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Managing Social Media and Networking In The Workplace – What Information Technology Project Managers Need To Know Now!

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Session Overview

- Introduction to Social Media
- Identification of Employer Concerns with Social Media
 - Right of Privacy
 - First Amendment
- Practical Strategies for Dealing with Social Media



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Brief Introduction to Social Media and Web 2.0

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What is Web 2.0?

Web 2.0 refers to web development and web design techniques that allow collaboration and content-sharing on the internet.

It differs from Web 1.0 in that Web 1.0 limits users to passive viewing while Web 2.0 sites permit participation from users.



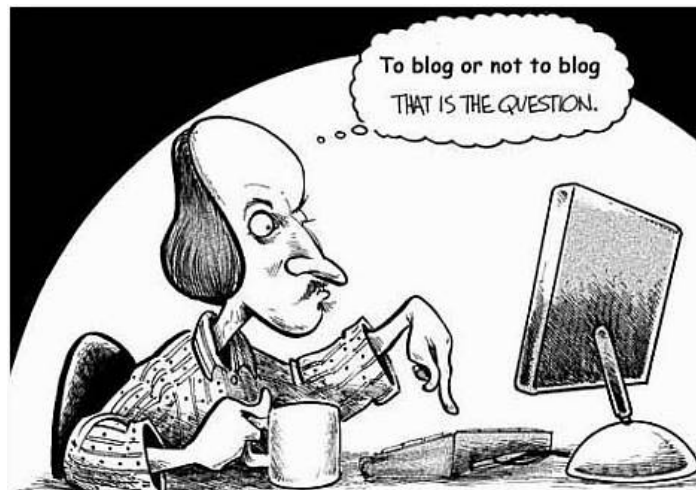
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Prominent Websites



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Prevalence of Social Media



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Social Media Statistics

- According to econsultancy.com, in January 2010:
 - More than 35 million Facebook users update their status daily.
 - More than 65 million Facebook users access their site using a mobile device.
 - Wikipedia has over 14 million articles and over 85,000 contributors.
 - At the current rate, Twitter will process almost 10 billion tweets in a single year.
 - There are more than 4 billion images on Flickr.




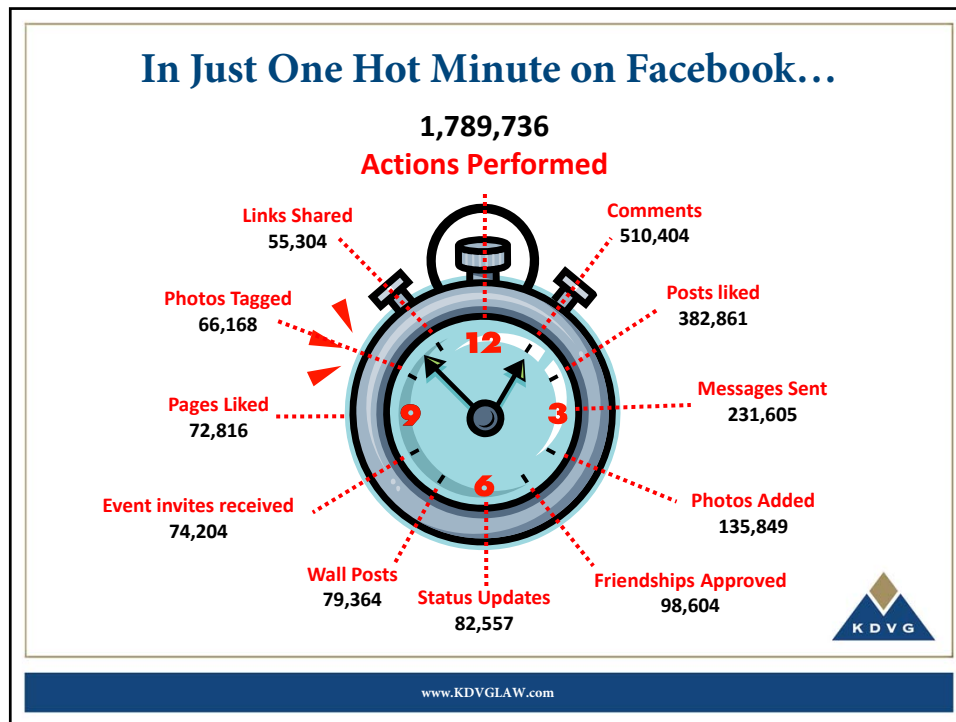
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Social Media Statistics

- In 2009, a Deloitte, LLP survey found that
 - 55% of employees visit social networking sites at least once a week.
 - 20% admit to visiting these sites during working hours.
- Citing Twitter's "immense impact on culture and history," in April 2010, the Library of Congress announced that it will archive the collected works of Twitter.



