



APRIL 4TH
Recording Now Available

WEBINAR ONE
Marijuana in the Workplace: Navigating Potential Potholes

APRIL 9TH
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WEBINAR TWO
#MeToo in the Workplace: Understanding, Addressing, & Preventing Sexual Harassment

APRIL 17TH
Recording Now Available

WEBINAR THREE
To Pay or Not To Pay: That is the Question Regarding your Interns and Volunteers

APRIL 25TH
2:00pm – 3:30pm EST

WEBINAR FOUR
Social Media at Work



Social Media in the Workplace

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April 25, 2018

Topics for Today

- **Using social media in pre-employment screening**
- **Disciplining employees for posts on social media**
- **Policies relating to social media**
- **Other issues concerning employees' social media use**

Benefits and Risks of Using Social Media in Pre-Employment Screening



Polling Question

Do you use social media to research candidates for employment?

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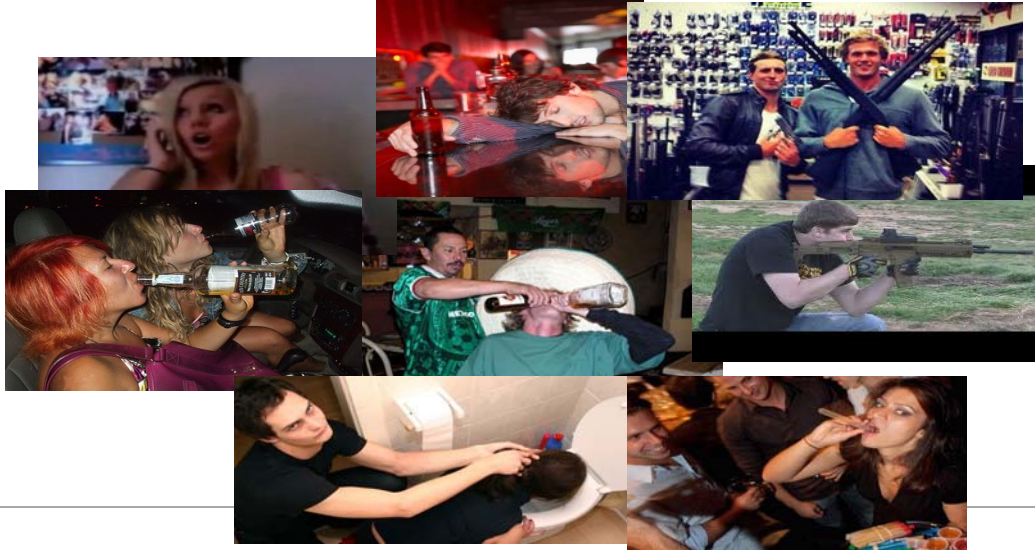
Polling Question

What types of social networking sites does your company use to research candidates?

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What Social Media Can Reveal



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What Social Media Can Reveal

Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.

3:17 AM Mar 18th from web



Now, that doesn't mean you should use it. Certainly long term use makes you dumb and crazy. I've watched friends ruin their lives on meth. It's a horrible drug that's less likely to turn you into the next Kerouac than it is **this guy**.

Why, this may shock you, but here's the thing: **Cocaine is exceptionally fun**. LSD? It genuinely alters your perception. I'm not suggesting that you do either of these. Both conspired, unsuccessfully, to kill me and I would no more try either today than I would attempt to put a rattlesnake in my anus. I am older and wiser and recognize that the benefits are not worth the risks. Despite my **[redacted] persona on Twitter**, I'm more **this guy** than **that guy**. Drugs, especially highly addictive ones like speed or cocaine or heroin or ones with powerful psychological components like LSD, tend to not be worth the price you pay for their use.

