

SOCIAL MEDIA

In the Public Workplace

POLICIES AND PERILS

Thomas G. Schroeter

Associate General Counsel

Port of Houston Authority

“Disclaimers”



- My presentation and the opinions expressed in this PowerPoint and in my audio presentation are solely my own and not those of the AAPA or the Port of Houston Authority.
- If you have a real-life situation on the issues herein, please consult legal counsel and do NOT depend on this presentation. This presentation is introductory only and does not attempt to mention the many laws that may apply to social media or give counsel for specific situations.
- Thanks for the opportunity to speak today!

Some Definitions and Considerations

- A *social networking site* is a website that provides a virtual community for people to interact for personal or business purposes, featuring a “profile” that includes biographical data and functions that allow the user to upload pictures or other information while posting comments and thoughts.
- A *blog* (short for “weblog”) is a website featuring regular entries of commentary, descriptions of events, or multimedia.
- Social Media is the **largest and fastest network experience** in the world today.

What's Out There

The Known:

- Facebook[®], LinkedIn[®], MySpace[®], Twitter[®], YouTube[®]

Hundreds of Lesser Known:

- Caring Bridge[®]
- Good and Bad (some very bad)
- Staff can play all day without leaving your network
 - Problem: Using computer makes one look busy but it may be the opposite

Social Media

Who Is Using It

1. Your Employees

2. Ports:

- Los Angeles
- Long Beach
- San Diego
- New York/New Jersey
- Galveston
- Prince Rupert
- Houston

Social Media – Astounding Growth; Sudden Dominance

- Social networking and blogging has surpassed email in use and popularity
- 22.7% of online time is social networking (up 43% from 2009)
- 8.3% is spent on e-mail (down 28% from 2009)
- The over-50 crowd is more active than teens!
- Source: Nielsen, “What Americans Do Online” (Aug. 1, 2010)

Social Media – Astounding Growth; Sudden Dominance

Facebook® (created in 2004):

- Over 640,000,000 Facebook® users (50+% daily)
- 20+ billion minutes a day spent on Facebook®
- 3,000,000,000 photos, 14,000,000 videos a month
- 85% of social networking is on Facebook®
- 60% of employees access Facebook® while at work

Social Media – Astounding Growth; Sudden Dominance

Twitter® (created in 2006):

- 175,000,000 users
- Twitter® grew 1,382% from 2008 to 2009
- Largest Twitter® demographic: 35-49
- More Tweets at work than home
- Twitter® users post 90 million “tweets” per day in 2009 (text-based posts composed of up to 140 characters); 100% increase over prior year

(Joel Schroeder & Leita Walker, *Social Media in Civil Litigation*, Law360.com, Oct. 12, 2010, http://employment.law360.com/print_article/200684.)

Social Media – Astounding Growth; Sudden Dominance

Other sites:

- Myspace (created in 2003): 100,000,000
- LinkedIn[®] (created in 2003): 100,000,000
- Windows Live Spaces[®]: 120,000,000
- Many that are popular in other countries, e.g.
Qzone (China) 480,000,000

Social Media Battle Lines

- 60% of managers want to know how employees represent themselves
- 53% of employees say managers have no business knowing that
- 17% of employers track employee use of social media
- 50% of employees ignore HR policies banning social media (Cisco 2010 Midyear Security Report, July, 2010)
- 49% of employees won't change on-line behavior even if employer tracks use

Social Media Use – Potential Risks, Misconduct

Social media websites such as Facebook®, Twitter®, and MySpace® present a host of potential and unique problems for employers.

The convenience, ease of use, instant posting - anytime, anyplace - with content often based more on emotion than careful consideration – make blogging and social networking difficult for employers to monitor or restrict. As a result, there are many serious risks:

- Disclosure of Confidential and Proprietary Information, Sensitive Security Information
- Employee Morale
- Harassment
- Bullying and Hazing
- Defamation (Libel/Slander)
- Productivity Drain (Overuse)

Social Media Use - Potential Risks, Misconduct

- Pornography; Obscenity
- Violence; Terroristic and Other Harmful Threats
- Unauthorized Statements
- Safety Issues (Text-Driving)
- Distraction from Corporate Mission
- Violations of Other Policies

Social Media Use – Additional Concerns

- Employees discuss their jobs and the workplace and create posts about an employer that may be public for long periods of time before the employer discovers them.
- Potential for dissemination of employer's trade secrets, tarnishing employer's public image, making defamatory, embarrassing, or statements that are damaging to the employer and other employees.

Issue: What actions can an employer take when it discovers objectionable online content?

Current law provides little in the way of guidance. State and federal employment statutes do not explicitly regulate employees' online activity, and there is little case law on the subject.

