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Preventive Strategies and Positive Solutions for the Workplace®

Time to Make Donuts: Social Media in the Life Cycle of an Employee

(Employee Privacy Issues – Social Media and Record Keeping)

January 25, 2012
Anaheim, California

Sponsored By: Jackson Lewis

Panelists: Nicky Jatana, Jackson Lewis
Cynthia Sandoval, Jackson Lewis
Ted Gizewski, Microsoft Corporation

MySpace or Your Space?

Texting: All The Rage

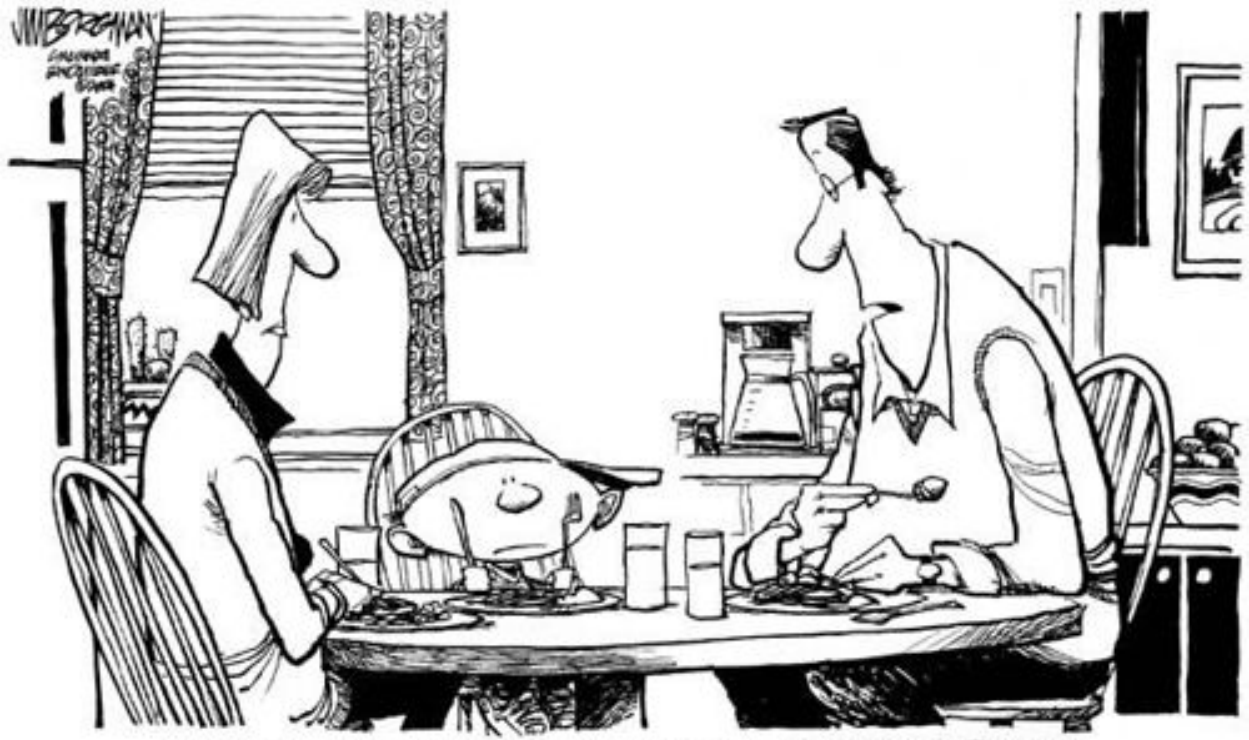
August 2010

- **"People Aren't Ready for the Technology Revolution"**
- **"5 Exabytes created from dawn of civilization through 2003. Now that much info is created every _____?"**

Eric Schmidt

Former CEO of Google

How Do We Communicate Now?



Social Networking

45% of employees work only 15 minutes or less without getting interrupted

53% waste at least 1-hour/day to distractions

1 wasted hour = $10,375 lost productivity/person (@ $30/hr.)

at 1,000 employees, cost of interruptions exceeds $10M annually

Social Networking Sites: All the Rage

- In 2010, two-thirds of the world's internet population visited social networking or sites
- 75 million Twitter registered users
- 80% of Twitter usage is on mobile devices. People update anywhere, anytime.
- There are over 200,000,000 blogs. 54% of bloggers post content or tweet daily.