Negative items are highlighted

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Why Employers Search Social Media

- To identify negative behaviors incompatible with workplace, like discriminatory remarks, sexually explicit photos or messages, and illegal drug use
- To gain access to information not on a resume
- To obtain insight into a candidate's professional and personal characteristics
- To spot resume fraud
- To identify positive attributes, like volunteer efforts, participation in industry blogs, and external recognition

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Potential Risks to Employers

- Screening out employees based on snap judgments about their lifestyle
- Legality of accessing a candidate's online information
- Permissibility of basing hiring decisions on information that is discovered

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Legality of Accessing a Candidate's Online Information

Searching publicly available, non-password-protected information

→ Permitted

Obtaining unauthorized access to password-protected information

→ Prohibited

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Legality of Accessing a Candidate's Online Information



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Legality of Accessing a Candidate's Online Information

	Restaurant Case	Hospital Case
What the employee did	Designed a private MySpace page for "smack talking" about the employer to "talk about all the crap/drama/gossip occurring in our workplace without having to worry about outside eyes prying in" and invited other employees to join. Postings included derogatory and sexual remarks about managers	Hospital employee criticized first responders for saving the Holocaust Museum shooter on her private Facebook page
Privacy settings	Only employees who were invited to join could see the postings	Only people that the employee had "friended" could see the postings
How management learned of the postings	An employee who was an invited member of the group showed the manager the postings. Another manager requested the employee's password to view webpage	One of the employee's friends printed out the page and gave it to the employer
Violation of the Stored Communications Act?	Violation	No violation

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Legality of Accessing a Candidate's Online Information

Requiring the candidate to provide the password

→ Prohibited in: Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maine, Maryland, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin

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Basing Decisions on Information Learned Online

May learn “off-limits” information about candidates:

Age

Medical Conditions

Race

Pregnancy Status

National Origin

Marital Status

Religion

Political Affiliation



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Practical Tips for Employers Using Social Media at the Hiring Stage

1. Determine whether the benefits outweigh the risks
2. Be skeptical of accuracy and aware of context
3. Conduct searches in a uniform manner among candidates
4. Avoid decisionmaker involvement in process
5. Search only public information (and don't require the candidate to change his/her privacy settings so you can access)
6. Obtain the candidate's consent
7. Address in company policies and training
8. Keep written documentation of the search, search results and non-discriminatory reason for the decision
9. Monitor the results of your hiring decisions based on online searches over time.

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Disciplining Employees for Social Media Activity



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Polling Question

"I thought BigCAP was supposed to take care of its employees! #unfairwages."

Can you discipline an employee for this post?

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Polling Question

"@BigCAPemployee My manager at the Maryland branch cut our hours again! #joinforces #jerk."

Can you discipline an employee for this post?

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Polling Question

"Disciplined AGAIN for coming in late! @BigCAPmanager #watchyourback."

Can you discipline an employee for this post?

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Polling Question

"I'm tweeting instead of working! LOL! #winning #freebies."

Can you discipline an employee for this post?

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Polling Question

"@BigCAPemployee Notice how anyone who complains about BigCAPmanager gets fired?"

Can you discipline an employee for this post?

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Can You Discipline Employees for Social Media Posts?

- Union and non-union employees are granted “Section 7 Rights” under the National Labor Relations Act, which include:
 - Right to organize or form a union
 - Right to engage in “**concerted activity**” for “**mutual aid and protection**”
- National Labor Relations Board (NLRB) views social media as the modern-day “water cooler”
- Note that Section 7 only applies to non-management employees, not supervisors.

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Can You Discipline Employees for Social Media Posts?

Protected Topics:

- Complaints about wages, hours or other conditions of employment
- Complaints about management
- Complaints of discrimination






Unprotected Topics:

- Threats
- Harassing or discriminatory remarks
- Individual gripes

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Can You Discipline For These Tweets?

	Can Discipline	Can't Discipline
I thought BigCAP was supposed to take care of its employees! #unfairwages		
@ BigCAPemployee My manager at the Maryland branch cut our hours again! #joinforces #jerk		
Disciplined AGAIN for coming in late! @BigCAPmanager #watchyourback		
I'm tweeting instead of working! LOL! #winning #freebies		
@BigCAPemployee Notice how anyone who complains about BigCAPManager gets fired?		

