



Social Media: Legal Risk Mitigation

July 21, 2011

Introduction & Agenda

- Social Media Considerations and Risks
- Legal Risks and Concerns
- Mitigating Legal Risks



Social Network -- Growth

- User growth is growing exponentially:

	April 2009	Oct 2010	Feb 2011	July 2011
Facebook	200 million	> 500 million	> 500 million	>750 million
Twitter	14 million	> 100 million	>175 million (95M tweets/day)	>200 million (110 million tweets/day)
Linked In	48 million	> 70 million	>90 million	>100 million
My Space	125 million	>113 million	50 million	??
Google+	N/A	N/A	N/A	10 million in first month

Social Media Considerations and Risks



- Reputational & Financial Risks
- Information Security & Privacy Risks
- Employment Risks
- Legal Risks
 - Liability for social media content
 - Regulatory, privacy and other legal considerations

Legal Risks and Concerns

Legal Risks and Concerns

- Release of Sensitive/Protected Information
- Defamation
- Discovery and Preservation Issues
- Intellectual Property

Release of Sensitive/Protected Information

- Data security: An employee could unwittingly click on links to spam and phishing schemes or download malicious code onto the company network.
 - Keylogging software
- Re-posting of material: E-mail messages, firmwide memos, or employee rants may end up before a wider audience, with little recourse from the original author.
 - Twitter tweets, even if original followers are restricted can be retweeted
 - See e.g., *Moreno v. Hanford Sentinel, Inc.*, 172 Cal.App.4th 1125 (2009) (author who posted an article on social network site cannot state a cause of action for invasion of privacy against the person who submitted that article to a newspaper for republication)
- Hackers: Need to maintain security to protect information of your customers/clients.

Defamation

- A false statement that tends to hold a person up to hatred, contempt, or ridicule or causes him to be shunned or avoided by others.
- *Re-publisher just as liable as the original speaker*
- Section 230 of the **Communications Decency Act** (47 U.S.C. §230): Total civil immunity to Internet Service Providers and others who provide interactive computer services
 - AOL was immune from claims that it unreasonably delayed in removing defamatory messages posted by third party, failed to post retractions, and failed to screen for similar postings
 - MySpace was immune from liability for sexual predators communicating with minors on its site
 - *Union immune from defamatory postings by members on its site*

Discovery and Preservation Issues

- Discovery, preservation issues:
 - Ensure that data can be preserved, retrieved and produced if required.
- Just because an attorney is cc'd, doesn't make it privileged.
- If a privilege exists, it can be lost: Once communications are shared with others, any privilege of confidentiality will be lost.

Intellectual Property

- **Harm to Reputation:** A company could suffer harm to its reputation from the creation of false profiles.
- **“Name squatting” and “brandjacking”** – when a third- party uses a company name in social media without authorization.
- **Copyright:**
 - Get a license: Copyright in original user generated content (UGC) belongs to the user, unless agreed otherwise. If you re-post, make sure what you’re reposting does not contain copyright violations.
 - Fair use is an affirmative defense, but can be very tricky



Legal Risks and Concerns

- Federal Regulations

- HIPAA : Healthcare Insurance Portability and Accountability Act of 1996.
 - Nurses in Wisconsin terminated for posting patient X-rays on Facebook
 - University of Mexico Hospital workers terminated for taking pictures of patient injuries with cell phone cameras and posting them on MySpace
- HITECH Act – requires businesses or third parties who receive HIPAA information to maintain confidentiality and must notify people if their confidential information is released.

Legal Risks and Concerns

- Federal Regulations (continued)
 - FTC Guidelines (16 CFR Part 255)
 - Testimonials/Endorsements guidelines implemented in 2009.
 - Administrative interpretations of laws enforced by the Federal Trade Commission with respect to the application of Section 5 of the FTC Act (15 U.S.C. 45).
 - Voluntary, but practices inconsistent with these guidelines may result in corrective action by the Commission.
 - Must disclose connections between advertisers and their endorsers that might materially affect the weight or credibility of the endorsement
 - Free or discounted product is considered compensation

Legal Risks and Concerns

- Federal Regulations (continued)
 - FTC Staff Report: Self-Regulatory Principles For Online Behavioral Advertising (Feb. 2009)
 - **Transparency:** The Report calls for companies to obtain affirmative express consent from consumers for material changes in use of PII
 - **Consumer Control:** clear statement that (1) data about consumers' activities online is being collected for behavioral advertising and (2) consumers can choose whether or not to have their information collected for such purpose.

