

Social Networking: Your Business Clients and Their Employees Are Doing It...Are You Advising Your Clients on How to Manage the Legal Risks?

By P. Haans Mulder and Nicholas R. Dekker

Introduction

Social networking sites such as Facebook, LinkedIn, and Twitter have experienced phenomenal growth in recent years. Between 2005 and 2008, the number of adult Internet users who have a social networking profile quadrupled from 8 percent to 35 percent.¹ Since 2009, that number has increased to approximately 50 percent of Americans.² The frequency of use has also grown dramatically. The minutes spent on social networking sites has increased by 210 percent over the last year, and the average time spent increased 143 percent during that same time period.³

Of these sites, Facebook, LinkedIn, and Twitter have seen significant growth.⁴ As of February 9, 2010, Facebook had 400 million registered users.⁵ The average time spent by U.S. users on Facebook increased by 368 percent between December of 2008 and one year later.⁶ Also, as of February 9, 2010, the business and professional social networking site, LinkedIn, had 60 million users.⁷ One of the more recent, but fastest growing social networking sites, Twitter, had 6 million unique monthly visitors and 55 million monthly visits as of that same date earlier this year.⁸ Between 2008 and 2009, the number of users on Twitter increased 579 percent from 2.7 million to 18.1 million.⁹

In addition to the rapid increase in individuals' use of social networking sites, businesses have also become early adopters. The percentage of small businesses that use social networking sites doubled from 12 percent to 24 percent from 2008 to 2009.¹⁰ According to a recent survey, 45 percent of small companies with fewer than 100 employees now use Facebook and Twitter to promote their businesses.¹¹ Another study found that about 9 percent mid-market companies use Twitter to market their business and that 32 percent

indicate they plan to include social media in their marketing mix in the next 12 months by including a page on a site such as Facebook, LinkedIn, or MySpace.¹²

Besides marketing to customers, businesses have been using social networking sites for other purposes. Eighty percent of companies were planning to use social network sites to find or attract candidates.¹³ In addition, 45 percent of employers use social networking sites to screen job candidates.¹⁴

What are Social Networking Web Sites?

The term social networking invariably evokes names like Facebook, Twitter, and LinkedIn.¹⁵ In legal scholarship, social networking sites have been defined as web-based systems that allow persons to perform three functions: (1) build a public or semi-public profile within a system, (2) construct a list of other users with whom they share a connection, and (3) view their list of connections and others that are within the system.¹⁶ These sites allow for the development of three different types of social interactions.¹⁷ The first is the development of identity through profiles. A profile is a description of the user and their characteristics, and the characteristics depend on the nature of the Web sites. For example, LinkedIn is oriented to business use, so the characteristics include such items as current employment, past employment history, and recommendations. Sites that are focused on social use (such as Facebook) include information like gender, birthday, hometowns, and religious as well as political views. The second criterion of social networking sites is the development of relationships among people using these sites (which can be called connections, friends, followers, etc.). The third and last attribute of these sites is the empha-

sis of community among the people who are using the sites. These sites allow users to post a variety of information, which can include photographs, journal entries, personal interests, and other personal information.¹⁸

Why is Social Networking Important to Businesses and How are the Early Adopters Using It?

These sites have allowed businesses to market and communicate with their customers in a variety of innovative ways.¹⁹ For example, a Los Angeles-based manufacturer and retailer of clothing and gear for skiers and snowboarders developed a Facebook fan page and its e-commerce went from \$0 to \$25,000 in three months.²⁰ The owner of a Milwaukee restaurant indicated that its sales were up 25 percent after his first year of using social networking sites.²¹ H&R Block has created a Facebook fan page to aggregate its social media activities and in doing so engage its customers and offer tax advice as well as resources.²² The online shoe retailer, Zappos, uses Twitter for employees to communicate with its customers about their passion for footwear.²³

In addition to the marketing and communications, a number of businesses use social networking sites for employment or human relations functions. Thirty-five percent of employers decided not to offer a job based on information that was included on a social networking site.²⁴ More than 50 percent of employers attributed the decision not to extend a job offer based on provocative photos, while 44 percent identified candidates' references to the use of drugs and alcohol.²⁵

A more notorious example of using social networking sites for human relations functions includes the City of Bozeman, Montana. It attempted to require all of its job applicants to disclose their user name and password so that the human relations department could access their social networking sites for background checks.²⁶ Due to the national media attention, the City of Bozeman discarded this requirement.