Social Media: Another Unanswered Question

Are Social Media communications, when made on public employer computers, subject to:

1. The federal Freedom of Information Act (FOIA), and
2. State “FOIA” (public records and public information) statutes?

Social Media and the First Amendment: *Richerson v. Beckon* (9th Cir. 2009)

- Teacher argued her reassignment from demotion based on blog posts
- Her blog contained highly personal and vituperative comments about the school district and her co-workers
- Teacher claimed her First Amendment rights were violated
- Held: teacher's speech unprotected because it disturbed co-worker relations and interfered with performance of duties

Social Media and the First Amendment: *Richerson v. Beckon (9th Cir. 2009)*

- Richerson, a school teacher working as a “curriculum specialist” and “instructional coach,” maintained a publicly available blog titled “What It’s Like on the Inside,” which included several highly personal and critical comments about her employer, union representatives, and fellow teachers.
- For example, in her blog, Richerson referred to a new employee as “White Boy” and a “smug know-it-all creep,” and equated the teacher union’s chief negotiator to Hitler. (Remember the State’s interest in dealing with **inflammatory and misguided speech** and to **prevent substantial disruptions**.)
- After the blog was discovered, several teachers and other school employees complained to the school district’s human resources director about the blog. Additionally, at least one person to whom Richerson was assigned to mentor refused to work with her any longer.
- Thereafter, the school district’s director of human resources transferred Richerson from her position as a “curriculum specialist” and “instructional coach” to a classroom teaching position.
- The district contended that Richerson was reassigned because her blog had undermined her ability to enter into **trusting relationships** as an instructional coach. Richerson sued the district, alleging that her duties were reassigned in retaliation for the exercise of her First Amendment free speech rights. The district court granted summary judgment for the district.

Social Media and the First Amendment

Richerson v. Beckon (9th Cir. 2009)

- The Ninth Circuit affirmed the district court's ruling that the reassignment did not violate Richerson's constitutional rights.
- In so ruling, the court applied the balancing test set forth in ***Pickering*** (Supreme Court, 1968), and weighed the administrative interests of the school district against Richerson's right of free speech under the First Amendment.
- **The court concluded that, because Richerson's blog postings eroded her work relationships, the balance tipped in favor of the school district.**

Fourth Amendment Considerations:

Ontario v. Quon (Supreme Court, 2010)

- Public employee (police officer) claimed that 4th Amendment's ban against "unreasonable searches and seizures" provided a right of privacy in reading text messages sent and received on a pager owned by the City and issued to the police officer.
- Supreme Court held that the 4th Amendment, made applicable to the States by the due process clause of the 14th Amendment (*Mapp v. Ohio*, 367 U.S. 643 (1961)), applied but that the "search" in question was reasonable.

Fourth Amendment Considerations:

Ontario v. Quon (Supreme Court, 2010)

- The Fourth Amendment states:
“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....”
- “It is well settled that the Fourth Amendment’s protection extends beyond the sphere of criminal investigations....The amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government, without regard to whether the government actor is investigating crime or performing another function.”
- **The Fourth Amendment applies as well when the Government acts in its capacity as an employer. (That is, government employees are protected by the Fourth Amendment.)**

Fourth Amendment Considerations: *Ontario v. Quon (Supreme Court, 2010)*

City of Ontario had a Computer Policy that made it clear that employees had no expectation of privacy or confidentiality when using the City's computer resources.

The police officer (Quon) was told that messages sent on pagers “are considered e-mail messages. This means that (text) messages would fall under the City's policy as public information and [would be] eligible for auditing.”

Social Media – Loaded with Legal Uncertainties

“The Supreme Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer, and the judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. “

– *City of Ontario (CA) v. Quon*, U.S. Supreme Court (2010)

Social Media - Employee Blogging, Social Networking

What Should HR Managers and Employment Counsel Do?

- Stay apprised of developments in the area.
 - Consult employment counsel; attend seminars; read articles in this area.
 - Become familiar and keep up with the rapidly changing technology – even if you don't use these sites yourselves
 - Develop a list of laws that may provide protections to employees and study them so you include them when deciding how to act on a specific problem:
 - First Amendment Retaliation
 - Fourth Amendment – search and seizure issues
 - NLRA (concerted activity as applied to employee blogging on work, pay, benefits issues)
 - State Privacy Laws
 - Title VII and State Discrimination Laws
 - Stored Communications Act (SCA)
 - Significant court cases
 - AAPA – Review available computer/technology policies from other ports
- With the help of counsel, draft a **Computer and Social Media Policy** that addresses the challenges and potential issues presented by employee online activity and use of government computers and other communication devices.