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Primary Employer Considerations with Social Media

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Two Primary Considerations

- Using social media **offensively** to recruit, promote, and market your agency
- **Defending** against the potential negative workplace impact and legal liabilities presented by social media



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Potential Employment Law Issues

- Employee Right of Privacy
- First Amendment
- Equal Protection / Due Process
- Employment Discrimination
- Harassment and Bullying
- Retaliation / Whistleblower Protection
- Defamation
- Off Duty Conduct Law
- Labor Relations



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Social Media Employment Litigation

- National Labor Relations Board (“NLRB”) Report of the General Counsel issued August 2011 presents recent case developments arising in the context of “today’s social media.”
- Social media includes “various online technology tools that enable people to communicate easily via the internet to share information and resources” which include:
 - Text
 - Audio
 - Video images
 - Podcasts
 - Other multimedia communications



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Social Media Employment Litigation

- NLRB report summarizes recent developments on emerging issues litigated by the NLRB, concerning:
 - Employee’s Facebook and Twitter postings
 - Impact of a union’s Facebook and YouTube postings
 - Lawfulness of employers’ social media policies and rules



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Social Media Employment Litigation

- *Wal-Mart* (Advice Memo July 19, 2011)
 - After a dispute with a store's assistant manager, an employee put up a Facebook message saying, "wuck falmart!" and "if this tyranny doesn't end in this store, they are about to get a wakeup call..."
 - Two other co-workers responded, one writing, "BAHAHHA like! ☺" and the other writing, "what the hell happens after 4 that gets you so wound up??? LOL"



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Social Media Employment Litigation

- The employee, replying to his co-workers, posted a follow up message on Facebook. In that post he referred to the assistant manager as "a super mega puta" and wrote that, "if it don't change Walmart can kiss my royal white ass!"
- Thereafter, the store manager was given a printout of the employee's Facebook postings from another co-worker. The store manager prepared a disciplinary report and imposed a "decision day" suspension on the employee.



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Social Media Employment Litigation

- The employee, who was unhappy being disciplined, sought the assistance of the NLRB, claiming that his postings on Facebook were “concerted activity” to improve working conditions and he was thus protected from discipline by the National Labor Relations Act.

The NLRB determined...



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Social Media Employment Litigation

- The employee was not protected, concluding, “We conclude that the charge should be dismissed because there is insufficient evidence that the employee engaged in concerted activity.”
- “An individual employee’s conduct is concerted when he or she acts with the authority of the other employees, when the individual activity seeks to initiate, induce, or prepare for group action, or when the employee brings truly group complaints to the attention of management...”
- “Comments made solely by and behalf of the employee himself are not concerted...comments must look toward group action; mere griping is not protected.”



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Social Media Employment Litigation

Hazards of Electronic Communications

- *American Medical Response of Connecticut:*
 - NLRB filed a complaint against employer, accusing it of “overbroad” social media policy that prohibits employees from depicting the company “in any way” on social media sites.
 - NLRB asserted that this improperly prohibited employees’ right to discuss working conditions.



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Social Media Employment Litigation

- *American Medical Response of Connecticut:*
 - The NLRB settled the case in February 2011. The financial terms remain confidential, but what we do know is that:
 - AMR agreed to change its policy barring workers from criticizing the company or its supervisors online.
 - AMR agreed it would no longer deny its employees union representation during investigative interviews.



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Social Media Employment Litigation

- American Medical Response of Connecticut:

In a press release, the NLRB explained the settlement in this way:

Under the terms of the settlement approved today by Hartford Regional Director Jonathan Kreisberg, the company agreed to revise its overly-broad rules to ensure that they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions.