Facebook.com Figures and Facts

- Facebook has over 750 million active users
- 50% of Facebook users log on every day
- Over 700 Billion minutes a month are spent on Facebook
- Average user spends an average 15 hours and 33 minutes on Facebook per month
- 48% of 18-34 year olds check Facebook when they wake up, with 28% doing so before even getting out of bed.

What's all the At Work "Twitter"

2009

- 22% of employees visit SNS 5 or more times per week; 23% visit 1-4 times per week. Many admit to logging on while at work.
- 53% of employees say their SNS are none of their employer's business
- 61% of employees say that even if employers are monitoring their social networking profiles or activities, they won't change what they're doing online
- 74% of employees say it is easy to damage a company's reputation on social media

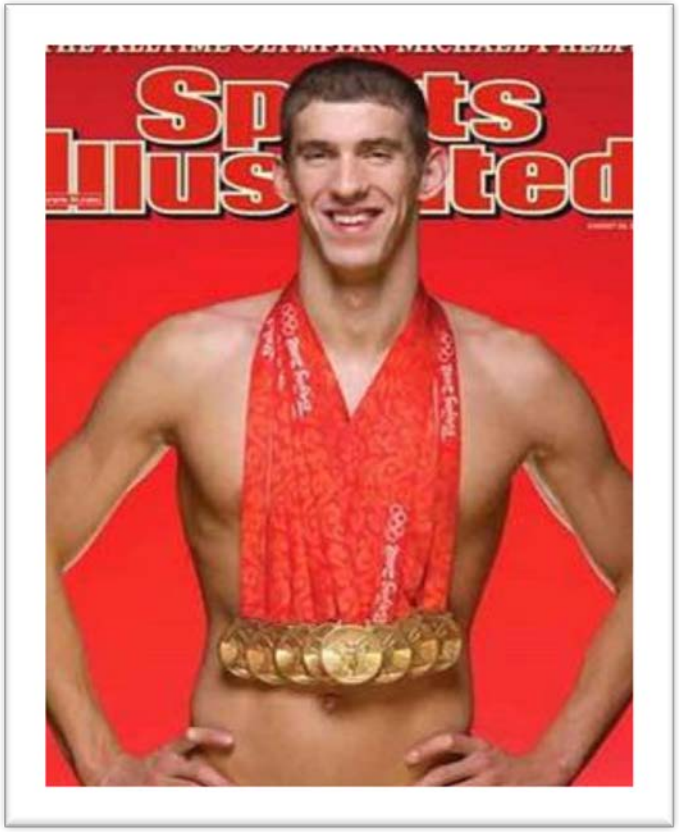
2010-2011

- 71% of employers issued a best practice policy on internet use
- 68% of employer monitor employee internet activity
- 56 % of employers blocked access to certain social networking sites
- 32% of employees do not use social networks, for fear it will negatively affect their careers
- 62% of employees prefer not to be friends with their managers on social networking sites

Source: 2010 Deloitte Ethics Workplace Survey, ClearSwift Research. 2011

Hiring Decisions

Would You Hire Him as a Lifeguard?



Would you STILL hire him as a Lifeguard?!

Information on the Web

Internet users share personal information through a variety of social networking websites and technologies including:

- **Email and Texting** - **Chat Rooms**
- **Blogging** - **Online Forums**
- **Video Sharing: Youtube**
- **Social Networking**
  - Facebook
  - MySpace
  - LinkedIn
  - Twitter
  - Google
  - Friendster

What Are You Likely to Find on a Social Networking Site?