Legal Risks and Concerns

- Federal Regulations (continued)
 - SEC Concerns
 - **Violation of securities laws:** Loose communication about public companies might violate securities laws that regulate material misstatements, public disclosures, and solicitations made by or on behalf of the company.
 - Example: In 2007, the SEC opened an informal inquiry into Whole Foods CEO John Mackey's "sock puppet" activities, that is, his anonymous posts and commentary to online financial message boards praising Whole Foods and offering other opinions about its competitors. Mackey was eventually cleared, but not before he and the company were dragged through a media gauntlet.

Legal Risks and Concerns

- Employment law issues
 - Use of social media in HR
 - Recruiting & screening job applicants
 - Revoking offers
 - Terminating employees
 - Pitfalls of Pre-employment Online Screening
 - Discrimination – Failure to Hire
 - Case Study: *Gaskell v. University of Kentucky*, E.D. Kentucky, Nov. 23, 2010

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Signs of the social networking times.

Legal Risks and Concerns

- Labor law/National Labor Relations Act
 - Section 7 of NLRA
 - Provides all nonsupervisory employees the right to engage in protected and “concerted” activity.
 - Includes discussions of “terms and conditions of employment”.
 - Affords protection to non-unionized employees as well as employees represented by union.
 - Employer violates section 7 if employees would reasonably interpret work rule to limit concerted activity.
 - Violation occurs even if employer never enforce rule in a way that infringes on Section 7 rights.
 - Work rules relating to social media posts are unlawful if they can be reasonably interpreted as limiting employees’ right to discuss terms and conditions of employment.
 - Examples of overly restrictive policies include rules prohibiting posting or discussion of:
 - Wages or benefits, “gossip”, derogatory statements about employer or managers, and “company business”
 - Case Study: *American Medical Response of Connecticut, Inc.* (Complaint and Notice of Hearing; October 27, 2010)
 - First NLRB case addressing protected status of social media posting.
 - Settled, so no definitive pronouncements from the National Labor Relations Board.

Legal Risks and Concerns

- Case Study: *Knauz BMW* (Complaint and Notice of Hearing, May 20, 2011)
 - The National Labor Relations Board issued a complaint against Knauz BMW, a Chicago area BMW dealership, alleging unlawful termination of an employee for posting photos and comments on Facebook that were critical of the dealership. The employee, a car salesman, and coworkers were unhappy with the quality of food and beverages at a dealership event promoting a new BMW model. Salesmen complained that their sales commissions could suffer as a result. Following the event, the salesman posted photos and commentary on his Facebook page critical that only hot dogs and bottled water were being offered to customers. Other employees had access to the Facebook page.
 - The complaint alleges that the employee's Facebook posting was protected concerted activity within the meaning of Section 7 of the National Labor Relations Act, because it involved a discussion among employees about their terms and conditions of employment, and did not lose protection based on the nature of the comments.
 - Unless it is settled, the case will be heard by an administrative law judge on July 21, 2011, in the Chicago Regional office of the NLRB.

Legal Risks and Concerns

- Case Study: *Hispanics United of Buffalo Inc.* (Complaint and Notice of Hearing, May 19, 2011)
 - The complaint alleges that the employer, a not for profit, fired five employees because they complained about working conditions on Facebook in violation of the NLRA.
 - A HUB employee on Facebook named a co-worker who claimed that HUB employees failed to adequately assist its clients. This prompted Facebook rejoinders from other HUB employees who, in defending their job performances, criticized HUB's working conditions, including workloads and staffing issues. HUB discharged five employee participants in this online forum on the basis that their comments illegally harassed the co-worker who made the "inadequacy" claim.
 - The NLRB asserts that the Facebook discussions were concerted activities under NLRA section 7 because they involved terms and conditions of employment such as job performances, workloads, and staffing levels.

