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**SOCIAL MEDIA AND EMPLOYMENT LAW**  
**SUMMARY OF KEY CASES AND LEGAL ISSUES**

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### **I. INTRODUCTION**

Social media and social networking websites fundamentally have shifted how people discover, read, and share news, information, and content. The impact is global – including to employers and their employees alike. As social media technologies continue to evolve and explode in use, employers seek answers to legal questions that courts and legislators often have not yet anticipated or addressed.

This outline summarizes the legal issues that arise when the world of social media intersects employers, their employees and the workplace. It includes key case law and legislative developments regarding the use of social media throughout the employment relationship, from the use of social media in hiring decisions, through employee discharge for social media use, to questions regarding who retains ownership of social media after the employment relationship ends. It is intended to be a resource for counsel who advise U.S. employers on social media usage and related employment law matters.

### **II. WHAT ARE SOCIAL MEDIA?**

Social media, while susceptible to multiple definitions, can best be described as “online communications in which individuals shift fluidly and flexibly between the role of audience and author.”<sup>1</sup> Social media often encompass many of the features of social networking. Through social networking websites, members create online profiles that they use to “become part of an online community of people with common interests.”<sup>2</sup> Below are some of the most popular forms of social media and social networking:

#### **A. Facebook**

Founded in 2004 and with an estimated 1.06 billion users each month,<sup>3</sup> Facebook is currently the most popular social networking site. Facebook users can, among other things, create and customize profiles with photos, videos and information for personal and/or business use. The user can then give “friends” and other members of the public specified degrees of access to the postings and information. Users and friends also are able to communicate instantly via postings and private messaging.

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<sup>1</sup> Joseph Thornley, CEO of Thornley Fallis, April 8, 2008, <http://propr.ca/2008/what-is-social-media/>.

<sup>2</sup> *Doe v. Myspace, Inc.*, 474 F. Supp. 2d 843, 845 (W.D. Tex. 2007).

<sup>3</sup> Associated Press, Number of Active Users at Facebook Over the Years, Jan. 30, 2013, <http://news.yahoo.com/number-active-users-facebook-over-230449748.html>.

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**B. LinkedIn**

Launched in 2003, and currently boasting over 200 million users from 200 countries around the world,<sup>4</sup> LinkedIn is a business-oriented social media website that focuses on professional networking. The purpose of the site is to allow registered users to connect with other business professionals they know and trust by maintaining a list of contact details. The people in the list are called “connections.” Users can invite users or nonusers to become a connection. A user then uses his connections to form a contact network consisting of his connections, the connections of each of the user’s connections (second-degree connections), and those users’ connections (third-degree connections). Through this network, users recommend jobs, people, and business opportunities to one another, and use the network to build relationships with mutual friends.<sup>5</sup>

**C. Twitter**

Twitter is a microblogging service that allows users to communicate through updates known as “tweets.” Tweets are posts of up to 140 text-characters, which Twitter displays on the user’s profile page and delivers to the user’s “followers.” Users can limit delivery of their tweets to their circle of friends, or, by default, allow anyone to access their page. Twitter estimates approximately 288 million monthly active users.<sup>6</sup>

**D. Blogs**

A blog, a contraction of the term “web log,” is a personal website where the site’s author provides reflections, comments, and hyperlinks to other websites of interest. By the end of 2011, NM Incite, a Nielsen/McKinsey company, tracked over 181 million blogs around the world.

**E. YouTube**

YouTube is a video-sharing website that allows users to upload, share, and view videos. According to YouTube, each month more than 1 billion unique users visit the site and over 4 billion hours of video are watched on YouTube.<sup>7</sup>

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<sup>4</sup> Nishar, Deep, 200 Million Members!, Jan. 9, 2013, <http://blog.linkedin.com/2013/01/09/linkedin-200-million/>.

<sup>5</sup> “Ten Ways to Use LinkedIn” [http://blog.guykawasaki.com/2007/01/ten\\_ways\\_to\\_use.html#axzz1QszKoT1w](http://blog.guykawasaki.com/2007/01/ten_ways_to_use.html#axzz1QszKoT1w), January 4, 2007.

<sup>6</sup> McCue, T.J., Twitter Ranked Fastest Growing Social Platform In The World, Jan. 29, 2013, <http://www.forbes.com/sites/tjmccue/2013/01/29/twitter-ranked-fastest-growing-social-platform-in-the-world/>.

<sup>7</sup> YouTube Statistics, <http://www.youtube.com/yt/press/statistics.html>.

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**III. USE OF SOCIAL MEDIA IN HIRING DECISIONS**

Through social media, individuals voluntarily disclose a vast amount of personal information not typically available outside of an individual's personal circle of friends and family. This can range from what movies and books an individual enjoys, to which political candidates the individual supports, to how (and with whom) an individual spends his or her personal time. Not surprisingly, many employers want to use this large quantity of free data to "cybervet" candidates at some point during the interview process. After all, the information is free, easy to access, and oftentimes provides more insight into a candidate than an entire day's worth of formal interviews.

However, there are a number of potential pitfalls awaiting employers who use social media, or even simple internet searches, for this purpose. For example:

- **False Identity:** How does the employer know that the "John Smith" Facebook page belongs to the same John Smith applying for the position?
- **Inaccurate Information:** How does the employer know whether the information posted is accurate?
- **Impermissible Subject Matter:** While much of the information contained on an applicant's social media page will be benign, information regarding protected characteristics (e.g., religion, disabled status, sexual orientation, marital status, genetic information, etc.) often is prominently displayed in social media. For example, in *Gaskell v. Univ. of Kentucky*, No. CIV.A.09-244-KSF, 2010 WL 4867630 (E.D. Ky. Nov. 3, 2010) the plaintiff was rejected for employment as a scientist after another employee circulated an email detailing the plaintiff's religious views – which were visible on the plaintiff's personal website – to members of the hiring committee. The Court denied the University's motion for summary judgment on plaintiff's Title VII claims of religious discrimination, finding that the plaintiff raised a triable issue of fact as to whether his religious beliefs were a motivating factor in the University's decision not to hire him.

The *Gaskell* case serves as a cautionary tale: Even if the impermissible information is not used in making the employment decision, the mere fact that the employer accessed the information may infer improper motive. Some employers attempt to avoid these potential pitfalls by separating the employees who "cybervet" from those who are involved in making employment decisions, to reduce the risk that "protected characteristics" are known by the decision-makers. There are also third-party vendors who can perform this task.<sup>8</sup>

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<sup>8</sup> It is not clear at this time whether such vendors are considered "consumer reporting agencies" subject to the Fair Credit Reporting Act ("FCRA"), but the Federal Trade Commission suggested as much when it issued a "no-action" letter to Social Intelligence

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In addition to the practical considerations outlined above, employers should be particularly cautious when asking candidates or employees for access to their personal social media accounts. Several states prohibit employers from requesting social media user name and password information from applicants. As of the end of 2012, California<sup>9</sup>, Illinois<sup>10</sup>, Maryland<sup>11</sup>, and Michigan<sup>12</sup> had laws on the books prohibiting or limiting employers from asking employees for social media account information. Similar bills were pending in Delaware<sup>13</sup>, Hawaii,<sup>14</sup> Kansas,<sup>15</sup> Maine,<sup>16</sup> Nebraska, New Hampshire,<sup>17</sup> New Jersey<sup>18</sup>, New

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Corporation ([www.socialintel.com](http://www.socialintel.com)), “an Internet and social media background screening service.” The FCRA imposes a number of requirements on employers and the consumer reporting agencies that they engage to perform background checks of applicants during the hiring process. These third-party agencies conduct their searches of criminal history databases, education records and other sources using personal information requested and disclosed by applicants during the hiring process (e.g., date of birth, Social Security Number). There is an open question whether the FCRA requirements, and similar rules imposed by state consumer protection laws, apply when employers engage third parties to “cybervet” candidates for employment.

<sup>9</sup> In September 2012, California Gov. Jerry Brown signed A.B. 1844, limiting employers from asking employees for social media account information. The law took effect Jan. 1, 2013.

<sup>10</sup> In August 2012, H.B. 3782 was passed, which amends the state’s Right to Privacy in the Workplace Act to make it illegal for an employer to request a password or related account information from an employee or prospective employee in order to access that person’s social networking site. The law took effect Jan. 1, 2013.

<sup>11</sup> On April 9, 2012, Maryland became the first state to pass legislation banning employers from asking for employees’ and job applicants’ social media passwords (H.B. 964, S.B. 433). The bill will take effect October 12 if signed by Gov. Martin O’Malley. The bill also prohibits employers from taking, or threatening to take, disciplinary action against employees or applicants who refuse to disclose such information.

<sup>12</sup> In December 2012, Michigan Gov. Rick Snyder signed legislation that limits employer and educational institution access to the social media accounts of employees, job applicants, students and prospective students. Violations of the law can result in a misdemeanor fine and allows aggrieved individuals to bring a lawsuit seeking damages, attorneys’ fees and costs.

<sup>13</sup> In May 2012, Delaware’s House Telecommunication Internet and Technology Committee introduced H.B. 308, known as the Workplace Privacy Act, prohibiting employers from mandating that workers or applicants provide social media account information. The bill would also prohibit employers from indirectly accessing an employee or applicant’s social media profile through another person who is a social media contact.

<sup>14</sup> In January 2013, Hawaiian lawmakers introduced S.B. 207, a bill that would restrict employers from requesting social media credentials from an employee or applicant and also penalize retaliatory acts for refusing to provide the information.

<sup>15</sup> S.B. 53, introduced in January 2013, would prohibit employers from asking employers or applicants for social media log-in information and would prohibit retaliation against employees who refused to provide it.

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York<sup>19</sup>, Oregon,<sup>20</sup> Texas,<sup>21</sup> Utah,<sup>22</sup> Vermont, and Washington.<sup>23</sup> In February 2013, Philadelphia became the first U.S. city to consider a similar prohibition.<sup>24</sup>

At the federal level, the Social Networking Online Protection Act, introduced in the U.S. House of Representatives in March 2012 and reintroduced in February 2013, would prohibit employers, schools and universities from requesting candidates' social media usernames and passwords, or denying employment or penalizing candidates for refusing to divulge such information. In April 2012, House and Senate Democrats introduced companion bills, titled The Password Protection Act of 2012, which would prohibit current and prospective employers from compelling or coercing workers into providing private account access or information. Also in 2012, Senators Richard Blumenthal (D-Conn.) and Charles Schumer (D-N.Y.) asked the Department of Justice and the EEOC to investigate whether employer demands for job applicants' social media passwords violates current federal law.

