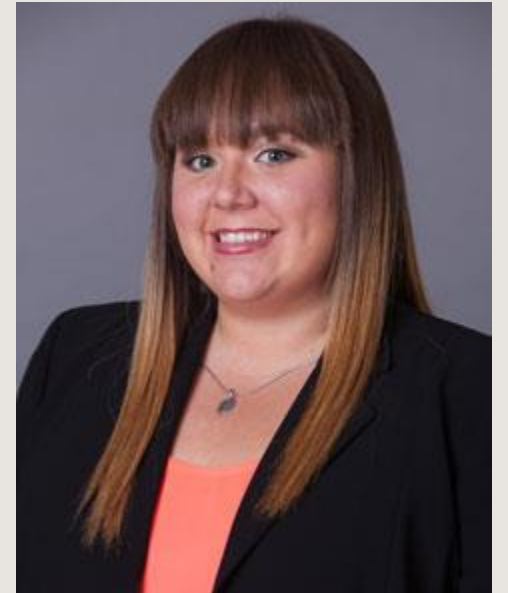


# Social Media and the Workplace: Do's and Don'ts

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# Before we get started, how many of you....

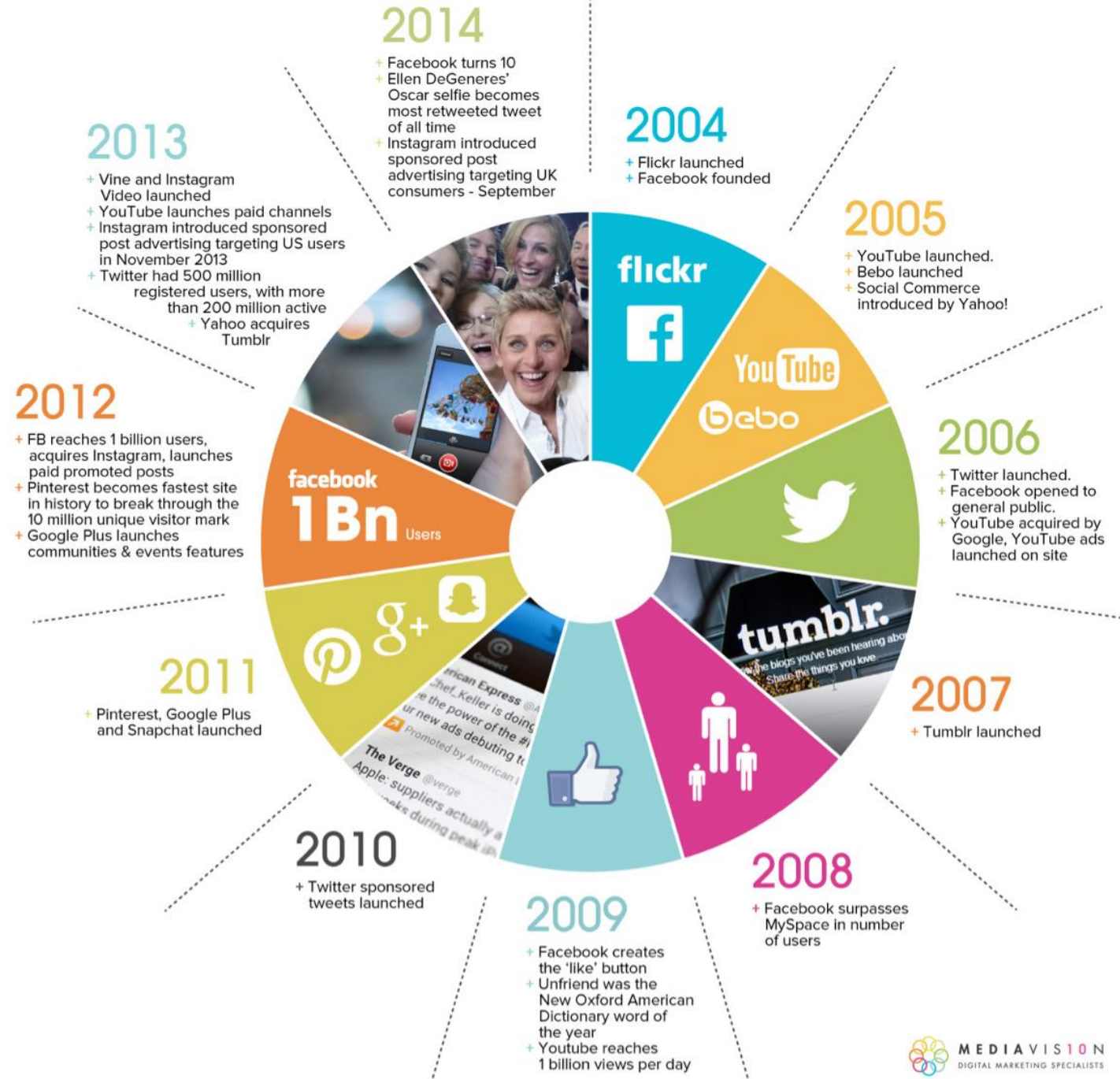
- Have social media accounts?
- Will admit to checking or posting on social media during the workday?
- Have been “friended” or “followed” by a boss?
- Have been “friended” or “followed” by a subordinate?
- Have accidentally run into a coworker on a dating-based social media website/app?
- Have checked or attempted to check the social media account(s) of an applicant?
- Have checked or attempted to check the social media account(s) of a current employee?
- Have used information on the social media account(s) of an employee involved in litigation?