Real Life Example No. 1

Taken directly from employee's personal Facebook page:

Employers

MGH

RN, BSN · Jan 2004 to present

I'm a nurse, I wipe alot of butt. I do love better living through sedation- my patient might blink funny and I get to knock em out.. I love my job.

Real Life Example No. 2

Taken directly from employee's personal Facebook page:

Tim Kurash

Hey! If any of you are looking for any last-minute gift ideas for me, I have one. I'd like Eddie Lampert, my boss, right here tonight. I want him brought from his happy holiday slumber over there on Beverly Road with all the other rich people and I want him brought right here, with a big ribbon on his head, and I want to look him straight in the eye and I want to tell him what a cheap, lying, no-good, rotten, four-flushing, low-life, snake-licking, dirt-eating, inbred, overstuffed, ignorant, blood-sucking, dog-kissing, brainless, dickless, hopeless, heartless, fat-ass, bug-eyed, stiff-legged, spotty-lipped, worm-headed sack of monkey shit he is! Hallelujah! Holy shit! Where's the Tylenol?

Mitigating Legal Risks

Mitigating Legal Risks

- Minimizing the Risks because of Employees' Use of Social Media
 - Implement and consistently follow policies and procedures regarding employees' use of online social networking, blogging, and other social media sites (e.g. YouTube) at work and outside of work.
 - Develop a (lawful and reasonable) method to monitor compliance with the policies and procedures.
 - Conduct periodic employee training on the organization's social media policies and procedures.

Basics of a Social Media Policy

- Define what constitutes “social media” and “blogging”
 - “Blogging” should be defined to mean all web postings, such as those in chat rooms, on bulletin boards, and social networking sites.
- Don’t prohibit all postings relating to the employer because that would violate the NLRA.
- On social media sites that are not employer-sponsored, employees who mention their employer’s name should be required to include a disclaimer that the statements posted are those of the individual and do not necessarily represent the opinion of the employer and have not been approved or otherwise reviewed by the employer

Basics of a Social Media Policy (continued)

- Prohibit the disclosure of the employer's confidential information (which should be defined elsewhere).
- Prohibit disparaging remarks about the employer's products or services.
- Prohibit disparaging and defamatory comments about competitors and other third-parties (especially if the individual identifies his or her employer).
- Bar postings that threaten, harass or intimidate coworkers.
- Do not allow postings that endorse the employer's products or services.

Basics of a Social Media Policy (continued)

