:
 - Access personal social networking pages during work hours
 - Post false or confidential information about the District, employees, or students
 - Not post agency logos on their personal social networking pages
 - Use agency email address to register personal social networking page

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SOCIAL NETWORKING GUIDELINES FOR EMPLOYEES

- Employees should not:
 - Give other's their password
 - Post personal confidential information (may be stolen for identity theft reasons)
 - Invite or accept the invitation of anyone who may not be an appropriate contact
 - Ignore their pages: audit, be proactive, delete content or links others post to your page that you do not approve of; contact service administrator for remedies re harassment, etc.

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SOCIAL NETWORKING GUIDELINES FOR EMPLOYEES

- Employee's speaking *about* the agency online should disclose that they do not *represent* the agency
 - Example: : "I work for the agency, I am not a representative or spokesperson, this is my personal opinion."
- Use dedicated professional account
- Keep profiles private to avoid unwelcome contact from members of the public, co-workers, students, etc.

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SOCIAL NETWORKING GUIDELINES FOR EMPLOYEES

- Employees expose themselves to liability if their conduct violates the law (defamation, harassment, etc.)
- Information posted is permanent and easily disseminated: employees should use good judgment regarding content and communications on personal sites

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BEST PRACTICES

“Never put in electronic form anything that you wouldn't want viewed by a million people, including your colleagues, students, and supervisors—and your mother.”

*Michael Simpson,
National Education Association*

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Thank you.

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