**IV. USE OF SOCIAL MEDIA IN INTERNAL INVESTIGATIONS**

Social media posts can provide a host of information about an employee that an employer may want to know about for any number of legitimate business reasons. Is an employee

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<sup>16</sup> Bill announced in February 2013 would bar employers from seeking workers' social media passwords.

<sup>17</sup> In January 2013, H.B. 379 was introduced, which would seek to deny employers the right to ask employees or applicants for social media user names or passwords.

<sup>18</sup> The New Jersey Senate and General Assembly have approved legislation prohibiting employers from asking applicants and current employees to provide login information for social networking sites. The bill establishes civil penalties for violations and also gives prospective, current or former employees the right to sue employers for requiring them to provide user names or passwords or even disclose whether they have an account on a social networking site. The bill currently awaits the Governor's signature.

<sup>19</sup> In April 2012, New York introduced S. 6938, a bill that would protect workers and prospective employees from employer requests for social media passwords. The bill would prohibit an employer from requiring an employee or applicant to disclose his or her social media passwords and refusal to provide a password or access to a social media site could not be used as a reason to not hire an applicant or discipline an employee.

<sup>20</sup> Oregon H.B. 2654 and S.B. 344 would both limit employer requests for private social media information.

<sup>21</sup> In January 2013, Texas introduced S.B. 118 and H.B. 318, identical bills that would make it unlawful for an employer to request a user name or password to a candidate or employee's social media or email account.

<sup>22</sup> An internet privacy bill passed by the Utah House of Representatives in February 2013 would prohibit employers from requesting workers' social media passwords or user names.

<sup>23</sup> In January 2013, Washington introduced S.B. 5211, a bill that would make it illegal for employers to demand social media passwords or other account information as a condition of employment.

<sup>24</sup> City of Philadelphia, Bill No. 130121 (Feb. 21, 2013).

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posting videos to YouTube while he should be working? Is an employee divulging confidential company information? Notwithstanding the potential wealth of information and knowledge that can be gained from employees' social media use, employers should proceed with care to ensure that any monitoring or investigation activity is conducted within the bounds of the law.

First, the employer should take care not to run afoul of the Stored Communications Act (SCA). The SCA imposes criminal and civil liability against whomever "intentionally accesses without authorization a facility through which an electronic communication service is provided" or "intentionally exceeds an authorization to access that facility," and by doing so, "obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system."<sup>25</sup> This includes, among other things, social networking sites.<sup>26</sup> Employers who access private social media without the owner's permission, or pressure employees to provide access to private social media sites, could find themselves in violation of the SCA.<sup>27</sup>

The limitations placed on an employer by the SCA highlight a key distinction between a government investigation with subpoena power and an internal investigation by a private entity. Under the SCA, the government may require an electronic communication service

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<sup>25</sup> 18 U.S.C. § 2701 (2011).

<sup>26</sup> *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 982 (C.D. Cal. 2010) (web hosting and social networking sites are electronic communication services ("ECS") providers under the SCA).

<sup>27</sup> See *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002) (reversing summary judgment for employer on employee's SCA claim; although employee gave certain co-workers authorization to access the secure website, who, in turn, agreed to allow management to access the secure site, those employees never actually "used" the website and thus were not "users" within the meaning of 18 U.S.C.A. § 2701(c)(2)'s exception for conduct authorized by a "user" of the service); *Pietrylo v. Hillstone Rest. Grp.*, CIV.06-5754(FSH), 2009 WL 3128420 (D.N.J. Sept. 25, 2009) (restaurant managers violated the SCA when they pressured an employee into providing her MySpace password so they could access a private, invitation-only chat room, and continued to access the chat room after realizing the employee had reservations about providing her password); *Gates v. Wheeler*, No. A09-2355, 2010 Minn. App. Unpub. LEXIS 1136 (Minn. Ct. App. Nov. 23, 2010) (unpublished) (affirming a preliminary injunction prohibiting one party's use of another's private emails in litigation between them; business co-owner used his access to the company's email systems to route his co-owner's (and party-opponent) email to him for use in the litigation, including all of his personal email sent using his work email account; the court found this conduct violated the targeted individual's reasonable expectation of privacy in his personal emails, and likely violated the SCA and similar state law); *Van Alstyne v. Elec. Scriptorium Ltd.*, 560 F.3d 199 (4th Cir. 2009) (plaintiff's manager accessed her personal email account without her permission and read her emails; although the jury's award of statutory damages under the SCA was vacated because the plaintiff failed to show actual damages, the court noted that punitive damages could be available for SCA violations without actual damages).

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provider to produce information relating to its users.<sup>28</sup> Private employers have no similar recourse. Yet as outlined above, resorting to self-help in an internal investigation could expose an employer to civil and even criminal liability under the SCA.<sup>29</sup>

Even if the employer is not exposed to statutory liability, an employer can violate an employee's privacy interest if the employer obtains access to private social media under false pretenses, or by placing an employee under duress.<sup>30</sup> Asking an employee to provide his or her social media username and password, or provide management access to his or her private account or the private account of a "friend," is generally not viewed favorably by the courts.<sup>31</sup> However, some courts have found that public social media are fair game for employee investigations, particularly when the employer obtains the information without asking or pressuring an employee to provide it.<sup>32</sup>

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<sup>28</sup> See 18 U.S.C. § 2703.

<sup>29</sup> Unlike the SCA, the federal Wiretap Act (18 U.S.C. § 2510 *et seq.*) does not apply when an employer acquires a website's content in its stored state, such as viewing a social media post, so long as the access is not acquired during transmission. *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002) (a secure website is "electronic communication" for purposes of the Wiretap Act's provision prohibiting the intentional interception of wire, oral, or electronic communication, but finding that no "interception" occurred in this case when management gained unauthorized access to a secure website maintained by an employee and containing statements critical of the employer, employer's officers, and employee's incumbent union, because management acquired the website's contents in their stored state and not during transmission).

<sup>30</sup> *Ebling v. Monmouth-Ocean Hosp. Service Corp.*, 872 F. Supp. 2d 369 (D.N.J. 2012) (plaintiff alleged employer gained access to her Facebook account when a supervisor asked a coworker who was Facebook friends with plaintiff to access the account on a work computer in the supervisor's presence; plaintiff argued that she had a reasonable expectation of privacy in her Facebook posting because her posts were limited to her "friends" and while some friends were coworkers, none were management employees; "given the open-ended nature of the case law" the court found that plaintiff had stated a plausible claim for invasion of privacy and denied the employer's motion to dismiss).

<sup>31</sup> *Pietrylo v. Hillstone Rest. Grp.*, No. CIV.06-5754(FSH), 2009 WL 3128420 (D.N.J. Sept. 25, 2009) (employee's disclosure of her MySpace password to defendant's management, which allowed management to access a private MySpace chat room, was not "proper authorization" because the employee felt that "something bad might happen to her" if she did not).

<sup>32</sup> *Sumien v. Careflite*, No. 02-12-00039-CV, 2012 Tex. App. LEXIS 5331 (July 5, 2012) (affirming summary judgment on employee's intrusion on seclusion claim; although plaintiff was discharged after the sister of employer's compliance officer saw the plaintiff's Facebook comments about patients and forwarded it to the employer, plaintiff could not show that the employer intentionally intruded on his alleged seclusion).

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**V. REGULATING THE USE OF SOCIAL MEDIA BY EMPLOYEES**

**A. Limiting Employee Use of Social Media**

Employers often desire to seek to restrict or limit employees' use of social media as it relates to their employment. For example, the employer may decide to prohibit altogether employees' use of social media on company-issued mobile devices, or it may decide instead to allow such use but to limit social media activity during working hours. Beyond these use determinations, what about limitations on the content of the employee's social media activity? What can an employer prohibit its employees from posting, "liking," and "tweeting?"

Courts have not yet clearly delineated the boundaries between a lawful and unlawful social media policy. At a minimum, however, employers should be aware that many state and local laws prohibit employment policies that restrict employees' lawful, off-duty conduct. For example, some states have broad lifestyle discrimination statutes, which generally forbid employers from discriminating on the basis of any lawful conduct that an employee engages in while off-duty and off-premises.<sup>33</sup> Other states slightly narrow the protected categories to an employee's use of "lawful products" or "lawful consumable products."<sup>34</sup> States with these relatively broad lifestyle discrimination protections typically include an escape hatch, such that an employer can discriminate on a protected category if: "(i) doing so is related to a bona fide occupational requirement, (ii) doing so is necessary to avoid a conflict of interest with the employer, (iii) use of the product affects an employee's ability to perform his job duties and/or [(iv)] the primary purpose of the organization is to discourage the use of the product at issue."<sup>35</sup> As a result, any social media policy should be narrowly tailored to the employer's legitimate business interests.

The National Labor Relations Board ("NLRB") also supports only narrowly tailored social media policies, but for a different reason. Section 8(a)(1) of the National Labor Relations Act ("NLRA") makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights to self-organize, form, join, or assist labor organizations, bargain collectively, or engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.<sup>36</sup> Thus, like any other employment

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<sup>33</sup> Christine Burke & Barbara Roth, *Labor: Lifestyle Discrimination Laws are Becoming Increasingly Prevalent*, INSIDECOUNSEL (June 13, 2011), <http://www.insidecounsel.com/2011/06/13/labor-lifestyle-discrimination-laws-are-becoming-i>. California, Colorado, New York and North Dakota have this type of broad lifestyle discrimination protection in place. *Id.*

<sup>34</sup> *Id.* (noting that Illinois, Minnesota, Montana, Nevada, North Carolina and Wisconsin have lifestyle discrimination laws that are narrowed to protecting employees' use of "lawful products" or "lawful consumable products").

<sup>35</sup> *Id.*

<sup>36</sup> 29 U.S.C. § 158.

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policy, a social media policy must be narrowly tailored to avoid infringing on an employee's rights under the NLRA.