The company also promised that employee requests for union representation will not be denied in the future and that employees will not be threatened with discipline for requesting union representation. The allegations involving the employee's discharge were resolved through a separate, private agreement between the employee and the company.

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Social Media Employment Litigation

More Hazards...

- Consider "cloud computing" issues which may present a disclosure risk as well since third party service providers have access to and storage of information and applications
- Risk of inadvertent disclosures continues to grow as transmission of electronic information through cloud computing and other media proliferate



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Additional Employer Concerns

- Maintaining productivity
- Regulate and restrict use of employer's property
- Maintain efficient operation of electronic communications systems
 - Preserve server space
 - Protect against computer viruses
- Avoid liability for inappropriate emails
- Protect employer data and confidential information

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Employer Practices

- 2005 AMA Survey Findings:
 - 75% of employers monitor employee web site visits
 - 65% use software to block connections to certain web sites deemed off limits
 - 30% track keystrokes and time spent on keyboards
 - 50% + review and retain electronic mail messages
 - 80% disclose monitoring practices
 - 84% have established policies governing internet and email usage



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The Right to Privacy

BIG BROTHER



**IS WATCHING
YOU**

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Right to Privacy under the California Constitution

California Constitution,
Article I, Section 1:



"All people are by nature free and independent and have inalienable rights. Among those are enjoying and defending life, liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy."



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Invasion of Privacy Tort

- Intrusion into Private Matters
- Public Disclosure of Private Facts
- Publicly Placing a Person in a False Light
- Misappropriation of a Person's Name or Likeness



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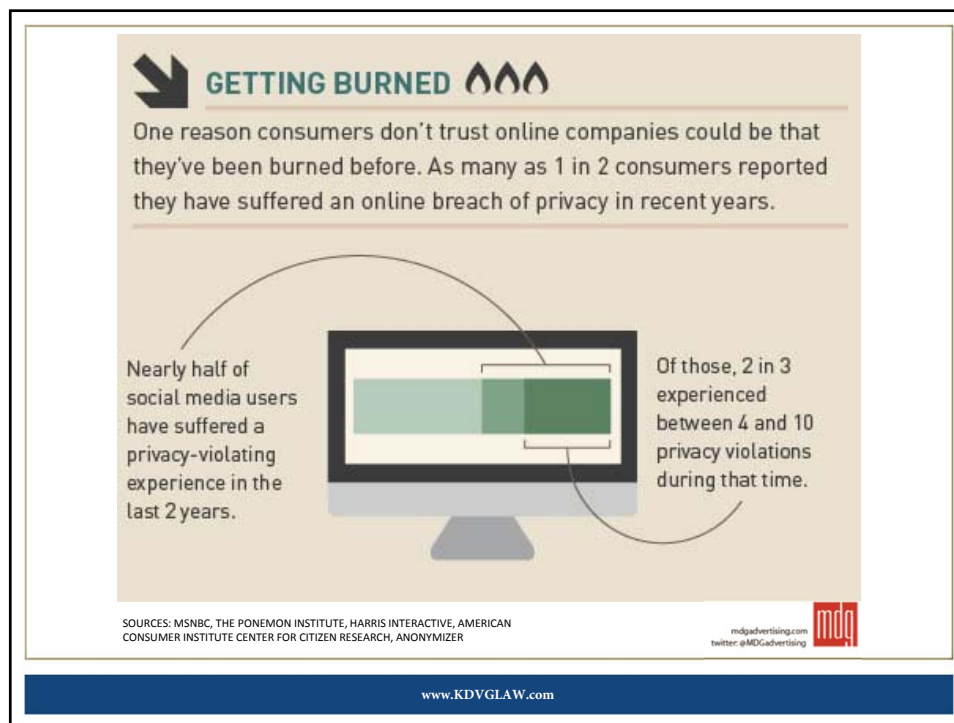
Right to Privacy Under California Law

- California courts have categorized privacy interests into two general classes
 - Informational privacy – “interest in precluding the dissemination or misuse of sensitive and confidential information”
 - Autonomy privacy – “interest in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference.”