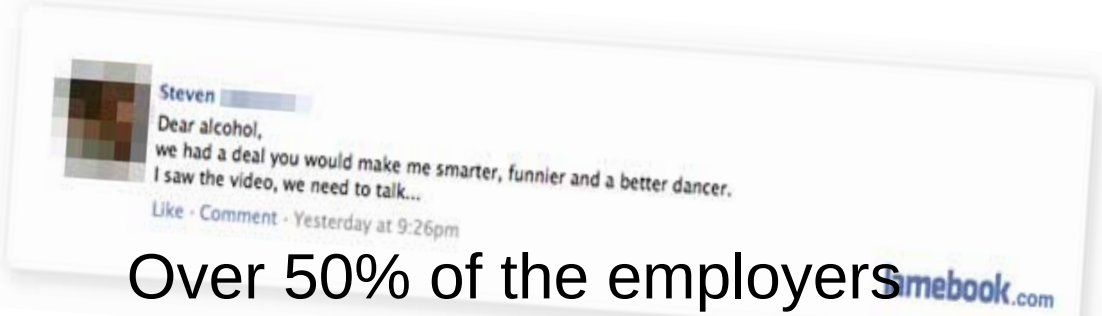
Contents

- Education
- Work History
- Career Interests
- Group or Association Memberships
- Political Views
- Likes and Dislikes
- Favorite Music and Movies
- Vacation, Family, or Party Photos
- Blog Entries

Applicant Screening

- 24 million American Facebook users leave their profiles mostly public
- 73% of social media profiles can be found through a public search engine
- 77% of social network users do not restrict access to their photos
- 2007 study – 45% of employers questioned use social networks to screen job candidates
- Of these, 35% decided not to offer a job to an applicant based on the content posted
- Facebook was the most popular for screening
- 7% of employers followed job candidates on Twitter

Applicant Screening



Over 50% of the employers surveyed attributed their decision not to hire to:

- Provocative photos
- References to drinking and drug use
- Bad-mouthing of previous employers and colleagues

Hiring Decisions Based on Social Networking Activity

Problem:

A search may identify an applicant's protected characteristics such as age, race, sexual orientation, marital status, arrests or other factors that should not be considered in a hiring decision.

Solution:

Have a non-decision maker conduct the search and filter out protected information.

Hiring Decisions Based on Social Networking Activity

Problem:

Internet information may be false.

Solution:

Carefully vet not only the candidate but the source of information. Try to confirm information obtained from the web.

Hiring Decisions Based on Internet Activity

Problem:

Most of the good information about applicants on the internet requires you to get past security tools**.**

Solution:

Do a better job interviewing. Do not use false identities or require applicants to provide you with passwords.

Hiring Decisions Based on Social Networking Activity

Guidelines for Employers on Internet Search of Applicants

If you are going to do these searches:

- Do them consistently
- Document them; and
- Determine how relevant the information is to the job

An Example of Improper Hiring

GASKELL v. UNIVERSITY OF KENTUCKY

- Title VII claim after a University failed to hire a job applicant for a position as Director of the university observatory.
- Plaintiff claimed he was rejected for the position because of his religious beliefs and expression of those beliefs.
- Claimed that during the hiring process, one of the hiring committee members conducted an internet search and came across his personal site, which contained an article titled “Modern Astronomy, the Bible, and Creation,” and lecture notes from a lecture plaintiff gave regarding the same topic.

Gaskell v. University of Kentucky

- Both the article and lectures notes *referenced several religious topics*.
- Hiring committee members expressed concern regarding the statements which they believed blended religious thought and scientific theory.
- The committee members undertook a review of the scientific integrity of plaintiff's statements, including bringing the article and the lecture notes to the attention of the Biology Department, which expressed concerns about plaintiff's "creationist" views and its potential impact on the university.

Gaskell v. University of Kentucky

- The Plaintiff successfully defeated summary judgment
- The Court found the arguments were very fact intensive and difficult to determine at the summary judgment stage
- This case eventually settled before trial for $125,000

And, remember, candidates may be using SNS to investigate you:

www.jobvent.com

www.hateboss.com

www.workrant.com

www.fthisjob.org

www.rantasaurus-rex.com

"my boss is smarmy sweet to me during the day because he needs me to do the load of work he gives me, and THEN forgets MY BIRTHDAY and doesn't bother organising a cake when he finds out because i'm "just a casual". The reason I'm "Just a casual" when I work full-time? because it saves them from paying me holidays and sick leave etc. Anyway even though i'm "just a casual" to him, I'm still a person and its still my birthday"

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The Ethics of "Friending": Judges

- 56% of Americans reported that "it's 'irresponsible' to friend your boss on Facebook
- While 62% of bosses agree "it's wrong to friend an employee."

In California, with qualifications, a Judge may join a social network, even one which includes lawyers who may appear before the Judge, but the Judge must disclose the social network connection and must defriend the lawyer when the lawyer has a case before the Judge.