# MODERN HISTORY OF SOCIAL MEDIA

2002 

2003  

2006 



USAGE STATS AS OF

2016

tumblr. hosts over

280.4

million blogs and  
more than 94.9  
billion posts in total

Instagram

500 million active users

95 million photos  
posted per day,

4.2 billion daily likes



310 million

monthly active users, 500 million Tweets are sent per day

facebook

1.59 billion users



450

million  
registered users

Pinterest

176

million users,  
of which

100

million  
are active users



Over

1 billion

You Tube  
users

6

billion hours of video watched per month,  
100 hours of video uploaded per minute



Over 1 billion enabled accounts and



359

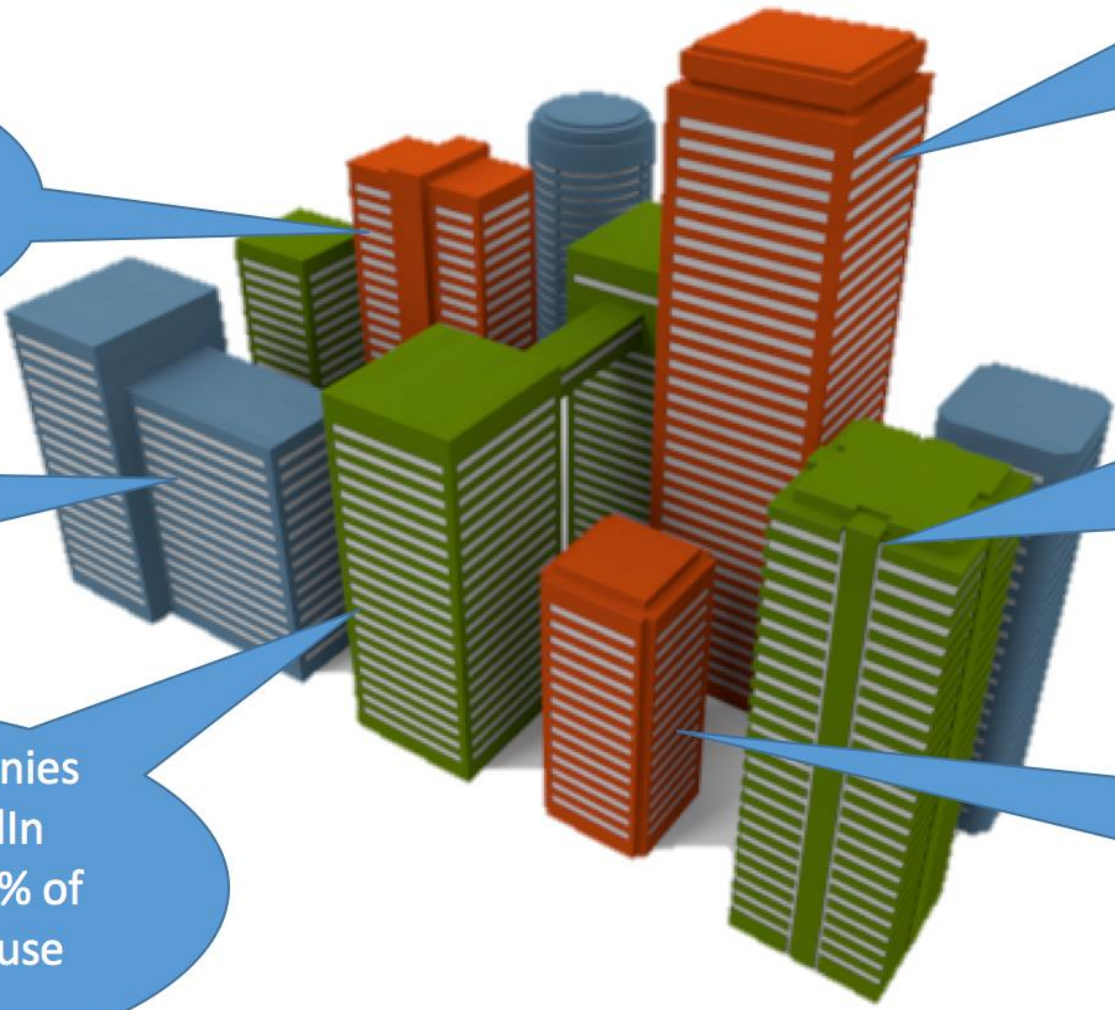
million  
monthly active users

100 million  
active users



# BUSINESS USE OF SOCIAL MEDIA

- Recruiting
- Employment candidate screenings
- Employee monitoring
- Litigation



84% of business recruit via social media

34% of employees use social media at work to take a mental break

Over 3 million companies have created LinkedIn accounts, but only 17% of US small businesses use LinkedIn

Only 20 Fortune 500 companies actually engage with their customers on Facebook, while 83% have a Twitter presence.

31% track employee use of social media; 43% block access on company computers and handheld devices.

Top 3 groups in an organization to use social media: marketing 67%, HR 44% and PR 38%.

# Social Media in the Hiring Process

# Social Media in the Hiring Process - RISKS

- Lifestyle concerns
- Inappropriate comments, tweets, status updates, etc.
- Unsuitable videos or photos
- Comments critical of previous employers
- Comments critical of clients or customers
- Comments critical of co-workers or supervisors
- Membership in political or affinity groups/organizations