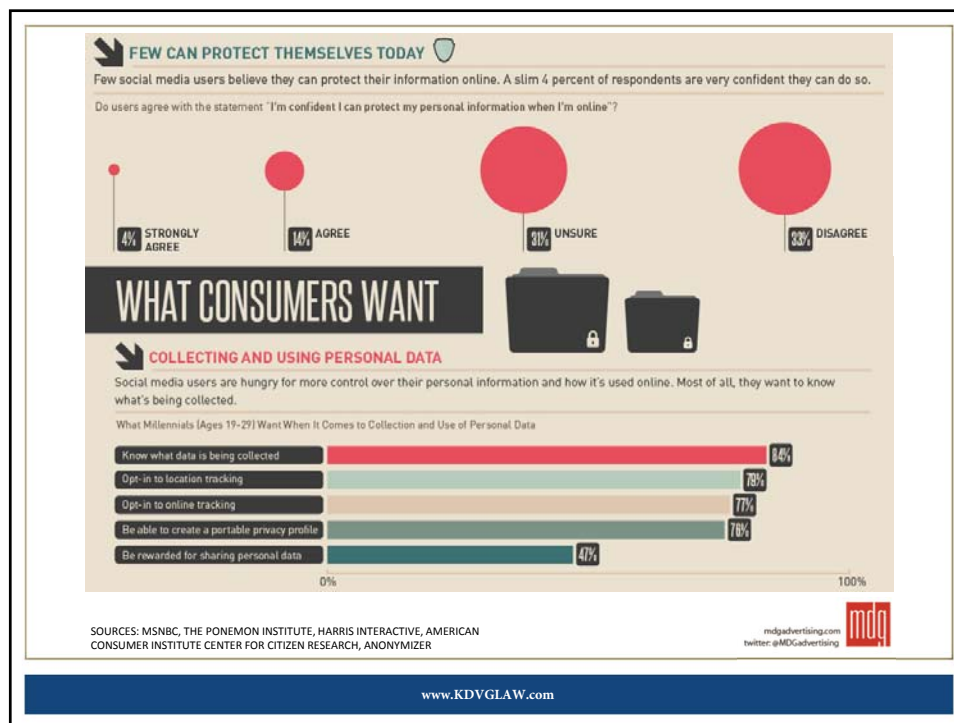
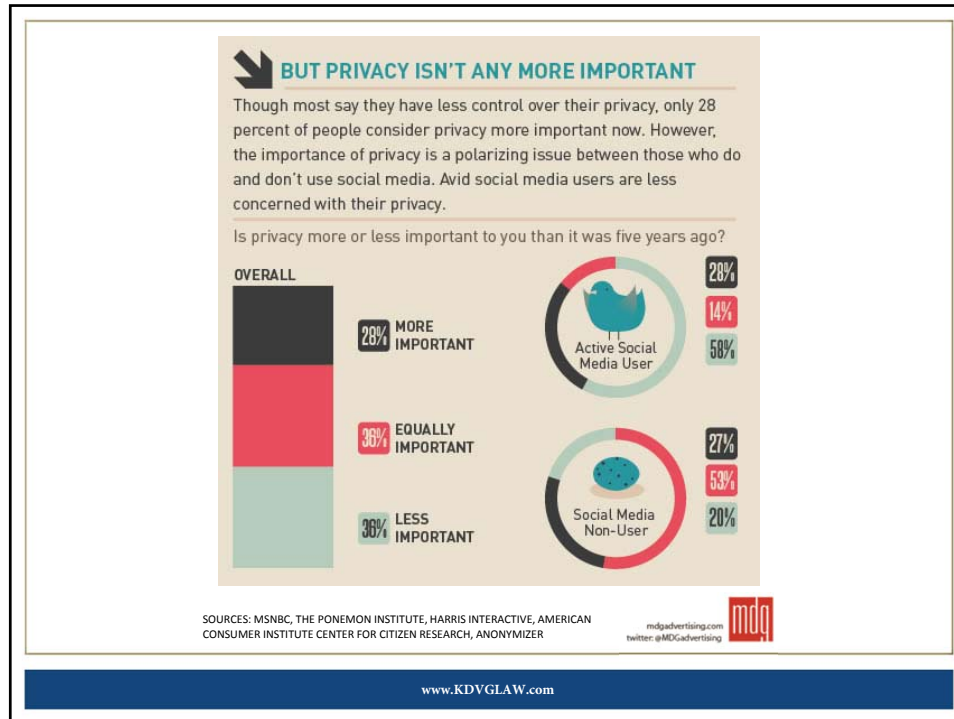
Hill v. NCAA (1994) 7 Cal.4th 1



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THE DESIRE TO SHARE EVEN MORE

Studies have shown that consumers have been concerned about their online privacy for years. Social networks should take note: giving users transparent, easy-to-use privacy controls could enable more activity.