When others post comments on a Judge's personal social network page, the Judge is obligated to monitor his/her page for comments and to delete the comments, hide them from public view or otherwise repudiate anything others say that is offensive or demeaning. Leaving comments on the page can create the impression that the Judge has adopted the comments.

Liberty Mutual's Responsibility Project

California Judicial Ethics Committee Opinion 66

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The Ethics of “Friending”: Parties

On May 24, 2011, the San Diego County Bar Legal Ethics Committee ("Committee") issued an advisory opinion finding that an attorney who sends an *ex parte* "friend request" on a social network site to a represented party violates California Rule of Professional Conduct 2-100 and the ABA Model Rule 4.2, which prohibit direct communication with a represented party.

In addition, an attorney who attempts to "friend" an unrepresented individual involved in litigation, such as a witness, without first disclosing his **identity and motive to use the individual's information in litigation violates his ethical duty to not mislead or deceive.**

San Diego County Bar Legal Ethics Committee Advisory Opinion 2011-2

Social Media In the Courts

Over 24 pending lawsuits involving social media firings, most involve the NLRB

NLRB's Aggressive Approach

- American Medical Response of Connecticut Inc. – February 2011
  - Settlement where employer had to revise policies regarding online communications after firing of employee for Facebook comment
- Build.com – April 2011
  - Settlement in which similarly terminated employee is reimbursed for lost earnings and employer must post signage in the workplace saying the company cannot terminate anyone over what they post online

NLRB's Aggressive Approach

- On August 18, 2011, the NLRB's Acting General Counsel released a report on the agency's handling of 14 cases involving employers' social media policies and their application in specific situations. In four cases involving employees' use of Facebook, the NLRB found that the employees were engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow employees. In five cases, some provisions of employers' social media policies were found to be unlawfully overbroad.

NLRB's Aggressive Approach Cont.

- Prohibiting employees from using any social media that may violate, compromise or disregard the rights and reasonable expectations as to privacy or confidential information for any person or entity.
- Prohibiting any communication or post that constitutes embarrassment, harassment or defamation of the employer or its officers, directors and employees.
- Prohibiting statements that lack truth or might damage the reputation or good will of the employer, its officers, directors and employees.

NLRB's Aggressive Approach Cont.

Additional unlawful provisions:

- Prohibiting employees from posting about company business on their personal accounts, anything they wouldn't want their supervisor to see, anything that may jeopardize their job, disclosing sensitive or inappropriate information about the company, posting pictures about the company and its employees that could be construed as inappropriate.
- Precluding the disclosure of personal information regarding coworkers, clients or the company and using company logos without written authorization.

NLRB's Aggressive Approach Cont.

- In the same report, the Board found certain activities involving Facebook or Twitter posts were not protected:
- Newspaper employee terminated following tweet about news headlines including homicides and several with sexual content and criticized an area television station.
- Employee terminated based on a Facebook conversation with a relative complaining about not getting a raise and working without tips. He did not discuss the posting with his coworkers and none of them responded.
- Employee terminated following posting to a Senator's Facebook wall that her employer was the cheapest service in town, paid below the national average, had only limited resources and referred to a specific safety incident.
- Employee was terminated based on Facebook conversations with friends in which she commented on the behavior of residents in a homeless facility.

NLRB's Aggressive Approach Cont.

- Employee terminated for individual gripes about supervisor on Facebook, commenting on the "tyranny" at the store and referring to the supervisor as a "super mega p_ _ a."
- Employer policy barring employees from pressuring coworkers to use Social Media was lawful.
- Employer's policy restricting employee's contact with the media was lawful under the policy, the Public Affairs office was responsible for all official external communications and employees were expected to maintain sensitive information confidentially to allow one person to speak on the employer's behalf

Protected Concerted Activity?

Karl Knauz Motors Inc. v. Robert Becker (October 2011)

- The owner of a BMW and Land Rover dealership terminated Robert Becker, a sales representative, for his Facebook posts. The employer argued the Facebook posts were negative comments made in the public forum.
- After Becker and another employee had voiced their unhappiness with the food choices at a company meeting and it was discussed by several salespeople after the meeting. Becker posted the following:

> "I was happy to see that Knauz went 'All Out' for the most important launch of a new BMW…the new 5 series. A car that will generate tens in millions of dollars in revenues for Knauz… The small 8 oz bags of chips, and the $2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were such a nice touch..but to top it all off… the Hot Dog Cart. Where our clients could attain a over cooked weiner and a stale bunn.."