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What if you don't discipline an employee for social media activity?

Hypothetical – Your employee, Marcia, has a Facebook page and is “friends” with several of her co-workers, including Greg. Greg is always the first to comment on Marcia’s new pictures, but she notices that his comments are becoming more frequent. Over the weekend, Marcia posts pictures from a recent beach trip (including pictures of her in a bathing suit). During that same weekend, Greg indicates that he likes her pictures...



BUT, he gives her a “thumbs up” 40 separate times.
 ...**CREEPY**, right??

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Polling Question

Could the employer be liable for Greg's behavior?

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What if you don't discipline an employee for social media activity?

Hypothetical – A professor who is Native American was made the chair of his department. One of his colleagues who wanted the job posted on Facebook:

“They’re making a f***ing indian chair.”

Later, when the professor scheduled a department meeting outdoors by the river, one of his disgruntled colleagues posted during a Facebook discussion of supplies that were needed:

“Nah, our chair will bring all the handbaskets we need. He’s probably woven them himself.”

And when department members were later posting on Facebook about whether anyone attended the meeting, that same colleague posted:

“Maybe they were all eaten by wolves.”

When it came time to vote on the professor’s application for tenure, one of the colleagues who made one of these posts participated in the review and voted on the application. The application was denied.

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Polling Question

Does the university face any liability for the decision to deny the professor's application for tenure?

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Social Media Policies



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Polling Question

Does your company have a social media policy that applies to employees?

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Sample Policy: Offensive Remarks

TREAT EVERYONE WITH RESPECT
Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline, even if they are unintentional. We expect you to abide by the same standards of behavior both in the workplace and in your social media communications.

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Sample Policy: Offensive Remarks

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Sample Policy: Requirement of Accuracy

If you engage in a discussion related to [Employer] ... you must also be sure that your posts are completely accurate and not misleading...



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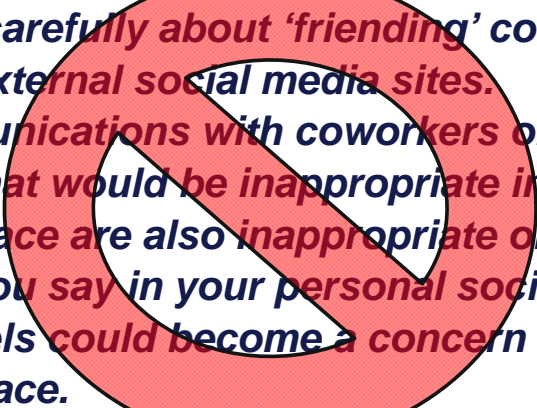
Sample Policy: Requirement of Accuracy

*If you engage in a discussion related to [Employer]. . . **you must also be sure that your posts are completely accurate and not misleading...***

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Sample Policy: "Friending" Coworkers

Think carefully about 'friending' co workers . . . on external social media sites. Communications with coworkers on such sites that would be inappropriate in the workplace are also inappropriate online, and what you say in your personal social media channels could become a concern in the workplace.



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Sample Policy: "Friending" Coworkers

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Sample Policy: Confidential Company Info

Confidential Information:

Make sure someone needs to know. You should never share confidential information with another team member unless they have a need to know the information to do their job. If you need to share confidential information with someone outside the company, confirm there is proper authorization to do so. If you are unsure, talk to your supervisor.

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Sample Policy #2: Confidential Company Info

Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.

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Sample Policy: Personal Coworker Info

Respect Privacy.