Employers are also monitoring employees' use of social networking sites.²⁷ This is understandable considering a study found that 74 percent of employed Americans surveyed believe it is easy to damage a company's reputation via social networking sites.²⁸ Some of the results of monitoring and discovering objectionable activity have become publicly known. For example, in May 2007,

the Olive Garden discharged a supervisor after she posted photos on MySpace of herself, her under-age daughter, and other restaurant employees hoisting empty beer bottles.²⁹ Virgin Atlantic Airlines also discharged 17 flight attendants as a result of their Facebook posting in which they criticized the airline's safety standards and insulted airline employees.³⁰ The Philadelphia Eagles fired an employee when he posted on Facebook that his employer was "retarded" for allowing a rival franchise to acquire one of its star players.³¹

What Legal Issues May Arise in the Workplace with the Use of Social Networking Sites?

There are no federal or state laws that prohibit businesses and employers from using social networking sites for various human relations functions regarding employees and job applicants. Further, employment law in Michigan is premised on an employees' "at will status."³² In other words, the termination of an employee could be any reason or no reason at all, and even an arbitrary or capricious discharge is not actionable.³³ Despite the general freedom to contract in the employment law context and the lack of specific regulation of employer's use of social networking sites, there are a number of statutes or common law theories that pose legal risks for employer's or their employee's use of social networking sites.

The first set of statutes relates to employment discrimination.³⁴ More notably at the federal level, this includes Title VII and the Americans with Disabilities Act, which protect against discrimination related to various "status" categories. This could also implicate Michigan's equivalent state law, the Elliot-Larsen Civil Rights Act.³⁵ Information that relates to these protected class categories (such as race, gender, religion, etc.) are found on many social networking sites and may easily become known to employers.³⁶ Using this information to make employment decisions (whether that is hiring, firing, promoting, etc.) could result in liability under these statutes. Further, failing to discipline other employees could result in a disparate treatment claim. For example, Delta Airlines dismissed a female flight attendant after discovering "inappropriate" photographs in her Delta uniform that were posted on a blog. The flight attendant sued Delta alleging among other claims sex discrimination because it purportedly failed to discipline male

There are no federal or state laws that prohibit businesses and employers from using social networking sites for various human relations functions regarding employees and job applicants.

employees who maintained blogs containing similar content.³⁷ These issues could also arise on a retaliatory basis when an employee has complained about the workplace.

Another category of liability is for protection that extends to non-work related conduct. Certain states such as New York have statutes that prohibit discrimination based on legal recreational activities. Michigan does not have this statutory protection. For this reason, companies that are only operating in Michigan should have much more discretion under common law to regulate the lifestyles and off-duty conduct of employees.³⁸ As an example, a Michigan court held that even if an employer had minimal or no factual basis for its decision to exclude employees from employment based on their associations, it would not be a public policy exception to the at-will employment rule.³⁹ Similarly, the Sixth Circuit Court applying Michigan law has upheld a number of decisions that at-will private sector employers can dismiss an employee for certain types of relationships and conduct that is not approved by the employer.⁴⁰

A third area of concern relates to potential violations of the National Labor Relations Act. If an employer takes any action to restrain an employee's effort to organize other employees related to a labor dispute, this could constitute an unfair labor practice. Due to the low cost and effectiveness of social networking sites, it is likely a medium that unions either currently or will use to organize. Employers should be mindful of not interfering in this process.

One of the most significant areas of concern is the right of privacy.⁴¹ There are four commonly recognized varieties of invasion of privacy in Michigan. The two that are pertinent to employment law and these issues are: (1) intrusion on the employee's seclusion or solitude into its private affairs, and (2) public disclosure of embarrassing private facts about the employee.⁴² This was also one of the claims that was asserted and adjudicated in federal district court in New Jersey.⁴³ The plaintiffs were employees of a restaurant group. They created a group on MySpace and posted comments "venting" about their employer. The group was entirely private and "could only be joined by invitation." A manager of one of the restaurant group's locations asked one of the plaintiffs to provide a password to access the site. The plaintiff was never explicitly threatened with adverse

employment action, but she stated that she gave her password to management because she believed she would have "gotten in some sort of trouble" if she did not. The group of employees filed suit alleging, among other claims, invasion of privacy. In analyzing the claim, the court stated that privacy interests must be balanced against an employer's interest in managing the business. In applying these principles, the court indicated the plaintiffs had created an invitation only Internet discussion space and that they had an expectation that only invited users would be entitled to read the discussion. On this basis, the court held that there was an issue of material fact as to whether one of the employees had voluntarily provided authorization to access the Web site. If this case provides any precedent for courts in other jurisdictions, employers could be exposed to liability if they take strong-arm action in accessing employees' profiles on social networking sites.