- Discovery of information that contradicts written application
- Poor communication skills displayed
- Indicators of poor financial background

# Social Media in Hiring Decisions



Mike Gallant

About ▾



Humphrey Goofus

About ▾

## Basic Info

Birthday March 3, 1970

Sex Male

Interested In Men

Religious Views **Christian**

## Basic Info

Birthday October 25, 1939

Sex Male

Interested In Women

Relationship Status **Married**

Religious Views **Atheist**



# Social Media in the Hiring Process – Potential Claims

- Invasion of Privacy
  - Reasonable expectation of privacy?
  - Gaining access through others or with dummy accounts
- Discrimination
  - Profile gives information you would not otherwise want to know about an applicant – race, religion, age, disability status, sexual orientation, marital status, etc.
  - Allows applicant to argue that hiring decision was made on the basis of these protected categories
  - Could lead to both disparate impact and disparate treatment claims

# Social Media in the Hiring Process – Potential Claims

Cal. Labor Code § 980 (Effective January 1, 2013)

- Purpose: regulate employers' ability to require employees or job applicants to provide the employer access to personal social media accounts
- Employers are prohibited from requesting an employee or applicant:
  - Disclose a username or password for purpose of accessing personal social media
  - Access personal social media in the presence of the employer
  - Divulge any personal social media
- Retaliation against an employee (or rejection of an applicant) for refusal to provide social media information is prohibited.
- Exception: Employers can still request social media information reasonably believed to be relevant to an allegation of employee misconduct or violation of laws/regulations.