The meaning of “narrowly tailored” under the NLRA, however, remains unsettled. To date, the NLRB has deemed all of the following social media policy provisions unlawful:

- prohibiting employee statements that “damage the company, defame any individual or damage any person’s reputation”;<sup>37</sup>
- prohibiting employees from making “disparaging or defamatory comments about [employer], its employees, officers, directors, vendors, customers, partners, affiliates, or ... their products/services”;<sup>38</sup>
- prohibiting “disrespectful” conduct and language that might injure the “image or reputation” of the employer;<sup>39</sup>
- prohibiting employees from posting pictures depicting the employer in any way, including a picture of the employee in a company uniform or the corporate logo;<sup>40</sup>
- prohibiting employees from making disparaging comments about the company or the employee’s supervisors, co-workers, or competitors;<sup>41</sup>
- prohibiting employees’ use of language or action that is “inappropriate,” of a general offensive nature, rude or discourteous to a client or co-worker;<sup>42</sup>

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<sup>37</sup> Costco Wholesale Club, NLRB No. 34-CA-012421 (Sept. 7, 2012) (in its first decision on the issue, the NLRB determined that a provision in Costco’s employee handbook prohibiting employee statements that “damage the company, defame any individual or damage any person’s reputation” was too broad, had a “reasonable tendency” to inhibit employees’ protected activity, and violates Section 8(a)(1) of the NLRA; that the company had not disciplined any employee for violating the rule was irrelevant).

<sup>38</sup> EchoStar Techs, LLC, NLRB No. 27-CA-066726 (Sept. 20, 2012) (invalidating employer’s policy forbidding employees from making “disparaging or defamatory comments about [employer], its employees, officers, directors, vendors, customers, partners, affiliates, or ... their products/services” because the term “disparaging” intruded on employees’ Section 7 rights; general savings clause in the company’s employee handbook was not enough to preserve the rule).

<sup>39</sup> Karl Knauz Motors Inc., 358 N.L.R.B. No. 164 (Sept. 28, 2012) (employer policy against “disrespectful” conduct or language that might injure the “image or reputation” of the employer would reasonably be construed by employees as encompassing Section 7 activity).

<sup>40</sup> Memorandum OM 11-74, Office of the General Counsel (Aug. 18, 2011).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

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- prohibiting employees from revealing personal information regarding co-workers, clients, partners or customers without consent;<sup>43</sup>
- prohibiting employees from identifying themselves as the employer's employee;<sup>44</sup> and
- limiting employee discussions of terms and conditions of employment to discussions conducted in an "appropriate" manner.<sup>45</sup>

The NLRB's General Counsel recently provided guidance to employers by concluding that at least one form of social media policy is, in fact, lawful. In that instance, the General Counsel determined that a national retailer's social media policy contained sufficient examples of prohibited conduct such that employees would not reasonably conclude that activities protected by the NLRA fell within the policy's scope. Even the employer's prohibition on revealing "trade secrets and private and confidential information" was deemed lawful because the provision incorporated specific examples of the types of information that the policy sought to reach.<sup>46</sup>

### **B. Employee Discipline for Social Media Activity**

Once an employer has crafted a social media policy, the employer will need to implement its policy and hold employees accountable for non-compliant behavior. Courts have had no difficulty concluding that an employer may discipline employees who use social media in violation of clearly stated policy use provisions, such as using social media during working hours.<sup>47</sup> When it comes to discipline for off-duty social media activity, however, the analysis is more complex. As noted above, discipline for lawful off-duty social media activity may violate state laws in those states with broad lifestyle statutes, particularly where the activity does not implicate an employer's legitimate business interest. The more difficult question is whether an employer may discipline an employee for off-duty social media conduct that does relate to the employment relationship.

While federal and state laws often do not address whether employees may be disciplined for off-duty social media activity that relates to the employment relationship, the NLRB and its General Counsel have focused heavily on these issues as they arise under the NLRA. The

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<sup>43</sup> *Id.*

<sup>44</sup> Memorandum OM 12-31, Office of the General Counsel (Jan. 24, 2012).

<sup>45</sup> *Id.*

<sup>46</sup> See Memorandum OM 12-59, Office of the General Counsel (May 30, 2012) for the sample policy.

<sup>47</sup> See *Chapman v. Unemployment Comp. Bd. of Review*, 20 A.3d 603 (Pa. Commw. 2011) (upholding the denial of plaintiff's unemployment benefits after she was terminated for using her mobile phone to post on Facebook in violation of the employer's policy regarding the use of personal cell phones while on duty).

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NLRA provides that all employees, including non-union employees, “have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>48</sup> This right to engage in “concerted activity” under the NLRA is typically referred to as an employee’s “Section 7” rights.

Concerted activity encompasses a variety of actions, such as challenging an employer’s pay practices,<sup>49</sup> protesting unsafe working conditions,<sup>50</sup> and complaining about work schedules.<sup>51</sup> Not all employee complaints are protected concerted activity, however; to qualify as concerted activity, the conduct must be undertaken “for the purpose of collective bargaining or other mutual aid or protection.” In other words, complaints made solely on behalf of an individual employee are not protected; rather, the complaints must be made on behalf of other employees or at least made with the object of inducing or preparing for group action.<sup>52</sup> Even a conversation can constitute concerted activity, “but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.”<sup>53</sup>

What is and is not “concerted activity” when it comes to employees’ social media use is not yet clearly answered by court decisions. The NLRB’s General Counsel has attempted to provide clarity in this area, however, by publishing three advice memorandums containing examples of protected, concerted social media activity. Examples include:

- photographs of an employer-sponsored sales event including sarcastic remarks that the employee was happy to see that the employer had gone all out for the important car launch by providing small bags of chips, inexpensive cookies, semi-fresh fruit, and a hot dog cart where clients could get overcooked hot dogs and stale buns were part of a course of protected, concerted conduct related to employees’ concerns over commissions and

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<sup>48</sup> 29 U.S.C. § 157.

<sup>49</sup> *JMC Transport, Inc. v. NLRB*, 776 F.2d 612, 618 (6th Cir. 1985).

<sup>50</sup> *Consumers Power Co.*, No. 7-CA-20060, 282 N.L.R.B. 130 (Nov. 13, 1986).

<sup>51</sup> *NLRB v. Hotel Employees & Rest. Employees Int’l Union Local 26, AFL-CIO*, 446 F.3d 200, 207 (1st Cir. 2006).

<sup>52</sup> *See Koch Supplies, Inc. v. NLRB*, 646 F.2d 1257, 1259 (8th Cir. 1981) (concerted activity “need not take place in a union setting and it is not necessary that a collective bargaining agreement be in effect. It is sufficient that the [complaining] employee intends or contemplates, as an end result, group activity which will also benefit some other employees”).

<sup>53</sup> *El Gran Combo de Puerto Rico v. NLRB*, 853 F.2d 996, 1004 (1st Cir. 1988) (quoting *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).

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were not disparaging of the employer's product or so "egregious" as to lose the NLRA's protection;<sup>54</sup>

- statements, including a short-hand expletive, expressing dissatisfaction with the employer's tax withholding practices and asserting that the employer's owners could not do paperwork correctly that were "Liked" and commented upon by other employees were related to employees' shared concerns about a term and condition of employment – the employer's administration of income tax withholdings;
- social media posts including, "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB[.] I about had it! My fellow coworkers how do u feel?" and "Tell her to come do [my] fucking job n c if I don't do enough, this is just dum[b]," were protected concerted activity because they were related to a co-worker's criticism of employee job performance, a matter the employees had a protected right to discuss;<sup>55</sup>
- social media post by employee alleging employer's labor code violations to which several co-workers responded with comments;<sup>56</sup>
- employee's act of clicking the "Like" button on a social media page was concerted activity because it expressed approval of employee complaints about payroll tax mismanagement and made "a meaningful contribution to the discussion";<sup>57</sup> and
- posts including, "tomorrow I'm bringing a California workers [sic] rights book to work. My mom works for a law firm that specializes in labor law and BOY will you be surprised by all the crap that's going on that's in violation".<sup>58</sup>

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<sup>54</sup> *NLRB v. Knauz BMW*, No. 13-CA-46452, 2011 WL 4499437 (NLRB Div. of Judges, Sept. 28, 2011).

<sup>55</sup> *Hispanics United Of Buffalo, Inc. v. Ortiz*, No. 3-CA-27872 N.L.R.B. (Sept. 2, 2011).

<sup>56</sup> *NLRB v. Build.com*, (settled in April 2011 with the employer agreeing to "post a notice at the workplace for 60 days stating that employees have the right to post comments about terms and conditions of employment on their social media pages, and that they will not be terminated or otherwise punished for such conduct").

<sup>57</sup> *Three D LLC d/b/a Triple Play Sports*, No. 34-CA-12915 (Jan. 3, 2012).

<sup>58</sup> *NLRB v. Design Tech. Group LLC d/b/a Bettie Page Clothing*, No. 20-CA-35511, 2012 WL 1496201 (NLRB Div. of Judges, Apr. 27, 2012).

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On the other hand, when an employee's social media actions do not constitute "concerted activity," the employee may typically be disciplined. Examples of unprotected conduct as determined by the NLRB's General Counsel include:

- employee tweets critical of his employer's copy editors and an area television station, along with tweets about homicides in the city (some with sexual content), were not protected concerted activity because the tweets did not relate to the terms and conditions of employment or seek to involve other employees;
- employee posts complaining that he had not received a raise in five years and that he was doing the waitresses' work without tips, calling customers "rednecks," and stating that he hoped the customers choked on glass as they drove home drunk, were not protected concerted activity because the employee did not share the posts with co-workers, no co-workers responded to the posts, and there had been no employee meeting or any attempt to initiate group action concerning the tipping policy or raises;
- employee who wrote on her Senator's Facebook wall that her employer received public contracts because it was the cheapest service in town, paid employees \$2 less than the national average, and that the state was looking for more cheap companies to farm jobs out to was not protected concerted activity because the employee did not discuss her posts with any other employee, there had been no employee meetings or any attempt to initiate group action, and the employee admittedly did not expect the Senator to help her situation;
- employee's posts that it was spooky being alone overnight in a mental institution, that one client was cracking her up, and that the employee did not know whether the client was laughing at her, with her, or at the client's own voices, was not concerted activity because the employee did not discuss her posts with her fellow employees, none of her co-workers responded to the posts, and her posts did not mention any terms or conditions of employment;
- employee complaints of "tyranny" by his employer, suggesting that the employer would get a wakeup call because several employees were about to quit, and calling the assistant manager a "super mega puta" was not protected concerted activity because the complaints contained no language suggesting that the employee sought to initiate or induce co-workers to engage in group action, rather, they expressed only the employee's frustration regarding his individual dispute with the Assistant Manager over mispriced or misplaced items; and

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- “F--- [Employer]” was merely an expression of an individual gripe.