The federal Computer Fraud and Abuse Act may also be at issue for employers.⁴⁴ This statute makes it illegal to "intentionally access without authorization a facility through which an electronic communication service is provided" or intentionally exceed authorized use of information.⁴⁵ This type of activity can result in both criminal and civil liability, as seen in *Pietrylo*.⁴⁶ In *Pietrylo*, the court focused on what is "conduct authorized" under the statute. Based on a dispute in facts, the court concluded that summary judgment should be denied and the lower court needed to determine whether authorization was in fact freely given.

The last area that this could arise is defamation. Although no cases currently discuss this theory, it could conceivably arise in a context in which information that is ultimately incorrect is learned on a social networking site and then it becomes disseminated to other employees and even outside the organization. To the extent this fits within the elements of defamation, it could also expose an employer to liability.

All of these issues underscore the liability exposure of an employer's use of social networking sites and highlight the importance of having a clear and consistent policy regarding its use of social networking sites.

There are a number of issues that an employer can proactively address in their employee handbook regarding social media policy.

What Considerations Should Employers Address in Their Employee Handbooks?

There are a number of issues that an employer can proactively address in their employee handbook regarding social media policy.⁴⁷ The first is to require employees to be clear that their opinions are not the views of the company and to make this evident within the posting of information. More generally, a policy should require that employees exercise good judgment in communications that relate directly or indirectly to the company. To eliminate any invasion of privacy claim, the policy should be clear that employees do not have any expectation of privacy in their use of the Internet. Employees should also be notified that conduct in violation of the policy could result in discipline including, termination based on conduct that is defamatory, obscene, libelous, or disloyal to the company. Further, the policy should also make clear that the sharing of confidential, proprietary, or private information is prohibited and that any trademarks or service marks cannot be used without permission of the company. In addition, there should be an outright prohibition on selling or promoting of product or services that compete with the company. Finally, not to stifle the use of social networking sites for valid purposes, employees should be encouraged to consult with the human relations department to deal with any issues proactively.

Conclusion

It is undeniable that the use of social networking sites has exploded in recent years. Businesses are adopting and seeing the value in using these sites. This use has been extended to employment issues. While this information can be very valuable to employers (in terms of making employment decisions), there are a number of issues that employers should be advised on to minimize the likelihood of a claim by an applicant who has not been hired or an employee who has been disciplined or terminated based on information that was made available through social networking sites.

NOTES

1. *Pew Internet & American Life Project, Adults and Social Network Websites*, <http://www.pewinternet.org/>

Reports/2009/Adults-and-Social-Network-Websites.aspx (January 14, 2009).

2. *Study Says Almost Half of Americans Use Social Networks*, <http://hothardware.com/News/Study-Says-Almost-Half-Of-Americans-Use-Social-Networks/> (April 9, 2010). See also *Social Media Becomes Part of Mainstream Media Behavior*, <http://rismedia.com/2010-04-11/social-media-becomes-part-of-mainstream-media-behavior/> (April 11, 2010).

3. *Led by Facebook, Twitter, Global Time Spent on Social Media Sites up 82% Year over Year*, <http://blog.nielsen.com/nielsenwire/global/led-by-facebook-twitter-global-time-spent-on-social-media-sites-up-82-year-over-year/> (January 22, 2010).

4. There are many more social networking sites. Wikipedia maintains a list of the more notable sites at http://en.wikipedia.org/wiki/List_of_social_networking_websites

5. *How Over 400 Million People Use Facebook*, <http://www.webpronews.com/topnews/2010/02/09/how-over-400-million-people-use-facebook> (February 9, 2010).

6. *Led by Facebook, Twitter, Global Time Spent on Social Media Sites up 82% Year over Year*, <http://blog.nielsen.com/nielsenwire/global/led-by-facebook-twitter-global-time-spent-on-social-media-sites-up-82-year-over-year/> (January 22, 2010).