Karl Knauz Motors Inc. v. Robert Becker

- Becker's second post consisted of photos of a vehicular accident which occurred at an adjacent Land Rover dealership where a car was accidently driven into a pond by a customer's 13 year old son.
- Knauz argued that Becker was fired because of his second post (the photo) and not the first post (the hot dog stand comments).
- Because the hot-dog stand had been a topic of employee discussion, the ALJ held that the first Facebook post consisted of "concerted activity"
- However, the ALJ found the second post was NOT protected because "it was posted solely by Becker… without any discussion with any other employee of the Respondent, and had no connection to any of the employees' terms and conditions of employment."
- The ALJ found Becker's termination was NOT WRONGFUL because the firing was due to the post regarding the auto accident. That post was not protected and therefore, the employer was within its rights to let the employee go.

Hispanics United of Buffalo (HUB) v. Carlos Ortiz (September 2, 2011)

- HUB, a non-profit corp. which offers housing and domestic violence services, terminated four employees, based on Facebook posts concerning a complaint they did not help their clients enough. HUB claimed the postings were bullying and harassment and terminated the employees.
- The Board held the employees engaged in protected, concerted activity through their Facebook postings and ordered HUB to offer reinstatement, pay for loss of earnings and benefits, and to post a notice outlining employee Section 7 rights and the remedy awarded to the complainants.

Social Media in the Workplace

Engaged in Protected Activity In CA?

- **Cal. Labor Code sections 232 and 232.5 protect similar interests**
  - Prohibits discrimination against employees who disclose the amount of their wages and/or information about their employer's working conditions.

Legal, Off-Duty Conduct

Labor Code 96k

The Labor Commissioner can investigate claims for the loss of wages as the result of demotion, suspension or discharge from employment for lawful conduct occurring during non-working hours away from the employer's premises.

Legal Issues Implicated by Social Networking

Employee's Perspective

- First Amendment
- Privacy
- Stored Communications Act
- Political activity statutes
- Lawful activities statutes
- Collective bargaining statutes
- Whistleblowing

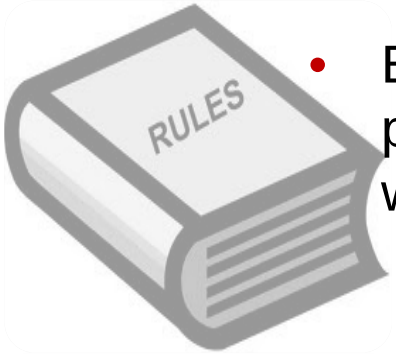
Legal Issues Implicated by Social Networking

Employer's Perspective

- Harassment and Discrimination
- Damage to reputations
- Interference with job functions and workplace
- Protection of confidential information
- Negligent hiring/retention

Guidelines for Discipline of Current Employees for Social Networking Activity

- Consider whether the activity may be viewed as protected concerted activity.
- Know that some occupations warrant a higher degree of scrutiny of off-duty internet activity (police, teachers) than others.
- Before you discipline, be able to articulate specific, substantial harm to the employer and workplace from the activity.
- Evaluate whether the employee was speaking as a private citizen on a matter of public concern, as a whistleblower, or other protected issue.



Guidelines for Discipline of Current Employees for Social Networking Activity

- Consider employee's efforts to keep internet activity private.
- Do not circumvent privacy tools or use a false identity to access website.
- Supervisors should not "friend" subordinates; teachers should not "friend" students.

Mai-Trang Thi Nguyen v. Starbucks Coffee Corp. (9th Cir. March 4, 2011)

- A Starbucks barrista had exhibited erratic behavior, which several customers complained was inappropriate. Starbucks arranged for the employee's leave of absence.

- During her leave a co-worker showed an assistant manager the plaintiff's MySpace page, which detailed very disturbing remarks and threats against Starbucks.

Mai-Trang Thi Nguyen v. Starbucks Coffee Corp.