61% of social network users would share more if they could control who sees what they share.

SOURCES: MSNBC, THE PONEMON INSTITUTE, HARRIS INTERACTIVE, AMERICAN CONSUMER INSTITUTE CENTER FOR CITIZEN RESEARCH, ANONYMIZER

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Privacy Cases involving Social Media



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Social Media Disclosed for Republication

- *Moreno v. Hanford Sentinel* (2009) 172 Cal.App.4th 1125
 - High school principal shared an individual's MySpace post with local paper, who published it under individual's full name as a letter to the editor.
 - Court held that there was no invasion of privacy by public disclosure of private facts because something published on MySpace is not private.



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Privacy Settings

“Although we allow you to set privacy options that limit access to your pages, please be aware that no security measures are perfect or impenetrable.”

- Facebook Privacy Policy



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First Amendment

THE FIRST AMENDMENT
CONGRESS SHALL MAKE NO LAW RESPECT-
ING AN ESTABLISHMENT OF RELIGION, OR
PROHIBITING THE FREE EXERCISE THEREOF;
OR ABRIDGING THE FREEDOM OF SPEECH, OR
OF THE PRESS; OR THE RIGHT OF THE PEOPLE
PEACEABLY TO ASSEMBLE, AND TO PETITION THE
GOVERNMENT FOR A REDRESS OF GRIEVANCES.

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Employer's Legitimate Interest

- Providing effective and efficient company operations (i.e., doing the company's business) through its employees:
 - context of the employee's speech;
 - employee's role in the company;
 - extent to which it disrupts the operation and mission of the company; and
 - whether the employee has a confidential, policymaking, or public contact role.



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Employer's Legitimate Interest

- Factors to consider include whether the speech:
 - impairs discipline by superiors;
 - impairs harmony among co-workers;
 - has a detrimental impact on close working relationships;
 - impedes the performance of the employee's duties;
 - interferes with the operation of the company;
 - undermines the mission of the company;
 - is communicated to the public or to co-workers in private; and
 - conflicts with the responsibilities of the employee within the company.



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First Amendment Cases involving Social Media



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Teacher Had No Free Speech Rights in MySpace Activity

- *Spanierman v. Hughes* (D. Conn. 2008) 576 F.Supp.2d 292.
 - Teacher created MySpace account to communicate with students, and his contract was subsequently not renewed after an investigation found that he had been engaged in inappropriate discussions with students. He alleged he was retaliated against for exercising his free speech rights.
 - Court held:
 - He was not acting pursuant to his responsibilities as a teacher, and so he spoke as a citizen.
 - The majority of his MySpace page did not involve speech on a matter of public concern; only a poem about the Iraq War was protected.
 - There was no causal connection between contract non-renewal and his protected speech.

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Other Employer Concerns

The Joy of Tech™

by Nitrozac & Snaggy



Signs of the social networking times.



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Other Legal Concerns

- **Discrimination/Equal Protection/Due Process**
 - Inconsistent enforcement of policy.
- **Harassment**
 - Obligation to protect employees from harassment.
- **Retaliation/Whistleblower**
 - Potential to retaliate against an employee who acts as a whistleblower online.
- **Defamation**
 - Internal online forums for employees.