# Social Media Issues for Current Employers

# Social Media Issues for Current Employers – RISKS

- Negative publicity; offending customers and clients
- Defamation
- Intellectual property infringement and disclosure
- Claims by coworkers against the employer, e.g., harassment, negligent retention/supervision, infliction of emotional distress
- Tortious interference with current or prospective business relationships or contracts
- Discovery in civil and/or criminal matters (evidentiary preservation orders, user information, etc.)
- Threats (including to the subject of the posting)
- First amendment speech (not applicable to private employers)

# Social Media Issues for Current Employers – RISKS

- Negative Publicity
  - This customer video taped a Comcast repairman, who waited on hold for an hour and fell asleep.
  - More than 1,000,000 views, hundreds of comments.
  - Every customer rises to the level of journalist.



# Social Media Issues for Current Employers – Potential Claims

- Off-duty conduct laws
- Retaliation under Title VII and state statutes
- Whistleblowing under federal and state statutes
- Discrimination under Title VII and state statutes
- Concerted action under the NLRA
- Invasion of privacy
- Stored Communications Act, Wiretap Act, and electronic monitoring statutes

# Social Media Policies and the NLRB

# Social Media and the NLRB – Relevant Laws and Cases

- Section 7 of the NLRA protects employees' rights to engage in “concerted activity,” including initiating, inducing, or preparing for group action, and filing group complaints
- Section 8(a) of the NLRA prohibits employers from maintaining policies or work rules that “would reasonably tend to chill employees in the exercise of their Section 7 rights”



# Social Media and the NLRB – Relevant Laws and Cases

- *Grill Concepts Services Inc.* (2016) – social media policy that mandated a “positive culture,” required employees to interact with management “respectfully” violated NLRB
- *Novelis Corp.* (2016) – social media policy violated NLRB where it required employees to represent the employer to the community in a positive and professional manner
- *T-Mobile U.S.A., Inc.* (2016) – handbook provisions requiring “positive workplace behavior” and prohibiting workplace recordings are illegal
- *G4S Secure Solutions* (2016) – social media policy violated NLRB where it prohibited making statements about activities/policies of the employer, prohibited posting photos and videos of employees in uniform or at a place of work
- *Chipotle Services, LLC* (2016) – social media policy prohibiting disclosure of company confidential information on social media infringes on right to concerted activity, even where employee acts individually
- *Component Bar Products* (2016) – social media policy violated NLRB where it prohibited boisterous or disruptive activity, and disrespectful conduct

# Social Media and the NLRB – Assessing Your Policy

- How do you think the NLRB has ruled on these policies?
  - “[B]e respectful to the company, other employees, customers, partners, and competitors.”
  - Do not engage in “[d]isrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative.”
  - “Never engage in behavior that would undermine the reputation of [the Employer], your peers or yourself.”
  - “[D]on't pick fights” online.
  - Do not make “insulting, embarrassing, hurtful or abusive comments about other company employees online,” and “avoid the use of offensive, derogatory, or prejudicial comments.”
  - Do not send “unwanted, offensive, or inappropriate” e-mails.
  - Do not engage in the use of social media “unless off the job.”

# Social Media and the NLRB – Assessing Your Policy

- Rules specifically restraining Section 7 rights are invalid
- Rules not specifically restraining Section 7 rights are invalid if “employees would reasonably interpret the rule to prohibit Section 7 activity”
- Fact-finder will analyze whether:
  - Employees would reasonably construe language of the rule to prohibit Section 7 activity
  - The rule was promulgated in response to union activity
  - The rule has been applied in the past to restrict the exercise of Section 7 rights
- Goal: Prohibit illegal conduct without implementing an overbroad policy; use language that *precisely* defines accepted behavior
- Remember: maintaining a vague or overbroad policy can be unlawful—even if the policy is not enforced

# Questions?