- Notably, a blog entry dated ten days after the employee's last day at Starbucks stated:

"Starbucks is in deep s--t with GOD!!…I've worked Tirelessly 2 not cause trouble, BUT I will now have 2 to turn 2 my revenge side (GOD'S REVENGE SIDE) 2 teach da world a lesson of stepping on GOD. I thank GOD 4 pot 2 calm down my frustrations n worries or else I will go beserk n shoot everyone . . . Prepare to See Crazy Trang in public eye soon IN UR TELEVISION n other news vehicles."

Mai-Trang Thi Nguyen v. Starbucks Coffee Corp.

- Employees expressed their concerns for their safety
- Starbucks terminated plaintiff by letter because of “inappropriate conduct and threatening violence”
- The employee sued Starbucks for sexual harassment, retaliation, religious discrimination, violations of the California Occupational Safety and Health Act, and the California Fair Employment and Housing Act Section 12940(j)(1).

Mai-Trang Thi Nguyen v. Starbucks Coffee Corp.

- The court eventually ruled in favor of Starbucks on a motion for summary judgment finding that Plaintiff failed to go beyond the pleading to support her claims.
- Lessons learned for employers:
  - Remain aware of any employee's violent tendencies.
  - Take preventative steps to address workplace violence.

Social Media in the Workplace

Proprietary Business Information

- **Intellectual property infringement**
  - Microsoft employee posted software upgrade
- **Securities fraud/Unfair Competition**
  - Whole Foods CEO's anonymous blogging criticizing competitors led to unfair competition lawsuit and FTC/SEC investigation

Social Media in the Workplace

- Federal Wiretap Act
  - **Wiretap Act**
    - Prohibits “interception” of electronic communications
    - Ordinary course of business exception

Social Media in the Workplace

- **Stored Communications Act**
  - Prevents employers from using illicit or coercive means to access employees' private electronic communications.

- ***Quon v. Arch Wireless Operating Co*., 554 F.3d 769 (9th Cir. 2008)**
  - Court held Arch Wireless violated SCA by disclosing text messages without consent; U.S. Supreme Court ruled separately the City's policy defeated expectation of privacy – 130 S.Ct. 2619 (2010)

Social Media in the Workplace

- ***Brian Pietrylo, et al. v. Hillstone Restaurant Group dba Houston's***
  - An employee created a group on MySpace.com while working as a server for a restaurant.
  - The stated purpose of the group was to allow group members to vent about their jobs. The group was private and an invitation was required to join for access to postings.
  - The plaintiff invited past and present employees of the restaurant to join the group.

Social Media in the Workplace

- **No Access Without an Invite**
  - While at a manager's home, one of the group's members showed the manager the website.
  - The manager then requested and obtained the password from that member, and accessed the group site without an invitation.

Social Media in the Workplace

- **No Access Without an Invite**
  - The MySpace group included:
    - Postings of sexual remarks about management and customers
    - Jokes about the restaurant's policies
    - References to violence and illegal drug use
  - Based on these postings, the manager terminated two employees.
  - The two employees brought suit against the restaurant for, among other things, violation of federal and state SCA statutes and other federal and state privacy laws.

Social Media in the Workplace

- **No Access Without an Invite**
  - The case went to trial where a jury verdict was rendered for employees on SCA claims
    - Found the restaurant intentionally or purposefully accessed the group site without authorization on five occasions, in violation of the SCA.
  - However, jury also found that the restaurant had not invaded the employees' common law right to privacy and therefore unnecessary to reach a verdict on the employees' wrongful termination in violation of public policy of private rights claim.

Social Media in the Workplace

- **Employers should:**
  - Avoid accessing social media accounts or groups without authorization
  - Refrain from accessing employee personal e-mail accounts by utilizing password information stored on the company's network.

What About Privacy in Personal Emails, Instant Messages, Blogs, and Websites?

- In *Thygeson v. U.S. Bancorp*, 2004 U.S. Dist. LEXIS 18863 (D. Or. Sept. 15 2004), the court held an employee had no reasonable expectation of privacy in the internet websites he accessed while using his work computer. The plaintiff was fired for excessive internet use and storing sexually inappropriate emails, from his web account, on the company network. The plaintiff sued, claiming the company invaded his privacy by monitoring the internet sites he visited.