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Other Legal Concerns

- **Lawful Off Duty Conduct**
 - Must Cause Actual Discredit to the Employer
 - Rational Relationship Between Misconduct and Employment
 - The Essential Test Is Whether the Conduct Harms the Company's Legitimate Interests



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Other Legal Concerns

- Unlawful Off Duty Conduct
 - Arrest Itself Not Enough (Labor Code § 432.7)
 - Discipline Based on Independent Investigation if Misconduct Can Be Proved
 - Discipline Based on Independent Investigation is Appropriate if Misconduct Can Be Proved
 - Obtain Assistance from Legal Counsel when Potential Unlawful Conduct is Involved
 - Connection of Activity to Job Responsibilities
 - Consistent Enforcement of “real” policy as to which employees received notice



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Practical Strategies for Dealing with Social Media

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Best Practices

- Develop clear, comprehensive policies.
- Revise policies when new laws, court decisions are issued or when new technologies emerge.
- Obtain employees' signed acknowledgement of receipt and understanding of policy and the limitation on their reasonable expectation of privacy.



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Best Practices

- Consider blocking access to social media websites from employer equipment.
- Personal cell phone vs. Employer-owned cell phone.
- Train employees.



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Social Media Policy

NOISE TO SIGNAL
Rob Cottingham



Sorry, but it's gotta go. Management says it could be used to access Facebook.



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Why Adopt a Policy?

- Employer may reduce expectation of privacy and expectations by adopting policies that explicitly reserve the employer's right to monitor computer and internet use.
- *United States v. Ziegler* (9th Cir. 2007) 474 F.3d 1184
 - Employee had reasonable expectation of privacy in his office where computer kept
 - However, employer's privacy interests may be overridden by comprehensive policy
 - Employer had joint control of computer and consented to search of office and computer

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Policy Adoption Process

- Assemble Your Team
 - Human Resources
 - Information Technology
 - Legal
- Determine Policy Location
 - Amendment to Existing Policy or Create a New Policy



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Policy Adoption Process

- Determine Which Other Policies are Affected by Social Media, Such As:
 - Policy Against Discrimination, Harassment, and Retaliation
 - Use of Employer Equipment Policy
 - Computer and Email Policy
 - Overtime Policy
 - Workplace Violence Policy
 - Code of Conduct
 - References
 - Records Retention



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Elements of a Policy

- Provisions to Consider Including:
 - Explanation and definition of social media.
 - Statement that employee has “no right or expectation of privacy” when using employer systems.
 - Reserve the right to monitor.
 - Statement that due to the nature of the internet, employees may not have an expectation of privacy when using social media websites.



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Elements of a Policy

- Provisions to Consider Including:
 - Requirement / encouragement to report violations of policy.
 - Prohibition on use of social media on employer-owned systems.
 - Prohibition on using social media while on duty.
 - Prohibition on representing themselves as an employee when using social media.
 - Identification of those employees authorized to speak on behalf of the employer.



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Elements of a Policy

- Provisions to Consider Including:
 - Identification of those employees authorized to speak on behalf of the employer.
 - Statement that use of a social media site in a way that violates employer policies will be cause for disciplinary action.
 - Contact information for questions
 - Technological issues
 - Personnel issues
- Signed acknowledgement.



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Creating A Social Media Presence For Your Company

According to a March 19, 2011 article on Yahoo.com which ranked the top 100 most socially networked cities in the U.S., the top ten were:

- | | |
|---------------------|------------------------|
| 1. Washington, D.C. | 6. San Francisco, CA |
| 2. Atlanta, GA | 7. Orlando, FL |
| 3. Denver, CO | 8. Austin, TX |
| 4. Minneapolis, MN | 9. Boston, MA |
| 5. Seattle, WA | 10. Salt Lake City, UT |



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Creating A Social Media Presence For Your Company

What are companies using social media for?

- Customer engagement
- Business engagement
- Company employee engagement
- Process improvement
- Public information, outreach and awareness
- Reduced need for company resources (i.e., fewer emails, phone calls)



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Creating A Social Media Presence For Your Company

There should be a written policy that considers the following:

1. Official purpose and proper uses of the page
2. Who will be responsible for posting, monitoring, and potentially removing content
3. Consistency of information posted with official company webpage
4. How to deal with improper/inappropriate content posted by the public
5. Whether to “like” other companies or entities (city, county, or non-profit agencies)
6. Obligation to maintain and produce web content under civil discovery statutes
7. Security, account management and access
8. Host site’s “Terms of Service”



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Train Employees



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Determine Who is Responsible for Your Company's Social Media Presence



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Questions & Answers

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