7. <http://en.wikipedia.org/wiki/LinkedIn>.

8. <http://en.wikipedia.org/wiki/Twitter>.

9. Report: Time Spent On Social Media Sites Increased By 82% Year Over Year, <http://www.social-times.com/2010/02/report-time-spent-on-social-media-sites-increased-by-82-year-over-year/> (February 23, 2010).

10. *More Small Businesses Using Social Media to Attract New Customers*, <http://www.inc.com/news/articles/2010/03/small-business-use-of-social-media-doubles.html#> (March 19, 2010).

11. *Small Businesses Use Facebook, Twitter for Promotion*, http://www.eweek.com/prestitial.php?type=rest&url=http%3A%2F%2Fwww.eweek.com%2F%2Fa%2FWeb-Services-Web-20-and-SOA%2Fsmall-Businesses-Use-Facebook-Twitter-For-Promotion-634033%2F&ref=http%3A%2F%2Fwww.google.com%2Fsearch%3Fq%3Dsmall%2Bbusinesses%2Buse%2Bfacebook%252C%2Btwitter%2Bfor%2Bpromotion%2B-%2Bweb%2Bservices%2Bweb%2B20%2Bband%2Bsoa%2Bfrom%2Beweek%26rls%3Dcom.microsoft%3Aen-us%3AIE-SearchBox%26ie%3DUTF-8%26oe%3DUTF-8%26sourceid%3Die7%26rlz%3D117GGLL_en (October 20, 2009).

12. *Businesses Increasingly Using Social Networking, Study Finds*, <http://www.eweek.com/c/a/Midmarket/Businesses-Increasingly-Using-Social-Networking-Study-Finds-285771/> (October 22, 2009).

13. Survey shows influx of companies using social networks for recruiting, <http://blogs.zdnet.com/feeds/?p=1197>.

14. *Nearly Half of Employers Use Social Networking Sites to Screen Job Candidates*, <http://thehiringsite.careerbuilder.com/2009/08/20/nearly-half-of-employers-use-social-networking-sites-to-screen-job-candidates/> (August 20, 2009).

15. An article in the *Journal of Computer-Mediated Communication* includes a very insightful history of the sites. Boyd, D.M. & Ellison, N.D., *Social Network Sites: Definition, History, and Scholarship Journal of Computer-Mediated Communication*, 13 CU, article II (2007). Id.

16. See *Id.* Another description of social networking site is available at http://en.wikipedia.org/wiki/social_network_service.

17. Grimmelmann, James, *Saving Facebook*, 94 Iowa L. Rev 1137 (2009).

[N]ot to stifle the use of social networking sites for valid purposes, employees should be encouraged to consult with the human relations department to deal with any issues proactively.

18. Burnside, Ian, *Six Clicks of Separation: The Legal Ramifications of Employers Using Social Networking Sites to Research Applicant*, 10 Vand J Ent & Tech L 445 (2008).

19. 35+ Examples of Corporate Social Media and Action, <http://mashable.com/2008/07/23/corporate-social-media/>. See also How Small Businesses Are Using Social Media for Real Results, <http://mashable.com/2010/03/22/>.

20. *How to Use Social Networking Sites to Drive Business*, <http://www.inc.com/guides/using-social-networking-sites.html> (January 25, 2010).

21. *How Small Businesses Are Using Social Media for Real Results*, <http://mashable.com/2010/03/22/small-business-social-media-results/> (March 22, 2010).

22. See *Id.*

23. See *Id.*

24. Sharon Nelson, John Simek & Jason Foltin, *The Legal Implications of Social Networking*, 22 Regent U L Rev 1 (2009-10).

25. See *Id.*

26. Klein, Jeffrey S. and Pappas, Nicholas J., *Legal Issues Arising Out of Employees' Use of Social Network Web Sites*, 10/5/2009 NYLJ 3 (2009).

27. In fact, a company recently released a product that automates the monitoring of employees' use of social networking sites. Service monitors workers' social network use, <http://www.networkworld.com/news/2010/032610-service-monitors-workers-social-network.html> (March 26, 2010).

28. *2009 Deloitte LLP Ethics & Workplace Survey*. Social networking and reputational risk in the workplace, http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2009_ethics_workplace_survey_220509.pdf.