- The court relied on the fact that the church accessed the contents of emails on the plaintiff's personal email account by guessing at his password, but in this case, the company accessed the record of the addresses of the web pages the employee had visited.

What About Privacy in Personal Emails, Instant Messages, Blogs, and Websites?

- *Thygeson* did not resolve the issue of whether there is a reasonable expectation of privacy in content contained on third-party servers accessed through an employer's computers. Arguably, an employer will be less likely to be found to have invaded an employee's privacy if the employer:
  1. Monitors only its own networks;
  2. Has an electronic communications policy in place which provides the employer may access emails at any time, and there is no expectation of privacy in such communications; and
  3. Requires employee acknowledgement of the policy.

Employee Privacy vs. Employer Monitoring

- *McLaren v. Microsoft Corp.*, 1999 Tex. App. LEXIS 4103 (Tex. App. May 28, 1999) – no reasonable expectation of privacy for password protected personal folders on company network accessed through a company computer.

- *TBG Insurance Services Corp. v. Superior Ct.*, 96 Cal. App. 4th 443 (Cal Ct. App. 2002) – no reasonable expectation of privacy in an employer-owned computer located at employee's home

Key Takeaways

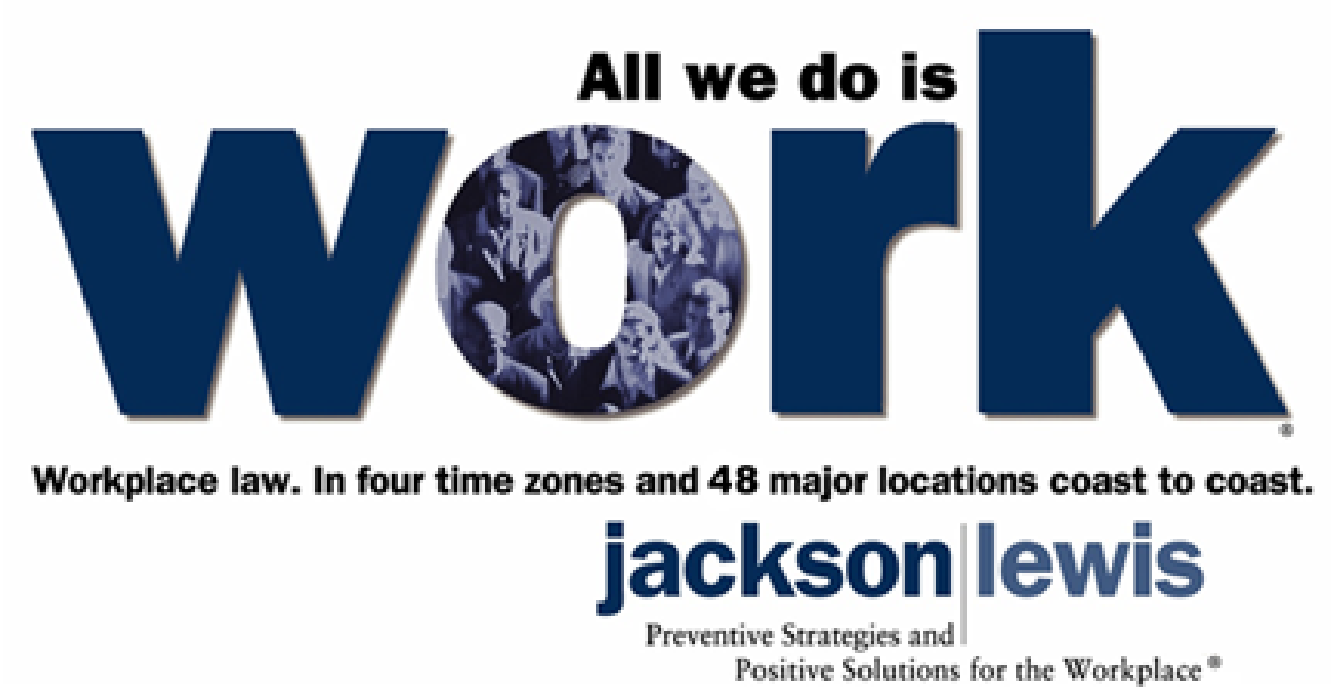
- Be wary of information found on the Internet regarding applicants
- Evaluate the use and monitoring of social media in your workplace
- Be careful about what you consider in making your employment decisions
- Have a clear policy so employees understand the parameters of use and expectation of privacy
- Train your management and HR personnel on your policies, expectations and enforcement

Questions?