When employee conduct violates an employer’s policy and does not fall within the NLRA’s protection for concerted activity, the employer generally may issue discipline.<sup>59</sup>

### **VI. EMPLOYER LIABILITY FOR EMPLOYEE’S USE OF SOCIAL MEDIA**

Employers also should consider the potential liability they may incur because of the social media activities of its employees. Harassment, discrimination and defamation are examples of claims that may impute liability to the employer if it does not take appropriate steps to monitor and address an employee’s social media once it is on notice that potentially unlawful conduct may be occurring.

#### **A. Harassment and Discrimination Claims**

Although an employer does not have a strict obligation to monitor employees’ social media (and indeed may not be permitted to monitor without permission), an employer has a duty to redress complaints of harassment or discrimination known to the employer if the harassment is related to the workplace. In some situations, it is conceivable that the employer’s obligation may extend to alleged harassment and discrimination that occur via social media use. If an employer is aware of allegedly harassing or discriminatory social media conduct made by or to an employee and does nothing in response, the employer could be liable for failing to remedy the situation, just as it would be for other complaints of workplace harassment or discrimination.<sup>60</sup> At the same time, employers that take prompt

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<sup>59</sup> *Palleschi v. Cassano*, Case No. 105486/11 (N.Y.) (upholding fire department’s decision to fire a lieutenant for posting on Facebook a photo of a computer screen containing confidential information about a 911 caller’s complaint, including the caller’s name, address and phone number); *City of San Diego v. Roe*, 543 U.S. 77 (2004) (dismissal of plaintiff’s 42 U.S.C. section 1983 claim upheld; plaintiff’s employment as a police officer was terminated after he was caught selling online videos depicting him stripping out of a police uniform and masturbating; although such actions took place while the plaintiff was off-duty, they were nevertheless related to the plaintiff’s employment because he depicted himself as a police officer in his uniform and used other clues to suggest he was a law enforcement professional; the plaintiff’s off-duty actions exploited the employer’s image and compromised the employer’s legitimate and substantial interests). *Nguyen v. Starbucks Coffee Corp.*, Nos. CV 08-3354, CV 09-0047, CRB, 2009 WL 4730899 (N.D. Cal. Dec. 7, 2009) (granting summary judgment to defendant employer in plaintiff’s Title VII claim; plaintiff was discharged after fellow employees alerted the employer to a post the plaintiff wrote on her MySpace page in which she stated that without marijuana she would “go beserk n [sic] shoot everyone”).

<sup>60</sup> *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J. 2000) (reversing summary judgment for employer on a hostile work environment claim; although an electronic bulletin board might not have a physical location within the workplace, it might nonetheless have been so closely related to the workplace environment and beneficial to the employer that continuation of harassment on the bulletin board forum should be regarded as part of the

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action in response to a claim of harassment or discrimination can reduce or eliminate liability.<sup>61</sup> Before acting, employers should consider whether the alleged “harassment” is likely to be deemed activity protected by the NLRA.<sup>62</sup>

### B. Other Civil Liability

It is not clear whether employers may be held liable for other civil actions resulting from employee social media activity. Lawsuits alleging negligence, defamation and various other causes of action have been filed and likely will persist.<sup>63</sup>

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workplace; if employer has notice that employees engage in retaliatory harassment toward another employee, employer has a duty to remedy the harassment); *Guardian Civic League v. Philadelphia Police Dep’t.*, No. 2:09-cv-03148-CMR (E.D. Pa. filed July 15, 2009) (alleging the employer police department created a hostile work environment under 42 U.S.C. section 1983 by allowing white police officers to operate a racist website and to post racially offensive comments while on and off duty; the case against the police department settled for \$152,000 plus injunctive relief); *Espinoza v. County of Orange*, No. G043067, 2012 Cal. App. Unpub. LEXIS 1022 (Feb. 9, 2012) (upholding jury verdict in favor of plaintiff; plaintiff’s evidence that co-workers posted harassing comments on a blog via workplace computers, the blog discussed workplace issues, and the employer sent emails to employees directing they discontinue posting the improper comments, but did not disable their access to the blog, was sufficient to impute liability to the employer under California’s Fair Employment and Housing Act).

<sup>61</sup> *Amira-Jabbar v. Travel Services, Inc.*, 726 F. Supp. 2d 77 (D. P.R. 2010) (granting defendant employer’s motion for summary judgment against plaintiff’s harassment claim; employer’s remedial action – instructing its IT department to block employees’ access to Facebook after allegations of Facebook-based harassment were raised – constituted a prompt and appropriate response to employee’s hostile work environment complaint).

<sup>62</sup> *Hispanics United of Buffalo, Inc. v. Ortiz*, No. 3-CA-27872 N.L.R.B. (Sept. 2, 2011) (ordering reinstatement of employees discharged for Facebook posts discussing a co-worker; posts included, “Lydia Cruz, a coworker feels that we don’t help our clients enough at HUB[.] I about had it! My fellow coworkers how do u feel?” and “Tell her to come do [my] fucking job n c if I don’t do enough, this is just dum[b]”; NLRB found posts were not sufficiently harassing to lose the protection of the Act because: (1) the posts were not made at work and were not made during working hours, (2) the posts were related to a co-worker’s criticism of employee job performance, a matter the discharged employees had a protected right to discuss; (3) there were no “outbursts” as several of the posts did not mention the co-worker by name and none of the posts criticized the employer; and (4) the posts did not violate the employer’s policies because the statements, while harsh, did not implicate any prohibited basis that could create an intimidating, hostile or offensive work environment, unreasonably interfere with an individual’s work performance or otherwise adversely affect an individual’s employment opportunity).

<sup>63</sup> See *Ward v. Cisco Systems, Inc.*, No. CIV. 08-4022, 2009 WL 2905572 (W.D. Ark. Sept. 2, 2009) (alleging that employer is liable for defamatory statements made by employee on an internet blog that accused the plaintiff, an attorney, of criminal and unethical conduct; case settled for undisclosed amount); *Doe v. XYZ Corp.*, 887 A.2d 1156 (N.J. Super. Ct. App. Div. 2005) (reversing summary judgment for employer on a negligence claim brought by a third

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**VII. SOCIAL MEDIA USED FOR BUSINESS-RELATED PURPOSES**

**A. Who Owns Social Media?**

Consider the following scenario: A headhunter amasses a large number of LinkedIn “connections” while working for Recruiting Agency A. She leaves to work for Recruiting Agency B. Can she take those “connections” with her? Could Recruiting Agency A have negotiated a pre-employment agreement that Agency A would retain the “connections” if the employee ever left for a competitor? Can Agency A prove that the “connections” are a trade secret?<sup>64</sup> Or that the employee engaged in misappropriation or conversion?<sup>65</sup> Or conversion?<sup>66</sup> What about the employee – does she have any legal right to her business-

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party; alleging the employer breached its duty to exercise reasonable care to report and/or take effective action to stop an employee’s activities in viewing child pornography on a workplace computer, where employer was on notice of the employee’s conduct).

<sup>64</sup> *Compare Sasqua Group, Inc. v. Courtney*, No. CV 10-528 ADS AKT, 2010 WL 3613855 (E.D. N.Y. Aug. 2, 2010) (plaintiff employer was not entitled to a preliminary injunction because it failed to show likely success on the merits of trade secret misappropriation claim; former employee defendant showed, inter alia, that the information alleged to constitute a trade secret – a database of contact information for potential customers of an executive recruiting firm – was widely available through social media such as LinkedIn and Facebook) and *Eagle v. Morgan*, No. 11-4303, 2011 U.S. Dist. LEXIS 147247 (E.D. Pa. Dec. 22, 2011) (finding LinkedIn connections were not trade secrets because the employer’s customers were listed on its website and thus either were “generally known in the wider business community or capable of being easily derived from public information”) with *PhoneDog LLC v. Kravitz*, No. C 11-03474 MEJ, 2012 U.S. Dist. LEXIS 10561 (N.D. Cal. Jan. 30, 2012) (employer permitted to proceed with trade secret misappropriation and conversion claims against former employee who refused to return control of employer’s Twitter account; when ex-employee left the company, he refused to return control of his employer-connected Twitter name, rather, he changed the name to eliminate reference to former employer (from @PhoneDog\_Noah to @noahkravitz) and continued to use the account with the built-in following; matter resolved in confidential settlement.) and *Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055 (D. Colo. 2012) (plaintiff employer alleged former employee misappropriated employer’s trade secrets, including login information for MySpace profiles and list of friends; although defendant contended that a list of MySpace friends is broadcast to the public and cannot be considered a trade secret, the court found that the cost and effort spent to create the friend list, as well as the non-public information associated with the list (email addresses, phone numbers, etc.) was sufficient to survive defendant’s motion to dismiss).

<sup>65</sup> *Eagle v. Morgan*, No. 11-4303, 2011 U.S. Dist. LEXIS 147247 (E.D. Pa. Dec. 22, 2011) (denying plaintiff’s motion to dismiss defendant’s counterclaim alleging misappropriation of employer-maintained LinkedIn account; although the account was in the ex-employee’s name, the employer spent time and money to develop and maintain all of the account’s connections and much of its content, “actions that were taken solely at [employer’s] expense and exclusively for its own benefit”; bench trial held November 2012).

<sup>66</sup> *Ardis Health, LLC v. Nankivell*, No. 11 Civ. 5013 (NRB), 2011 U.S. Dist. LEXIS 120738 (S.D.N.Y. Oct. 19, 2011) (court ordered former employee to return passwords and other login information for plaintiff-employer’s websites, email accounts and social media

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related social media after discharge?<sup>67</sup> These questions and more regarding the ownership and value of social media content created or gathered during the employment relationship will continue to emerge as business is increasingly transacted through social media.

### **B. Use of Social Media to Compete with Former Employer**

Even if an employee leaves without taking an entire LinkedIn account or Facebook access codes, workers still may attempt to use social media to compete with their former employer or solicit employees. Whether or not “connecting” with a former client contact via LinkedIn or “friending” former coworkers in the hopes that they will come work for a new employer violates non-compete or non-solicitation agreements are questions that courts are just now starting to address and determine.<sup>68</sup>

### **C. Industry Specific Regulations Regarding Business Use of Social Media**

As business-related use of social media continues to increase, at least some industries have begun to regulate its use. For example, the Financial Industry Regulatory Authority (FINRA) has promulgated advice regarding the recordkeeping and monitoring obligations for firms who use, or permit individuals to use, social media sites for business purposes.<sup>69</sup> In January 2013, the Federal Financial Institutions Examination Council (FFIEC) released proposed guidelines on the applicability of consumer protection and compliance laws, regulations, and policies to activities conducted via social media by banks, savings associates, and credit unions, as well as nonbank entities supervised by the Consumer Financial

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accounts; employer’s position strengthened by work product agreement signed at beginning of employment providing that all work created or developed by the employee would be the sole and exclusive property of the employer).