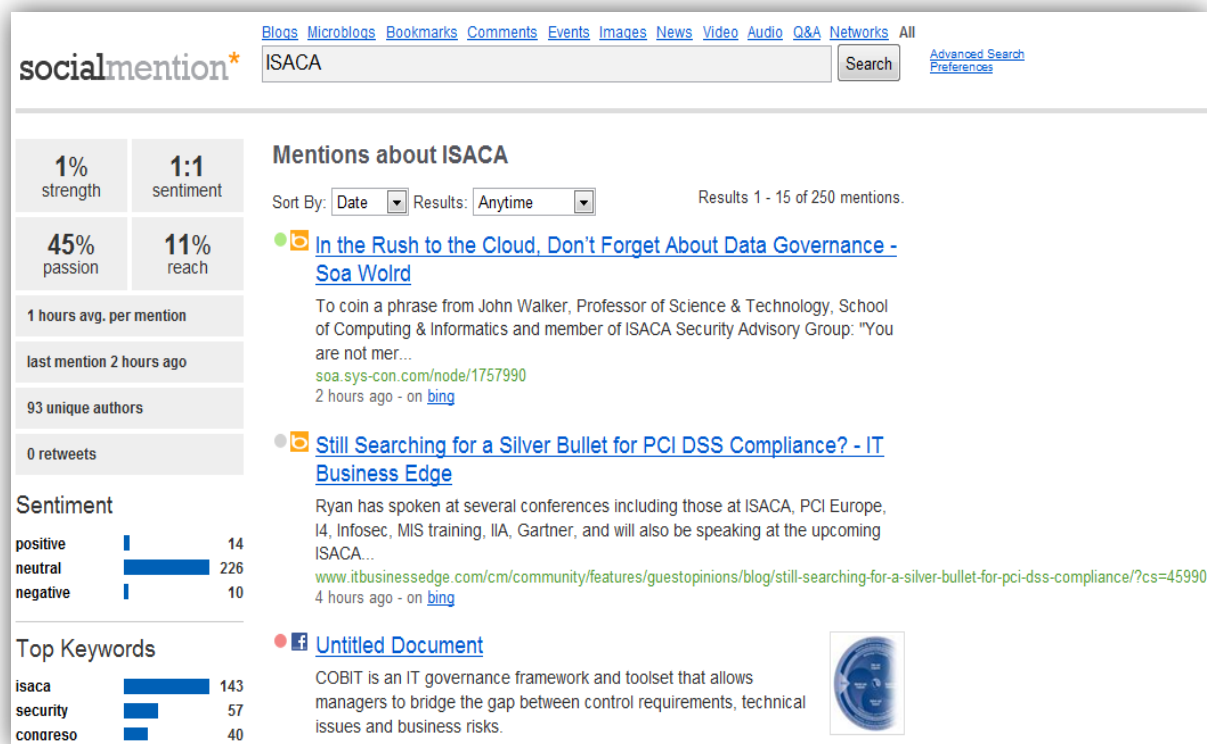
- Prohibit employees from using the employer's trademark or logo without consent of a designated company official.
- Do not allow employees to use the employer's computer systems or network access for posting to social media sites that are not sponsored by the employer.
- Bar postings that violate patient confidentiality or privacy rights under state or federal law (e.g., HIPAA).
- Where employees are permitted to post on behalf of or for the employer, include policies limiting when employees may make those posts so as to control overtime.

Basics of a Social Media Policy (continued)

- Specifically define what topics are “off-limits.”
- Notify employees that the policy applies at all times.
- Advise employees to notify their supervisor or human resources about possible violations of the policy or other company policies, such as anti-harassment policies.
- Notify employees that the company monitors Internet usage on company-provided equipment and system for compliance with the policy.
 - This includes an employee’s personal email account that is accessed using the company’s computer system.

Monitoring

- Set up “Google alert” for company name and other key words.
- Conduct key word search through company server.
- Use of Internet search tools that provide “real-time and interactive social media monitoring and analytics”
 - Examples: sysomos, buzzstream, biz360, customscoop, echosonar, sentimentmetrics and Social Mention (not endorsements)



Training

- Communicate your Corporate Social Media strategy and policies
- Talk about the risks and rewards of Social Media with your employees
- Communicate when policies are updated, when practices change significantly, and in the event of an incident
 - This should occur at least annually
- Conduct training at least annually on how employees can/should be using social media



Resources

- 164 Examples of social media policies:
 - <http://socialmediagovernance.com/policies.php>
- The Huffington Post, Fired Over Facebook
 - http://www.huffingtonpost.com/2010/07/26/fired-over-facebook-posts_n_659170.html#s115707
- ISACA, Top 5 Social Media Risks for Businesses
 - <http://www.isaca.org/About-ISACA/Press-room/News-Releases/2010/Pages/Top-Five-Social-Media-Risks-for-Business-New-ISACA-White-Paper.aspx>
- Cost and Content of Social Media Policies Vary Widely by Industry
 - <http://searchcio.techtarget.com/news/2240037303/Cost-and-content-of-social-media-policies-vary-widely-by-industry>
- Gartner 2010 Magic Quadrant for Social CRM
 - http://www.gartner.com/DisplayDocument?doc_cd=201531
 - <http://www.jivesoftware.com/resources/analyst-coverage>
- Half of social networkers post risky information, study finds
 - http://www.computerworld.com/s/article/9176265/Half_of_social_networkers_post_risky_information_study_finds

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