About the Firm

- Representing management exclusively in every aspect of employment, benefits, labor and immigration law and related litigation
- Over 50 years of experience; founded in 1958 in New York City
- Almost 670 attorneys in 48 offices nationwide
- National perspective and sensitivity to the nuances of regional business environments

THANK YOU!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Ms. Jatana's practice focuses on employment litigation, as well as on advising employers regarding daily workplace issues. Her background includes, litigation involving wrongful termination, discrimination, harassment, breach of contract, wage and hour, preventive advice and training, and other labor and employment-related matters. She has litigated numerous wage and hour class and multi-plaintiff actions and has trial experience. Ms. Jatana conducts training seminars and frequently speaks publicly on a multitude of employment law topics. Her experience includes handling employment matters from both in-house counsel and outside counsel perspectives. She practices in both state and federal court and also before such tribunals as the United States Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing and the California Department of Industrial Relations - Division of Labor Standards Enforcement. She has represented employers in the retail, restaurant, manufacturing, pharmaceutical, transportation and banking industries, among others.

Ms. Jatana has been honored as a 2007 Southern California Super Lawyer, Rising Star; and as a 2010 Southern California Super Lawyer. She has served as Chair in 2009-2010 and 2010-2011on the Litigation Committee for the Executive Board of the South Asian Bar Association of Southern California. Ms. Jatana also volunteers her time as a Board Associate of the Big Brothers Big Sisters of Los Angeles and the Inland Empire.

Ms. Jatana is admitted to practice in all California State Courts; the United States District Courts for the Central, Southern, and Eastern Districts of California; and the Ninth Circuit Court of Appeals. She is a member of the Labor and Employment Law Section of the State Bar of California and a member of the Los Angeles County Bar Association, the South Asian Bar Association and the National South Asian Bar Association.

Ms. Jatana received her undergraduate degree from Rutgers College in New Brunswick, New Jersey, and she earned her Juris Doctor from University of the Pacific, McGeorge School of Law in Sacramento, California. During law school, Ms. Jatana excelled as an author and editor for *The Transnational Lawyer* and she received Honors in Trial Advocacy.

Ms. Jatana also speaks Hindi.

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CYNTHIA S. SANDOVAL is a Partner in the Orange County, California office of Jackson Lewis.

Ms. Sandoval has dedicated her entire legal career to the practice of employment law/litigation. She has dealt with various employment issues, including, harassment, discrimination, family medical leave, wage and hour, and breach of contract. Ms. Sandoval has won numerous summary judgment motions and appeals, including multi-plaintiff litigation. She has also prevailed on motions to compel arbitration. Further, Ms. Sandoval has handled several administrative complaints with the Department of Fair Employment and Housing, the Equal Employment Opportunity Commission and the Labor Commissioner. To this end, she has drafted position statements and prepared witnesses for administrative interviews and hearings.

In addition to her litigation practice, Ms. Sandoval provides advice and trainings to employers. She counsels employers on their personnel policies including anti-harassment, equal employment opportunity, leave of absence, and vacation policies. Ms. Sandoval also provides training seminars on numerous employment matters including hiring practices, how to avoid wrongful termination, leave issues, wage and hour traps for the unwary, sexual harassment and discrimination (in both English and Spanish). Ms. Sandoval has also served as a guest speaker at the national SHRM and ACC conferences.

Ms. Sandoval received her B.A. in Business Economics from the University of California at Los Angeles in 1993. In 1997, she earned her J.D. from Golden Gate University, where she was a Merit Scholar. Ms. Sandoval also served as an Associate Editor of the *Golden Gate University Law Review*.

TED GIZEWSKI is a Senior Attorney at Microsoft responsible for overseeing Microsoft's sales, marketing, and competition legal strategies. He manages a team of transactional attorneys and paralegals that focus on Microsoft's online business growth and IP protection, especially in Asia. Mr. Gizewski is also a former Marine Corps officer and chairman of the legal department's Diversity Team of 70 legal professionals.