<sup>67</sup> *Eagle v. Morgan*, No. 11-4303, (E.D. Pa. March 12, 2013) (holding employer liable for invasion of privacy, unauthorized use of name and misappropriation of publicity for retaining access to former employee’s LinkedIn account after her termination, blocking the former employee’s access to the account and replacing some information with that of its newly appointed CEO, however, the former employee was not entitled to damages because she could not point to a specific business deal she lost out on because of her lack of access to her LinkedIn contacts).

<sup>68</sup> *NDSL, Inc. v. Patnoude*, No. 1:12-cv-1161, 2012 WL 6096584 (W.D. Mich. Dec. 7, 2012) (after leaving for a competitor, employee sent a generic LinkedIn invitation request to a former customer; denying employer-plaintiff’s request for preliminary injunction because, *inter alia*, the court found the standard LinkedIn invitation was not sufficient to establish solicitation in violation of the employee’s non-solicitation agreement); *Pre-Paid Legal Servs. v. Cabill*, No. 2012-cv-00346, 2013 WL 551335 (E.D. Okla. Jan. 22, 2013) (former employee-defendant did not solicit former employer’s workers with general posts to his Facebook page about his new employer and invitations to former coworkers to join Twitter).

<sup>69</sup> *Regulatory Notice 10-06*. See also *Regulatory Notice 11-39* (providing further clarification and advice regarding social media sites used for business purposes).

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Protection Bureau.<sup>70</sup>

**VIII. BRING YOUR OWN DEVICE**

Each day, more employers are moving towards permitting employees to bring personally owned mobile devices (laptops, tablets, smart phones, etc.) to the workplace and use those devices to access company information and applications, a phenomenon commonly referred to as BYOD (Bring Your Own Device). While many companies permit employee BYOD, only some have BYOD policies in place to address security and compliance concerns. Because employees who use a personal device for work purposes oftentimes use the same device to access and contribute to social media, any employer permitting employees to BYOD should ensure their policies cover both areas of emerging technology – BYOD and social media.

One of the key legal issues surrounding BYOD is employee privacy. To what extent may an employer access, monitor or review information stored on an employee’s personal device, even if the device is used for work purposes? In one of the earliest court decisions addressing the issue, the Georgia Court of Appeals ruled that the extent of the employer’s policies really matter. In *Sitton v. Print Direction, Inc.*, a salesperson for a commercial printing business used his personal laptop connected to his employer’s network for business and personal use.<sup>71</sup> His “personal use” included brokering print jobs for his wife’s company, a competing printer.<sup>72</sup> When the employer learned about these activities, the CEO entered the employee’s office, moved the computer’s mouse, and printed certain emails confirming the employee’s actions.<sup>73</sup> After the employee was discharged he sued the employer for computer theft, computer trespass, and computer invasion of privacy under the Georgia Computer Systems Protection Act.<sup>74</sup> Affirming the trial court’s judgment in favor of the employer, the court agreed that despite the fact that the computer belonged to the employee and not the employer, the employer was authorized to inspect the computer pursuant to the computer usage policy contained in the Employee Manual.<sup>75</sup> The company’s broad computer usage policy stated that the employer needed access to company data and information to respond to legal requests for electronically-stored evidence and that employees should not regard electronic mail “left on or transmitted over” the employer’s system as private or confidential.<sup>76</sup> A less robust employer policy might have led to a strikingly different result.

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<sup>70</sup> The proposed guidelines are available at <http://www.ffiec.gov/press/pr012213.htm>.

<sup>71</sup> 718 S.E.2d 532, 535 (Ga. 2011).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 536.

<sup>76</sup> *Id.*

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A related issue is the employer's desire to retain the right to centrally lock, erase, and wipe company data from an employee's personal device if it is lost or stolen, or if the employment relationship terminates. Readily available software allows an employer to remotely "wipe" those devices to ensure the data is not accessed. While remotely deleting the company's data and information stored on a personal device is generally allowed, employers must take steps to avoid remotely wiping the employee's personal information without the employee's consent. Depending on the facts, the employee may have a claim against the employer under the Computer Fraud and Abuse Act ("CFAA")<sup>77</sup> or similar state law.

Finally, employers must be sensitive to their obligations to preserve data stored on employee-owned devices in the event of litigation. A Florida district court issued sanctions against defendants in one case after the defendants' Blackberries were wiped of all data, including emails, calendar items, text messages, and telephone records.<sup>78</sup> Other courts have ordered individuals to turn over their personal electronic devices for imaging when relevant to the litigation at hand.<sup>79</sup> While BYOD-related law is relatively limited to date, as business is increasingly conducted using personal devices, the issues are likely to become more complex.

### **IX. UNIQUE ISSUES FOR PUBLIC EMPLOYERS**

Public employers face unique constitutional issues when their employees use social media to voice opinions or concerns.

#### **A. First Amendment**

Like other speech issues involving public employees, determining whether social media use is protected free speech depends on whether the social media activity is conducted in the employee's capacity as a private citizen (and thus protected) or as part of the employee's job duties (not protected).<sup>80</sup> At least one court has articulated the novel concept that some social

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<sup>77</sup> 18 U.S.C. § 1030.

<sup>78</sup> *Southeastern Mech. Servs. v. Brody*, 657 F. Supp. 2d 1293, 1302 (M.D. Fla. 2009)

<sup>79</sup> *Stooksbury v. Ross*, No. 3:09-CV0498, 2012 U.S. Dist. LEXIS 124148, at \*13 (E.D. Tenn. Aug. 31, 2012); *AllianceBernstein L.P. v. Atha*, 954 N.Y.S. 2d 44, 46 (2012) (ordering defendant to deliver his iPhone and a record of its contents to the court for in camera review to determine what, if any, information contained on the iPhone was responsive to plaintiff's discovery request).

<sup>80</sup> *Compare Citywide Sewer & Drain Service, Corp. v. Carusone*, No. 0018160/2005 (N.Y. App. Div. Sept. 18, 2006) (granting employee's motion for summary judgment on employer's defamation claim; statements by employee who worked a summer job for employer, and subsequently made comments on his blog under the title "Citywide Really is Shittywide," were statements of opinion protected by the First Amendment), and *Grazjosi v. City of Greenville*, No. 4:12cv68DAS (N.D. Miss. July 23, 2012) (police officer allegedly fired after making disparaging comments on the mayor's Facebook page about the city's lack of response to the death of another police officer sued the city and its officers, saying her

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media activity (i.e., clicking “Like” on a Facebook post) is not “speech” and thus not protected by the First Amendment, but commentators do not expect this decision to be followed by other courts.<sup>81</sup>

### B. Fourth Amendment

Public employers also may face constitutional questions under the Fourth Amendment. While Fourth Amendment concerns are more frequently implicated in criminal cases,<sup>82</sup> *National Treasury Employees Union v. Von Raab*<sup>83</sup> held that “[t]he Fourth Amendment applies as well when the Government acts in its capacity as an employer.”<sup>84</sup> While a warrant is typically required before the government may conduct a search, “there are ‘a few specifically established and well-delineated exceptions’ to that general rule.”<sup>85</sup> In *O’Connor v. Ortega*,<sup>86</sup> a plurality of the Supreme Court stated that a warrantless search by a government employer is reasonable if it is conducted for a “noninvestigatory, work-related purpos[e],” or for the “investigatio[n] of work-related misconduct,” and if “the measures adopted are reasonably

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termination violated her right to free speech), *with In re Tenure Hearing of Jennifer O’Brien*, No. A-2452-11T4, 2013 N.J. Super. Unpub. LEXIS 28 (App. Div. Jan. 11, 2013) (appeals court upheld firing of tenured school teacher who allegedly wrote derogatory remarks about her students on Facebook; finding the First Amendment does not protect her posts because even if the teacher’s comments were on a matter of public concern, “her right to express those comments was outweighed by the district’s interest in the efficient operation of its schools”).

<sup>81</sup> *Bland v. Roberts*, No. 4:11cv45, 2012 U.S. Dist. LEXIS 57530 (E.D. Va. Apr. 24, 2012) (government employees who clicked “like” on a political candidate’s Facebook page did not engage in constitutionally protected speech; “merely ‘liking’ a Facebook page is insufficient speech to merit constitutional protection”).

<sup>82</sup> *See State v. Harris*, No. 2011NY080152, 949 N.Y.S.2d 590, 2012 N.Y. Misc. LEXIS 3076 (Crim. Ct. June 30, 2012) (Twitter user had no reasonable expectation of privacy in “tweets” published on the social network, rejecting criminal defendant’s bid for Fourth Amendment protection for his Twitter stream; “[T]he defendant has no reasonable expectation of privacy in the information he intentionally broadcast to the world”); *U.S. v. Meregildo*, No. 11-cr-576 (S.D.N.Y. Aug. 10, 2012) (criminal defendant who allowed his Facebook contacts to see his list of Facebook friends and comments on his page lacked any reasonable expectation of privacy in his messages; defendant’s legitimate expectation of privacy ended when he disseminated posts to his ‘friends’ because those ‘friends’ were free to use the information however they wanted—including sharing it with the Government); *but cf. R.S. v. Minniewaska Area Sch. Dist. No. 2149*, No. 0:12-cv-00588-MJD-LIB (D. Minn. Sept. 6, 2012) (student had reasonable expectation of privacy in her private Facebook messages; “Facebook’s private messaging service operates in all practical ways as an email service, and individuals have an expectation of privacy when using email, just as they do when sending traditional letters”).

<sup>83</sup> *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

<sup>84</sup> *Id.* at 665.

<sup>85</sup> *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2630 (quoting *Katz v. U.S.*, 389 U.S. 347, 357(1967)).

<sup>86</sup> *O’Connor v. Ortega*, 480 U.S. 709 (1987).

