

SOCIAL MEDIA AND THE WORKPLACE

EFFECTIVE DOCUMENTATION AND PERFORMANCE MANAGEMENT

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Social Media and the Workplace

- Should employers conduct social media background checks?
- What are some of the litigation landmines to avoid when using social media as a basis for an employment decision?
- Should employers develop and maintain a social media policy?



Social Media and the Workplace

- In 2012, the number of people accessing the internet via mobile phone was 1.58 billion
- By 2017, 2.97 billion used mobile phones to access the internet
- 51% of people aged 25-34 used social networking in the office in 2017
- Of the younger generation, 1 in 10 has been rejected for a job because of online content



Social Media and the Workplace

- **Americans aged 18-64 who use social networks report spending an average of 3.2 hours per day doing so**
- **Six of ten employees report using social media at work**



Social Media and the Workplace

Laws that are implicated

- **Electronic Communications Privacy Act (“ECPA”)**
- **Fair Credit Reporting Act (“FCRA”)**
- **Title VII, and other discrimination laws**
- **Whistleblower laws**
- **Public Employees Relations Act (“PERA”)**
- **Stored Communications Act (“SCA”)**



Social Media and the Workplace

➤ ECPA

- Prohibits unauthorized intentional interception of a wire, oral, or electronic communication while communication is being transmitted
- Prohibits unauthorized and intentional access and disclosure of electronically, stored wire or electronic communications
- Email is an electronic communication regulated by ECPA



Social Media and the Workplace

➤ Three Exceptions to ECPA

- Business Extension

- Service Provider

- Consent

- Does the employee have a reasonable expectation of privacy in the use of the equipment and service in question?



Social Media and the Workplace

➤ SCA

- Prohibits intentionally outsourcing access without authorization to wire or electronic communications while in electronic storage

Two Exceptions:

- Authorized by user of service
- Authorized by service provider
- Pietrylo v. Hillstone Rest. Group (Manager coerced employee to disclose password protected by MySpace Account)



Social Media and the Workplace

➤ Applicant Screening and Hiring Decisions

- To recruit
- To conduct background checks
- There are legal risks
- Employees may learn about age, race, national origin, disabilities, or other protected characteristics
- Recordkeeping deficiencies can pose problems for defense of failure to hire claims
- Inconsistency/reliability problems
- FCRA issues



Social Media and the Workplace

➤ Disciplinary Decisions

➤ Protected Concerted Activity

- Employees have right to engage in concerted activities for the purpose of mutual aid or protection

➤ First Amendment Speech

- Public Employers cannot take adverse action against an employee who (as a citizen) speaks out on a matter of public concern

- Lopez v. Gibson – August 24, 2018
- McCullars v. Maloy – April 2, 2018

➤ Florida Constitution

- Right to Privacy – protecting a person's seclusion, solitude, or private affairs

➤ Whistleblower Protection



Social Media and the Workplace

➤ Developing Social Media Policies

- No expectation of privacy in use of County's computers or internet while at work
- Right to monitor
- Right to perform social media background checks
- Communicate to employees what use at work is acceptable
- Reminder that all other County rules still apply
- Guidelines on appropriate use of social media when interacting with fellow employees or third parties



Social Media and the Workplace

- **Make a policy decision whether or not to conduct internet searches of candidates**
 - **Decide what candidates to search and when during the process**
 - **Document what you find in your candidate searches**
 - **Search only publicly available information that is not password-protected**





EFFECTIVE DOCUMENTATION AND PERFORMANCE MANAGEMENT



Effective Documentation and Performance Management

- **Reasons documentation is important**
 - Creates history that won't be lost
 - Improves employee performance
 - Helps make difficult decisions about employees



Why Document?

- Creates accurate record—memories fade
- Facilitates equal treatment of employees
- **CYA**



Prove It!

“If there is no written record it did not happen!”



When to Document?

- **When to Document**
 - **Exceptional performance**
 - **Poor performance**
 - **Violations of Policy**
 - **Annual performance evaluations**
 - **Investigations**
 - **Oral counseling sessions**
 - **Formal Discipline**



When to Document?

- ☐ Documentation must be kept consistently for all employees.
 - It is harmful, not helpful, to “target” an employee and write up violations if other employees are not written up for similar violations
- ☐ Documentation must be contemporaneous.



EFFECTIVE DOCUMENTATION

❑ Key principles:

- Keep a litigation perspective – what will the documents look like in a court room?
- Be objective, not subjective
- Be fact-driven, not conclusory
- Be accurate



How to Document

- **How to Document an Incident:**
 - **Date documentation created**
 - **Name and position of author (print/sign)**
 - **Date of incident/infraction**
 - **Where incident occurred**
 - **Who was involved**
 - **What happened**
 - **Who witnessed the incident**



How to Document

- ❑ **GIVE SPECIFIC FACTS, not conclusions:**
 - **BAD:** Jim endangered coworkers and the public
 - **BETTER:** Jim left his grader running
 - **BEST:** When Jim went to lunch early he left his grader running with several employees still working around the machine and with children playing in the area



How to Document

❑ What NOT to write

- Do not write conclusions
 - **“Anne is a slow worker.”**
- Do not write assumptions
 - **“Bill is probably drinking again because he’s late to work a lot.”**
 - **“Suzie is unable to perform her work without errors.”**



How to Document

- ❑ Do not write speculation
 - **“Carol doesn’t value her job.”**

- ❑ Do not write down guesses about what is going on.
 - **“Dave isn’t completing his reports on time. He must be too set in his ways to understand the technology.”**



Discipline

- ❑ **Writing Up and Giving Discipline:**
 - **Create disciplinary memo**
 - **Describe investigation (if conducted)**
 - **Identify which policies are violated**
 - **Describe the discipline**
 - **Identify what will happen if the problem is not corrected**



How to Document

- **Do not save drafts**
- **Do not save notes with attorneys unless they are clearly marked “Confidential Attorney-Client Privilege”**



Performance Reviews

- **Employee Performance Reviews**
 - Use the whole scale and whole evaluation period.
 - Differentiate employees
 - Note areas of strength
 - Note areas of weakness
 - Make specific written comments
 - Use as a tool to improve performance
 - Good time to address “low grade” issues
 - Do not inflate scoring



Thank You

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