~~If, during the course of your work you create, receive or become aware of personal information about [Employer's] employees, contingent workers, customers, customers' patients, providers, business partners or third parties, don't disclose that information in any way via social media or other online activities.~~

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Areas of NLRB's Concern About Social Media Policies

- Prohibitions on criticism of managers or the company
- Prohibitions on offensive language
- Requirements of total accuracy
- Prohibitions on “friending” coworkers
- Prohibitions on sharing confidential company and coworker information
- Prohibitions on use of company’s trademarks and logos

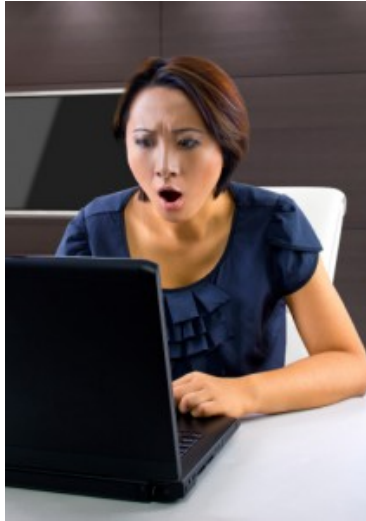


A “Savings Clause” Will Not Save You

This policy will not be construed or applied in a manner that improperly interferes with employees’ rights under the National Labor Relations Act.



Other Potential Concerns With Employee Use of Social Networking Sites



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Other Potential Concerns With Employee Use of Social Networking Sites

Hypothetical – Jan sets up a Twitter site as part of her job, so that she can tweet interesting developments in the industry out to customers.

What issues does this create?

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Other Potential Concerns With Employee Use of Social Networking Sites

What happens when Jan leaves?

If employees are going to set up social media sites as part of their job, the company needs to make sure that they know that the account, its contents and any access rights belong to the company.



Other Potential Concerns With Employee Use of Social Networking Sites

- **Hypothetical** – You are Cathy’s interim manager for 3 months. Cathy does an OK job for you, but clearly had some performance issues and was absent a lot.

Ask the people who know you best to endorse you on LinkedIn

1 Choose what you want to be recommended for

Choose [dropdown menu] [Add a job or school]

2 Decide who you'll ask

Your connections: [dropdown menu]
You can add 200 more recipients

3 Create your message

From: Tevis Marshall
tevis_marshall@troutmansanders.com

Subject: Can you endorse me?

I'm sending this to ask you for a brief recommendation of my work that I can include in my LinkedIn profile. If you have any questions, let me know. Thanks in advance for helping me out.
-Tevis Marshall

You receive an e-mail from Cathy’s LinkedIn account asking for a recommendation or endorsement that will be posted to her account. You don’t really want to respond, but you don’t want to be rude. You write a quick comment for Cathy:

“Cathy did a really great job for me!”



Other Potential Concerns With Employee Use of Social Networking Sites

Any problems with this?

What if Cathy is terminated one week later for performance related issues, but then sues the company for discrimination?

Does your company policy address this kind of “informal” recommendation?

Should they be allowed?

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Other Potential Concerns With Employee Use of Social Networking Sites

Hypothetical – Mike is connected to his boss on Facebook and posts the following update:

“Thanks for the Happy Birthday wishes, everyone. I wish my company felt the same way about us old folks. I feel like they’re constantly getting on me about being too slow, not being tech savvy, and stuff like that. Oh well – just a few more years ‘til retirement, right?”

One week later, Mike is fired for performance-related issues.

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Other Potential Concerns With Employee Use of Social Networking Sites

Any problems with this?

If you are Mike's boss, what should you have done?

Are your supervisors restricted in their social networking activities with subordinates? Should they be?

Do you monitor employees' comments on websites like this? If so, are these comments taken into consideration prior to taking adverse action?



Other Potential Concerns With Employee Use of Social Networking Sites

Hypothetical – Peter “tweets” the following on his Twitter page:

“We just closed a big deal with Company X, and I think they must be cooking the books in order to make this deal work....”



Polling Question

Would you fire Peter for this post?

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Other Potential Concerns With Employee Use of Social Networking Sites

Any problems with this?

Is this defamatory?

Who will be liable? Peter... or the company?

Do you monitor employees' comments on websites like this?

Is the discussion of company business on personal social media sites addressed in your company handbook?





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