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related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search.”<sup>87</sup>

**C. Political Activities**

On July 27, 2010, the U.S. Office of Special Counsel issued guidelines for federal employees to ensure their social media use complies with the Hatch Act,<sup>88</sup> which regulates the political activities of federal government employees.<sup>89</sup> The guidelines state that federal employees cannot engage in political activities that are directed towards the success or failure of a particular political party, candidate or group while at work, including blogging.<sup>90</sup> Federal employees are free to blog about political matters on their own time at home, but they may not encourage their friends on social networks to “like” or “fan” a particular candidate or party on work-time or work-premises.<sup>91</sup> Nor can they include their government job title with their online opinions in an attempt to influence readers.<sup>92</sup> The guidelines do permit an employee who has posted his job title as part of his social media profile to identify with a particular political party, since identification of a political party does not amount to political activity.<sup>93</sup> The guidelines also address the social media profiles of agencies themselves and provide examples of impermissible political activity for an agency, such as posting links for a particular candidate’s fundraising campaign to the agency’s social media pages.<sup>94</sup>

**X. OBTAINING AND USING SOCIAL MEDIA IN LITIGATION**

**A. Obtaining Social Media in Litigation**

Prior to litigation, employees may have a heightened interest in their private social media content remaining private. Once litigation is initiated, however, the balancing test is generally the same test used for other evidence sought – is the information relevant to the claims or defenses at issue in the case?

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<sup>87</sup> *Id.*, 480 U.S. at 725-26 (internal quotation and citation omitted).

<sup>88</sup> 5 U.S.C. § 7323.

<sup>89</sup> *See* U.S. Office of Special Counsel, Frequently Asked Questions Regarding Social Media and the Hatch Act (July 27, 2010), available at <http://www.osc.gov/documents/hatchact/federal/2010-08-10%20FAQs%20Re%20Social%20Media.PDF>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

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Courts have consistently held that social media that is relevant to the litigation at issue is discoverable.<sup>95</sup> Courts typically will not permit a party to engage in a “fishing expedition” by requesting all of the opposing party’s social media content – public and private – without a basis to conclude that the private social media contains relevant information.<sup>96</sup> However, the

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<sup>95</sup> *EEOC v. Original Honeybaked Ham Co. of Georgia, Inc.*, No. 11-cv-02560-MSK-MEH, 2012 U.S. Dist. LEXIS 160285 (D. Colo. Nov. 7, 2012) (based on one class member’s Facebook page containing a significant amount of relevant information (e.g., financial expectations in the lawsuit, musings about emotional state in having suffered a broken relationship, self-described sexual aggressiveness, etc.), the court ordered each class member’s social media content produced for in camera review to determine relevance to sexual harassment and hostile work environment class action); *EEOC v. Simply Storage Management, LLC*, 270 F.R.D. 430 (S.D. Ind. 2010) (in cases alleging claims for sexual harassment and emotional distress brought by two employees against their mutual employer, the plaintiffs’ full Facebook and MySpace profiles were discoverable because: (1) the profiles were relevant to showing the plaintiffs’ mental health and their emotional distress claims, (2) the plaintiffs’ privacy concerns could be addressed adequately by a protective order, and (3) the plaintiffs already shared some of the information on their profiles with others in the social networks via private messages or public postings); *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010) (ordering disclosure of the entirety of plaintiff’s Facebook and MySpace pages because the contents were relevant to the extent of the plaintiff’s injuries in her personal injury suit; while the plaintiff claimed to have been confined to her bed, her social media pages depicted her enjoying life outside of her home).

<sup>96</sup> *Keller v. Nat’l Farmers Union Prop. & Cas. Co.*, No. 9:12-cv-00072-DLC-JCL (D. Mont. Jan. 2, 2013) (denying insurance company’s motion to compel discovery of two plaintiffs’ social media communications; unless defendant can point to publicly available posts that contradict allegations made in the lawsuit, request was a fishing expedition conducted with the hope that defendants might find something relevant); *McCann v. Harleysville Ins. Co. of N.Y.*, 910 N.Y.S.2d 614 (N.Y. App. Div. 2010) (defendant’s discovery motion seeking access to the plaintiff’s Facebook account was overly broad given that the defendant had not adequately shown the relevance of the sought Facebook content to the plaintiff’s personal injury claim); *Tompkins v. Detroit Metro. Airport*, No. 10 10413, 2012 WL 179320, at \*2 (E.D. Mich. Jan. 18, 2012) (“I agree that material posted on a ‘private’ Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy. Nevertheless, the Defendant does not have a generalized right to rummage at will through information that Plaintiff has limited from public view. Rather, consistent with Rule 26(b) and with the cases cited by both Plaintiff and Defendant, there must be a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence.”); *Chauvin v. State Farm Mut. Auto. Inc. Co.*, No. 2:10-CV11735, 2011 U.S. Dist. LEXIS 121600 (E.D. Mich. Oct. 20, 2011) (refusing to set aside denial of insurance company’s motion to compel production of plaintiff insured’s Facebook login, password, and list of friends; the insurance company failed to show that the information was relevant or reasonably calculated to lead to the discovery of admissible information, and amounted “to a fishing expedition at best and harassment at worst”); *Potts v. Dollar Tree Stores Inc.*, No. 3:11-cv-01180 (M.D. Tenn. March 20, 2013) (denying motion to compel; “Defendant lacks any evidentiary showing that Plaintiff’s public Facebook profile contains information that will reasonably lead to the discovery of admissible evidence.”).

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mere fact that a party set his or her account settings to “private” does not shield otherwise relevant information.<sup>97</sup>

Generally, all relevant social media in the public sphere is discoverable because the party cannot claim a reasonable expectation of privacy.<sup>98</sup> The question is when and to what extent parties can obtain discovery of an adversary’s private social media. Generally, courts have held that if the publically available portion of an individual’s social media makes it reasonably likely that the individual’s private posts contain relevant information, the party must produce even the private portions requested.<sup>99</sup> Other courts have been more lenient in allowing parties to obtain private social media in litigation, opting instead to balance the individual’s privacy interest against the value of the potential information.<sup>100</sup>

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<sup>97</sup> *Patterson v. Turner Construction Co.*, 88 A.D. 3d 617, 618 (N.Y. 2011) (social media postings, “if relevant, are not shielded from discovery merely because plaintiff used the service’s privacy settings to restrict access, just as relevant matter from a personal diary is discoverable”).

<sup>98</sup> *Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535, 2011 WL 2065410 (Pa. Com. Pl. May 19, 2011) (granting defendant’s motion to compel where the public portion of plaintiff’s Facebook page contained evidence that the plaintiff was not embarrassed about showing off his leg scar due to a workplace injury; holding that the Plaintiff, by voluntarily posting pictures and information on Facebook and MySpace, cannot claim that he has “any reasonable expectation of privacy to prevent [defendant] from access to such information”); *Coates v. Mystic Blue Cruises, Inc.*, No. 1:11-cv-01986 (N.D. Ill. Aug. 9, 2012) (redacted versions of two Facebook messages and a tweet to male co-workers from a female former employee discoverable in her sexual harassment lawsuit against the company).

<sup>99</sup> *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. Com. Pl., Sept. 9, 2010) (ordering plaintiff to comply with defendant’s discovery request for read-only access to plaintiff’s social media accounts where the public portion of plaintiff’s Facebook page reveals content suggesting that plaintiff exaggerated his injuries); *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010) (where plaintiff made publically available portions of her social networking pages containing materials that appeared contrary to her claims, the private portions of those pages were discoverable given the likelihood that they contained further relevant evidence); *Bass ex rel. Bass v. Miss Porter’s School*, 738 F. Supp. 2d 307 (D. Conn. 2010) (ordering all 750 pages of plaintiff’s Facebook content to be produced because the court could find no meaningful difference between subset provided to defendant and complete set provided to the court); *Reid v. Ingerman Smith LLP*, No. CV 2012-0307 (ILG) (MDG), 2012 BL 339744 (E.D.N.Y. Dec. 27, 2012) (law firm sued by legal secretary for harassment is entitled to private postings to plaintiff’s social media accounts “that reveal, refer, or relate to any emotion, feeling or mental state,” where posts on publically available pages contradict plaintiff’s claims of mental anguish resulting from harassment); *Keller v. National Farmers Union Property & Casualty Co.*, No. 9:12-cv-00072-DLC-JCL (D. Mont. Jan. 2, 2013) (insurance company seeking discovery of plaintiffs’ social media communications denied access to the information because it could not point to publically available posts that contradicted allegations made in the lawsuit).

<sup>100</sup> *Robinson v. Jones Lang LaSalle Americas Inc.*, No. 3:12-cv-00127-PK (D. Or. Aug. 29, 2012) (granting employer’s motion to compel in part; a company defending against an employment

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Analyzing the claims and defenses at issue is critical to determining whether private social media is relevant, and certain claims are more likely to involve relevant social media evidence than others. For example, social media frequently contains evidence to support and/or refute emotional distress<sup>101</sup> and physical injury<sup>102</sup> claims. Social media may also contain

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discrimination lawsuit may seek discovery of social media activity by the plaintiff that could shed light on the extent of her alleged emotional distress; “It is reasonable to expect severe emotional or mental injury to manifest itself in some [social media] content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress.”); *Offenback v. L.M. Bowman, Inc.*, No. 1:10-CV-1789, 2011 U.S. Dist. LEXIS 66432 (M.D. Pa. June 22, 2011) (ordering plaintiff to produce certain portions of his private Facebook account containing potentially relevant information that may contradict the extent of his alleged damages); *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, (S.D. Ind. 2010) (holding that while there are some limitations on the discovery of plaintiff’s social media information, social media information that reveals, refers, or relates to, or could reasonably be expected to produce, any emotion, feeling, or mental state is discoverable).

<sup>101</sup> *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, (S.D. Ind. 2010) (requiring all information from plaintiffs’ social networking profiles and postings related to the plaintiffs’ general emotions, feelings, and mental states to be produced in discovery where plaintiffs allege severe emotional trauma against their employer); *Mackelprang v. Fidelity Nat. Title Agency of Nevada, Inc.*, No. 2:06-CV-00788-JCM, 2007 WL 119149 (D. Nev. Jan. 9, 2007) (content of MySpace page relating to plaintiff’s emotional distress could be relevant to her complaint of sexual harassment and is therefore discoverable so long as the scope of the discovery is limited to relevant MySpace communications); *Thompson v. Autoliv ASP, Inc.*, No. 2:09-cv-01375-PMP-VCF, 2012 U.S. Dist. LEXIS 85143 (D. Nev. June 20, 2012) (in personal injury case resulting from auto accident, plaintiff’s Facebook and MySpace pages were relevant given the nature of plaintiff’s claims; “Because the alleged consequences of Plaintiff’s injuries include severe physical injuries, emotional distress, and impaired quality of life, evidence relating to Plaintiff’s physical capabilities and social activities is relevant to Plaintiff’s claims in this action.”).

