



# VIEW*S* & VISIONS

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## Navigating the Shark-Infested Waters of Social Media

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Mr. Peterson counsels and advises clients in wage and hour matters, workplace harassment investigations, development of handbooks and policy manuals, hiring and discharge of employees, drafting and litigation of employment contracts including restrictive covenants, wrongful discharge claims, worker's compensation matters, compliance with state and federal employment laws, and unemployment benefits claims.

A graduate of West Virginia University, he received his bachelor of arts degree, *summa cum laude*, in 1995, and was inducted into Phi Beta Kappa. He received his law degree in 1998 from the West Virginia University College of Law. While in law school, he was editor-in-chief of the *West Virginia Journal of Law & Technology* and an associate editor of the *West Virginia Law Review*.

The Internet has evolved. It's outgrown its static, brochure-like format, and matured into a ubiquitous, informal avenue of two-way communication. In 2002, the average American spent one hour per day online during non-working hours. By 2012, that number nearly quadrupled to 3.8 hours per day. The rise in popularity of smart phones, tablets and social networks like Facebook and Twitter has greatly contributed to the increase. A January 2013 study showed the average online American spends two hours per day on social networks using their computers and mobile devices.

The wave of social media use has flooded the workplace, bringing opportunities and risks. Tech-savvy businesses embrace social media to promote their brands and connect with customers. Other businesses view social media as just another drain on productivity. Whether your business is embracing social media or simply trying to regulate it, it's important to know the dangers lurking beneath the surface of the wave.

### Scoping Out Your Applicants

Social media sites reveal much more about job applicants than their resumes and interviews. More than one-fourth of Facebook users share all, or almost all, of their wall posts beyond their

circle of friends. The default sharing option for new Facebook users is set to public, meaning anyone can see posts, even if they don't have a Facebook account. Employers can find gigabytes of publicly available, and largely unfiltered, information about applicants if they choose to search for it. A Facebook page may quickly reveal an applicant's communication skills, work ethic, illegal drug use, and general attitude, all of which an employer may lawfully consider in making a hiring decision.

But wait! Social media may also reveal an applicant's race, age, disability, religion, familial status, pregnancy, and sexual orientation. If the applicant is rejected, an employer can face liability under federal, state and local discrimination laws for using any information it gleans from social media sites about these protected characteristics.

To guard against liability, employers who want to use social media screening have several options. The most conservative approach is to obtain consent from the applicant, and make a job offer contingent upon a satisfactory background check with a social media component. Use of third-parties to perform social media background checks will require compliance with the federal Fair Credit Reporting Act. To avoid the FCRA, another option is to designate an in-house employee, unconnected with the hiring decision, to review publicly-available social media posts and produce a report for the decision makers that references only lawful, job-related information (such as communication skills, general attitude, *etc.*) The in-house screener must be well trained and given strict protocols to ensure consistency.

### Preventing Employees from Sinking Your Business

Current employees can do substantial damage with social media. The most common negative





impact of social media use is the countless hours of lost productivity. In addition, employees can use social media to harass co-workers, reveal an employer's trade secrets, offend customers and clients, violate customer privacy, and generally bad-mouth the employer. The natural reaction of employers is to enact broad policies that ban these types of behaviors.

Not so fast! In a series of rulings and advisory memos, the National Labor Relations Board has found that scores of social media policies violate the National Labor Relations Act by infringing on employees' rights to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. The NLRA protects both union and non-union employees who post about low wages, long hours, or proposed changes in working conditions, as they affect all or a group of employees.

A well-drafted social media policy can protect an employer from many social media abuses without violating employees' rights under the NLRA. Employers can prohibit employees from using social media during working hours except for approved business purposes, prohibit disclosure of the employer's trade secrets,

and prohibit unlawful harassment of co-workers through social media. This area of the law is quickly developing, so having a lawyer review or help draft the policy is extremely important.

### **Dealing with Employees Who've Abandoned Ship**

Disgruntled former employees use social media to vent about their former employers and co-workers. Ninety percent of the time, the best reaction is to ignore the ranting. But even happy former employees can present problems through social media.

Former employees may use social media sites like LinkedIn to request endorsements and recommendations. When a supervisor gives an endorsement or recommendation to a departed employee, is she speaking on behalf of the company or on her own behalf? What if the supervisor's opinion is different from that of upper management?

Although employers may not be able to control the social media rants of former employees, they can regulate their current employees' use of social media to give recommendations and endorsements. A policy requiring that all inquiries regarding current and former employees'

work performance be referred to human resources should be strictly enforced.

### **Tight Policies Make Tight Ships**

As the workplace changes, an employer's rules and guidelines must evolve to keep up with them. Employers who ignore social media as a passing fad do so at their own risk. Once employers understand the dangers, they can begin to address them. Crafting specific social media policies that balance the employers' interests against employees' legal rights can help ensure smooth sailing. ▽