29. Don Aucoin, *MySpace Versus Workplace*, Boston Globe, May 29, 2007, at D1.

30. *Crew Sacked Over Facebook Post*, BBC News, http://news.bbc.co.uk/2/hi/uk_news/7703129.stm (October 31, 2008).

31. *Eagles Employee Fired For Facebook Post*, New York Times, <http://fifth-down.blogs.nytimes.com/2009/03-10-eagles-employee-fired-for-facebook-post> (March 10, 2009).

32. It is well established that employment contracts for an indefinite duration are presumptively terminable at the will of either party. *Lytle v Malady*, 458 Mich 153, 579 NW2d 906 (1998).

33. *Lynas v Maxwell Farms*, 279 Mich 684, 273 NW 315 (1937); *Bracco v Michigan Tech Univ*, 231 Mich App 578, 588 NW2d 467 (1998); *Schipani v Ford Motor Co*, 102 Mich App 606, 302 NW2d 307 (1981).

34. This could include: Title VII of the Civil Rights Act of 1964, 42 USC 2000e et seq.; the Elliot-Larsen Civil Rights Act, MCL 37.2101 et seq.; the Age Discrimination in Employment Act of 1967, 29 USC 621 et seq.; the Pregnancy Discrimination Act, 42 USC 2000e(k); and the Civil Rights Act of 1991, 42 USC 1981.

35. MCL 37.2101 et seq.

36. 42 USC 2000e et seq.

37. *Simonetti v Delta Airline, Inc*, Case No. 1:05-CV-2321, Complaint filed (ND Ga September 7, 2005); *Legal Issues Arising Out of Employees' Use of Social Network Websites* (2009).

38. *Employment Law in Michigan An Employer's Guide*, ICLE (2005).

39. *Prysak v RL Polk Co*, 193 Mich App 1, 483 NW2d 629 (1992).

40. *Flaskamp v Dearborn Pub Schs*, 385 F3d 935 (6th Cir 2004) (teacher denied tenure base on out-of-classroom conduct with former student; *Marcum v McWhorter*, 308 F3d 635 (6th Cir 2002). (dismissal of

public sheriff because his relationship and cohabitation with a married woman did not infringe on his right of association and is guaranteed by the First and Fourteen Amendments); *Beecham v Henderson County*, 422 F3d 372, 378 (6th Cir 2005) (deputy county clerk was property terminated since court officials could decide if it was "unacceptably disruptive to the workplace for woman employee in an office of one of the county's courts to be openly and deeply involved with a romantic relationship with man still married to a woman employed in the other county court down the all).

41. On June 17, 2010, the U.S. Supreme Court rejected a police officer's claim that the city audit of his personal text messages was an illegal search under the Fourth Amendment. *City of Ontario v Quon*, ___ US ___, 130 S Ct 2619 (2010). While certain aspects of the legal analysis may apply, it is difficult to ascertain what significance this decision will have to state common law invasion of privacy cases because it only addressed a violation of the Fourth Amendment.

42. *Lansing Ass'n of Sch Adm'rs v Lansing Sch Dist*, 216 Mich App 79, 549 NW2d 15 (1996), *affirmed in part and reversed in part on other grounds Bradley v Saranac Bd of Educ*, 455 Mich 285, 565 NW2d 650 (1997).

43. *Pietrylo v Hillstone Rest Group*, No 06-5754 (FSH), 2009 US Dist LEXIS 88702 (Sept 25, 2009).

44. 18 USC 2701 et seq.

45. 18 USC 2701.

46. *Pietrylo v Hillstone Rest Group*, No 06-5754 (FSH), 2009 US Dist LEXIS 88702 (Sept 25, 2009).

47. As mentioned previously, In addition to the legal risks that have been addressed, it is important to note that a study has shown that there is significant reputational risk with employees' use of social networking sites. *2009 Deloitte LLP Ethics & Workplace Survey*, Social networking and reputational risk in the workplace, http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_2009_ethics_workplace_survey_220509.pdf.



P. Haans Mulder is a shareholder with Cunningham Dalman PC in Holland, Michigan. His practice areas include business law and estate planning.



Nicholas R. Dekker is an associate with Cunningham Dalman PC in Holland, Michigan. His practice areas include business and corporate law, construction law, environmental law, probate law, real estate law, and wills and trusts.