<sup>102</sup> *Richards v. Hertz Corp.*, 100 A.D.3d 728 (2012) (plaintiff ordered to produce all portions of Facebook profile for in camera review after defendant found Facebook photographs showing the plaintiff snow skiing, contradicting her deposition testimony that the car accident at issue caused her to feel pain in cold weather and impaired her ability to play sports); *Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535, 2011 WL 2065410 (Pa. Com. Pl. May 19, 2011) (permitting discovery of photos and other non-public material from social networking sites where the materials contain information that defendant believed to be relevant in ascertaining the mental and physical state of plaintiff resulting from a workplace injury); *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. Com. Pl. Sept. 9, 2010) (ordering plaintiff to comply with defendant’s discovery request for his MySpace and Facebook accounts where the plaintiff claims permanent life impairment, loss and impairment of general health, strength, and vitality, and inability to enjoy certain pleasures of life in a personal injury suit against the defendant); *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010) (permitting discovery of plaintiff’s “current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information” for her personal injury claims, especially her claim for loss of enjoyment of life); *Ledbetter v. Wal-Mart Stores, Inc.*, No. 06-CV-01958-WYDMJW,

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relevant evidence in harassment claims, particularly in cases where there is a disputed issue regarding whether the plaintiff subjectively believed the alleged conduct was harassing.<sup>103</sup>

**B. Methods of Obtaining and Using Social Media as Evidence**

The methods used to obtain social media in litigation likely will vary based on the level of privacy maintained by the party posting the material. However it is obtained, however, counsel must take steps to ensure social media can be authenticated and introduced at trial.<sup>104</sup>

**1. Narrowly tailored discovery request to party**

Discovery requests for social media are normally granted where the individual's privacy interests do not outweigh the probative value of the material and the request is tailored so that the information gained through discovery is relevant to the claims and defenses at issue. Overly broad requests are often denied.<sup>105</sup>

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2009 WL 1067018 (D. Colo. Apr. 21, 2009) (holding that subpoenas issued by defendant to social networking sites are permissible where the plaintiff claims permanent physical and psychological injuries associated with work); *Davenport v. State Farm Mutual Auto. Ins. Co.*, No. 3:11-cv-00632-J-JBT, 2012 U.S. Dist. LEXIS 20944, (M.D. Fla. Feb. 21, 2012) (in a case in which the plaintiff's physical condition and "quality of life" were at issue, plaintiff was ordered to produce all photographs depicting her taken after the date of the accident in question and posted to a social networking site regardless of who posted them (i.e., photos in which plaintiff was "tagged") but denying defendant's request that plaintiff produce all devices by which she accesses social media); *B.M. v. D.M.*, No. 50333/2007, 2011 N.Y. Slip Op 50570U, 2011 N.Y. Misc. LEXIS 1534 (N.Y. Sup. Ct. Apr. 7, 2011) (unpublished) (statements regarding belly dancing made on social media sites by wife in divorce proceedings were allowed as admissions contradicting her claims of physical disability).

<sup>103</sup> *Targonski v. City of Oak Ridge*, No. 3:11-cv-269, 2012 WL 2930813 (E.D. Tenn. July 18, 2012) (denying defendant's motion for summary judgment despite "very enticing" evidence from plaintiff's Facebook page, including plaintiff's own posts).

<sup>104</sup> *Campbell v. State*, No. 03-11-00834-CR (Tex. App. Aug. 11, 2012) (the fact that a Facebook message was sent from an account holder's Facebook account is in itself insufficient to authenticate the message, however, circumstantial evidence can be used to authenticate posts over a party's claim that the posts were not genuine; here, the messages utilized the same "unique speech pattern" present in defendant's other messages and demonstrated direct knowledge of the incident soon afterwards by the defendant); *Simmons v. Commonwealth*, No. 2012-SC-000064-MR (Ky. Sup. Ct. Feb. 21, 2013) (unpublished) (Facebook messages properly authenticated and admitted into evidence by the recipient, detective, and another individual who viewed the messages after transmission).

<sup>105</sup> *Schubart v. Horizon Wind Energy, LLC*, No. 11-cv-1446, 2012 U.S. Dist. LEXIS 175063 (C.D. Ill. Dec. 11, 2012) (social media discovery request for all information related to a sex discrimination plaintiff's mental state was overly broad and should have had time limitations or required a connection to the events of the case); *Howell v. Buckeye Ranch, Inc.*, No. 2:11-cv-01014-GLF-MRA (S. Ohio Oct. 1, 2012) (motion to compel production of sexual harassment plaintiff's social media user names and passwords denied as overbroad);

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### 2. Subpoena to social media provider

Subpoenas to social media providers are governed by the Stored Communications Act. Normally, information made publically available by an individual can be subpoenaed directly from the provider.<sup>106</sup> Where the information is not publically available, the provider usually must obtain a letter of consent from the owner of the account.<sup>107</sup> However, a criminal court recently rejected a defendant-subscriber's motion to quash a subpoena to Twitter, on the grounds that Twitter's terms of service and privacy policy made clear that the subscriber lacked any privacy or property interest in his account data or Tweets.<sup>108</sup>

### 3. Creating third party accounts

A third party, such as a judge or discovery referee, may create a social media account to "friend" and view a party's social media activity if the individual consents to the scheme and has knowledge of the third party's identity or who the third party represents. For example, in *Barnes v. CUS Nashville, LLC*,<sup>109</sup> the Magistrate Judge agreed to create a Facebook account specifically for the case so he could review and rule on withheld documents and photos, promising to terminate the account after reviewing the content for relevant information.

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defendant can make specifically tailored requests for information in the accounts that is relevant to the claims and defenses at issue and plaintiff can search the accounts and respond accordingly); *Mailboit v. Home Depot USA Inc.*, 285 F.R.D. 566 (C.D. Cal. 2012) (holding that the majority of defendant's requests for discovery of plaintiff's social media posts were not described with sufficient particularity and therefore not reasonably calculated to lead to the discovery of admissible evidence; "while a party may conduct discovery concerning another party's emotional state, the discovery itself must still comply with the general principles underlying the Federal Rules of Civil Procedure that govern discovery"); *Muniz v. United Parcel Service, Inc.*, No. C-09-01987-CW DMR, 2011 WL 311374 (N.D. Cal. Jan. 28, 2011) (quashing third party subpoena to obtain social media information from plaintiff's counsel's Facebook page relating to work on plaintiff's case; subpoena was overbroad and vague where only issue in case was whether attorneys' fees were reasonable).

<sup>106</sup> *Ledbetter v. Wal-Mart Stores, Inc.*, No. 06-CV-01958-WYDMJW, 2009 WL 1067018 (D. Colo. Apr. 21, 2009) (denying plaintiff's protective order; the subpoenas issued to Facebook, MySpace, and Meetup.com were reasonably calculated to lead to the "discovery of admissible evidence as is relevant to the issues in [the] case").

<sup>107</sup> *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010) (quashing subpoenas to Facebook and MySpace for plaintiff's private messages under SCA and holding that the record was unclear as to whether the plaintiff's Facebook postings and MySpace comments were available to the general public; noting that if the posts were available to the general public, they could be subpoenaed); *Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc.*, No. 2:06-cv-00788-JCM, 2007 WL 119149 (D. Nev. Jan. 9, 2007) (defendant subpoena to MySpace to produce all records from plaintiff's accounts; MySpace produced publically available information but refused to produce private information).

<sup>108</sup> *People v. Harris*, No. 11-80152, 949 N.Y.S.2d 590, 2012 N.Y. Misc. LEXIS 3076, at \*2-3 (Crim. Ct., June 30, 2012).

<sup>109</sup> No. 3:09-CV-00764, 2010 WL 2265668 (M.D. Tenn. June 3, 2010).

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### C. Ethical Issues Regarding the Use of Social Media in Litigation

The use of social media continues to raise a host of ethical issues for attorneys, judges and jurors.

#### 1. Attorneys

Many attorneys use social media to investigate adverse parties, attorneys and witnesses. Like any member of the public, an attorney may view the public portion of an adverse party or witness' social media.<sup>110</sup> In contacting a party or witness through social media, however, many city, county and state ethics committees have found that attorneys may not utilize deception, or direct a third party to utilize deception (e.g., hide the true purpose for "friending" or change the attorney's profile to induce the other party to accept friend request), in order to "friend" an adverse party, or a witness for an adverse party.<sup>111</sup> At least one bar association takes this position one step further, stating that attorneys may not "friend," or direct a third party to "friend," an adverse party or a witness for an adverse party at all, even if the attorney or third party does not engage in deception.<sup>112</sup>

Attorneys also use the internet and social media to research jurors, a practice that is typically allowed absent a court rule to the contrary.<sup>113</sup> In fact, one Missouri attorney was admonished for failing to perform internet searches on jurors to determine whether the jurors' voir dire answers were accurate.<sup>114</sup> In many jurisdictions, however, attorneys may not

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<sup>110</sup> *New York State Bar Ass'n, Comm. of Prof'l Ethics, Opinion 843* (Sept. 10, 2010) (a lawyer may view the public portion of a party's social media site in pending litigation to secure information about the party for use in the lawsuit); *Oregon State Bar, Opinion No. 2005-164* (Aug. 2005) (a lawyer may visit an adverse party's public website to gain information).

<sup>111</sup> *The Ass'n of the Bar of the City of New York Comm. On Prof. Ethics, Formal Op. 2010-2* (Sept. 2010) (lawyers and their agents must not use deception in "friending" an individual to obtain information from a social networking website but should rely on informal and formal discovery procedures); *The Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 2009-02* (Mar. 2009) (if a lawyer "friends" a witness (with testimony potentially helpful to the lawyer), or directs a third party to do the same, it could potentially implicate various Pennsylvania Rules of Professional Conduct); *San Diego County Legal Ethics Op., 2011-2* (May 24, 2011) (it is deceptive for attorneys to "friend" a witness or adverse party on a social networking site without revealing their reasons for extending the request; "friending" a represented party violates California Rules of Professional Conduct 2-100).

<sup>112</sup> *New York State Bar Ass'n, Comm. of Prof'l Ethics, Opinion 843* (Sept. 10, 2010) (a lawyer may not friend, nor direct a third party to friend, a party to the lawsuit in pending litigation in order to gain information not publically available).

<sup>113</sup> *Carino v. Muenzen*, No. A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154, at \*26-27 (App. Div. Aug. 30, 2010) (determining trial judge acted unreasonably in preventing attorney from using the internet to research potential jurors during voir dire).

<sup>114</sup> *Johnson v. McCullough*, 306 S.W.3d 551, 558-59 (Mo. 2010) (admonishing attorney for failing to perform internet search on juror in the course of zealous representation of a client;

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“friend” jurors or take any other actions that could make jurors aware that the attorney is checking up on them.<sup>115</sup>

In addition to using technology and social media as litigation tools, attorneys should advise clients that their own electronic communications may be accessed by third parties. The American Bar Association advises:

A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access. In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party.<sup>116</sup>

Finally, attorneys must be aware and advise clients of their obligations to retain documents and information in litigation, including relevant social media. This obligation is equally important for plaintiffs and defendants alike. For example, in *Gatto v. United Airlines Inc.*, a New Jersey federal judge ruled that a personal injury plaintiff's deletion of his Facebook account amounted to the destruction of evidence, entitling the defendant to an instruction at trial that the jury may draw an adverse inference against the plaintiff for failing to preserve his account and intentionally destroying evidence.<sup>117</sup>

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juror stated that was never a party to non-family law litigation when, in fact, the juror had been party to several debt collection suits as well as a personal injury suit).

<sup>115</sup> *Sluss v. Commonwealth*, 381 S.W.3d 215 (Ky. 2012) (lawyers may use social media websites to gather information about jurors, but they must not friend jurors, sign up to receive their tweets, or otherwise make contact with them); *New York County Lawyers' Association Committee on Professional Ethics, Opinion No. 743* (May 18, 2011) (it is proper under NY RPC 3.5 for a lawyer to conduct a search of a prospective juror's social media, both before and during trial, provided there is no contact or communication with the prospective juror and the lawyer does not seek to “friend” jurors, subscribe to their Twitter accounts, contact jurors in any way, and does not use deceit in reviewing the social media sites); *New York City Bar Ass'n Comm. on Professional Ethics, Formal Op. 2012-2* (July 2012) (a lawyer may use social media to gather information about jurors but must not “friend” them, sign up to receive their postings, or do anything else the lawyer knows would make jurors aware that the lawyer is checking up on them, noting, “it is incumbent upon the attorney to understand the functionality of any social media service she intends to use for juror research.”).

<sup>116</sup> *American Bar Ass'n, Standing Comm. on Ethics & Prof'l Responsibility, Opinion 11-459* (August 4, 2011).

<sup>117</sup> *Gatto v. United Airlines Inc.*, No. 2:10-cv-01090-ES-SCM, (D.N.J. March 25, 2013).

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### 2. Judges

Generally, judges may engage in social networking and may “friend” lawyers so long as they comply with local ethics rules and refrain from engaging in conduct that would erode confidence in the independence of their decision making.<sup>118</sup> To avoid such problems, some states direct judges not to “friend” lawyers who have been before them, are currently before them, or may in the future appear before them.<sup>119</sup>

### 3. Jurors

Perhaps the most daunting task related to social media in litigation is preventing jurors from using social media and the internet to research and discuss pending cases. The model federal jury instructions and many state jury instructions now instruct jurors not to share details

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<sup>118</sup> *American Bar Association Formal Opinion 462* (Feb. 21, 2013) (judges may participate in social networking but “must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety”); *Tennessee Judicial Ethics Committee Advisory Opinion No. 12-01* (Oct. 23, 2012) (judges may use social media platforms such as Facebook, Twitter, or LinkedIn so long as they are cautious and keep in mind their professional obligations; “judges must be constantly aware of ethical implications as they participate in social media and whether disclosure must be made”); *The Supreme Court of Ohio, Board of Comm’rs on Grievances and Discipline, Opinion 2010-7* (Dec. 3, 2010) (judges may participate in social networking, and “friend” lawyers, so long as they comply with the ethical rules in the Ohio Code of Judicial Conduct by refraining from: (i) making online comments about a pending or impending matter, (ii) viewing a party or witness’s page, (iii) using the site to obtain information regarding the matter before them, and (iv) eroding confidence in the independence of judicial decision making through social network interactions); *Ethics Committee of the Kentucky Judiciary, Judicial Ethics Opinion JE-119* (Jan. 20, 2010) (a judge may participate and be friends with an attorney on Facebook so long as the judge is mindful of the appearance he or she may create when establishing a connection on Facebook with an attorney); *New York Advisory Comm. on Judicial Ethics, Opinion 08-176* (Jan. 29, 2009) (judges may join and make use of internet-based social networks, and “friend” lawyers, so long as the judge complies with the Rules Governing Judicial Conduct).

<sup>119</sup> *Domville v. State*, No. 4D12-556 (Fla. Dist. Ct. App. 2012) (judge may not oversee the trial of an attorney Facebook friend; motion for certification to the Florida supreme court granted Jan. 16, 2013); *California Judges Association, Judicial Ethics Committee, Opinion 66* (Nov. 23, 2010) (judges may participate in online social networking but they should not “friend” lawyers who are currently before them to avoid the appearance of impropriety and should exercise caution in “friending” other attorneys who have at one point, or may in the future, appear before them); *Florida Supreme Court, Judicial Ethics Advisory Committee, Opinion 2009-20* (Nov. 17, 2009) (a judge may not add lawyers who may appear before him as friends on a social networking site but may post comments and other materials on his or her own social networking page); *State of North Carolina Judicial Standards Comm., Public Reprimand of Judge B. Carlton Terry, Jr., Inquiry no. 08-234* (Apr. 2009) (reprimanding a judge for ex parte communications with counsel regarding a matter before him where the judge and counsel were Facebook friends and discussed the open matter via Facebook posts).

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about the case through social media or other electronic communications.<sup>120</sup>

The remedies available for impermissible juror social media conduct will depend on the prejudice to the parties. If the court learns of the juror's conduct during trial, the court may remove the juror depending upon the circumstances.<sup>121</sup> If the conduct is not discovered until after the trial, a new trial may be ordered if the conduct resulted in prejudice to one party.<sup>122</sup> But if no prejudice results, a new trial may not be appropriate.<sup>123</sup> Where there is a

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<sup>120</sup> *Model Federal Jury Instructions* (revised June 2012) ("I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions."); *Memorandum to Judges, U.S. Dist. Courts, from Judge Julie A. Robinson, Chair, Judicial Conference Comm. on Court Admin. & Case Mgmt.* (Jan. 28, 2010) (proposed model instructions instruct jurors not to use their electronic devices or social sites to communicate about the trial or deliberations); CAL. CIV. PROC. CODE § 1209 (criminal penalties for juror misconduct include engaging in internet research or using social networks to communicate on the trial; courts must "clearly explain" to jurors that they must refrain from electronic communications about the subject of the trial and internet research about the trial; willful disobedience of an admonishment against prohibited online conduct is punishable as either civil or criminal contempt of court); *Ohio State Bar Ass'n Jury Instructions I.C* (May 2010) (warning jurors not to communicate with, or contact about, the case through social media sites); *In Re: Standard Jury Instructions, Juror's use of Electronic Devices*, No. SC10-51, 2010 Fla. LEXIS 1780 (Fla. Oct. 21, 2010) (instructing jurors not to tweet or post information about jury service or ask for advice on how to decide the case); *State of Connecticut Judicial Branch, Civil Jury Instructions 1.1-1* (Nov. 20, 2009) (instructing jurors not to communicate with anybody about the case by any means including social media); E.D. Mich. Local Rules 47.1 (Feb. 1, 2011) (jurors in the courtroom must refrain from outside contact or communication relating to the case including the use of social networking sites).

<sup>121</sup> *U.S. v. Fumo*, No. CRIM.A.06-319, 2009 WL 1688482 (E.D. Pa. June 17, 2009) (trial court did not abuse discretion in refusing to remove a juror who, during the trial, had posted public messages about the trial on Facebook, Twitter and his websites/blogs despite trial court's instructions not to discuss the case outside the jury room).

<sup>122</sup> *State v. Dellinger*, 696 S.E.2d 38 (W. Va. 2010) (upholding order for a new trial due to prejudice resulting from juror's lack of candor during voir dire where the juror failed to disclose that prior to trial she sent a message to the Defendant on MySpace, became MySpace friends with the Defendant, and commented on her own MySpace page about the trial); *Dimas-Martinez v. State*, No. CR 11-5, 2011 Ark. 515, 2011 WL 6091330 (Dec. 8, 2011) (Arkansas Supreme Court held defendant in a capital murder case was denied a fair trial when one of the members of his jury continued to post messages to his Twitter account even after the trial judge admonished him to stop; the juror's demonstrated failure to follow the court's instructions itself was prejudicial, even if the defendant was not prejudiced by the

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question regarding the prejudice resulting from a juror's social media use, the court may order an in camera review of the juror's posts to determine their prejudicial effect.<sup>124</sup>

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tweets themselves; juror was subsequently convicted of contempt); *State v. Abdi*, 45 A.3d 29 (Vt. 2012) (juror's internet research warranted new trial).

<sup>123</sup> *U.S. v. Ganius*, No. 3:08CR224(EBB), 2011 U.S. Dist. LEXIS 114751 (D. Conn. Oct. 5, 2011) (denying defendant's motion for a new trial on the following facts: the day after Juror X was selected to serve, but before the start of evidence, he wrote on his Facebook wall: "Jury duty 2morrow. I may get 2 hang someone ... can't wait ...". In addition, during the course of the trial Juror X posted: "Jury duty sucks;" "Guinness for lunch break. Jury duty ok today;" "Your honor, i [sic] object! This is way too boring.... Somebody get me outta here;" and on the day of the verdict he posted "Guilty :) ... I spent the whole month of March in court. I do believe justice prevailed! It was no cake walk getting to the end. I am glad it is over and I have a new experience under my belt!" Juror X also became Facebook friends with another juror. After questioning Juror X, the court was convinced they were just "jokes," did not evidence bias, and denied defendant's motion); *Sluss v. Commonwealth*, 381 S.W.3d 215 (Ky. 2012) (two jurors in criminal trial failed to reveal they were Facebook friends with the victim's mother; the Kentucky Supreme Court remanded to trial court for hearing on question of whether jurors should have been struck for cause on the basis of alleged social networking activity; the mere fact that jurors were Facebook friends with victim's mother not enough, on its own, to warrant new trial).

<sup>124</sup> *Juror Number One v. Super. Ct.*, 206 Cal. App. 4th 854 (2012) (affirming trial court decision ordering juror to turn over social media posts allegedly made during criminal trial for in camera review; juror did not show that his alleged posts were protected by the SCA or the Fourth or Fifth Amendments).

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