Social Media - Computer and Social Media Policy

Keys:

- Clear
- Understandable
- Requires Mandatory Employee Training
- Right Level of Control – Does Not Sound or Appear Overly Controlling Beyond the Employer's Legitimate Interests

Massport's Computer and Electronic Communication Systems Policy*

- No expectation of privacy
- Right to access and monitor its computers and systems without warning or notice
- Right to disclose communications sent or received on its systems
- Right to backup everything, even if deleted by the employee
- Includes personal emails sent on or to Massport's computers used by the employees, even if encrypted
- All such communications may be subject to Public Records disclosure statutes
- Many, but not all non-work messages (e.g. instant messaging, playing of games on the Internet, downloading software) are prohibited
- Violation of policy may result in disciplinary action up to and including termination

* With permission of and thanks to Massport Legal Dept.

Massport's

Blogging and Social Networking Policy

- *“Win-Win” Statement of Goal:* protect confidentiality and interests of Massport as well as the privacy of its employees and customers.
- *Careful Not to Abridge Employee Rights:* Policy NOT meant to abridge the rights employees are afforded under state and federal law, such as employees’ First Amendment right to free speech, employees’ rights to speak as individuals on matters of public concern, or employees’ right to engage in concerted activity for their mutual aid and protection. *(NLRA)*

Massport's

Blogging and Social Networking Policy

- “Win-Win” NOT intended to interfere with Massport employees' appropriate use of business-related social networking websites, blogs, interactive websites that are used by employees as part of their employment at Massport or for professional development purposes.
- Contains Definitions
 - “Blog” = abbreviation for web log; any postings on wikis and other interactive sites
 - Social Networking Website = a website that provides a platform for interaction and/or networking for either personal or professional purposes. Examples: Facebook.com®, Friendstar.com®, MySpace.com®, LinkedIn.com®, Twitter.com®, and YouTube.com®

Massport's Blogging and Social Networking Policy

Provisions for Protection of Massport:

- OK to use social media sites for bona fide business or professional development purposes, but not otherwise during work- that is, personal use prohibited during work
- Massport prohibits on or off duty disclosure of any non-public information that is confidential or proprietary to Massport (without approval)
- OK to list Massport as your employer on your own website or social media website, but it may be a violation to identify oneself as a Massport employee when posting inappropriate materials to an online public forum
- Without approval, an employee cannot represent that he/she is authorized to speak on behalf of Massport

An Alternative (Less Strict) Draft of a Social Media Policy

The Port's Blogging and Social Networking Policy:

GOAL STATEMENT

The goal of Port's Blogging and Social Networking Policy (Policy") is to protect the confidentiality and interests of Port as well as the privacy of its employees and customers. This Policy is not meant to abridge Port employees' First Amendment rights to free speech or to limit employees' rights to speak as individuals on matters of public concern.

STATEMENT OF POLICY

Port recognizes that as an increasing number of individuals author and visit online blogs and participate in social networking or interactive Websites, many of our employees may choose to engage in these types of online activities for both personal and professional reasons. The purpose of this Policy is to communicate to employees the Port's expectations for their online activity, whether on or off-duty, that may implicate the Port. Any conduct that violates this Policy or any other Port policy or rule, or online activity that interferes with an individual's performance of his or her Port duties is prohibited. However, this Policy is not intended to interfere with Port employees' appropriate use of business-related social networking Websites, blogs or interactive Websites that are used by employees as part of their employment at Port or for professional development purposes.

DEFINITIONS

Blog or Blogging: "Blog" is an abbreviation for web log. For purposes of these guidelines, the terms "Wog" or "Blogging" shall mean any postings on wilds and other interactive sites, postings on video or picture sharing sites, or the comments that you make online in a public forum whether conducted during on or off-duty time. Social Networking Website: A Website that provides a platform for interaction and/or networking for either personal or professional purposes. Examples of Websites include Facebook.com. MySpace.com[®], LinkedIn.com[®], Twitter.com[®], Flickr.com[®] and YouTube.com[®].

An Alternative (Less Strict) Draft of a Social Media Policy

PROHIBITED CONDUCT

No prohibitions contained in this Policy are intended to address employees' use of Blogs or Social Networking Websites for authorized business purposes that are related to their Port employment or are used for professional development purposes.

All such use of the Internet for work-related activity is permitted under this Policy, assuming that it does not violate any other Port policy, rule or regulation. The following prohibitions apply to Internet activity that is not related to individuals' Port employment.

Subject to compliance with this Policy, Port allows reasonable use of employees' personal Blogs during work time.

Port prohibits the posting of information, including pictures or videos, to a Blog or Social Networking Website which may affect the legitimate safety or security interests of Port without an approved business purpose. If you have any questions concerning what constitutes the type of information that may affect the safety or security interests of Port, you should contact the Security and Emergency Operations Manager for guidance.

If you have any questions concerning what constitutes an approved business purpose, you should consult your manager or supervisor for guidance.

Port prohibits the on or off-duty disclosure of any non-public information that is confidential or proprietary to Port without an approved business purpose including personally identifiable information or any other information that has not been made public by Port or is not contained in a public record.

An Alternative (Less Strict) Draft of a Social Media Policy

PROHIBITED CONDUCT

If any Port employee chooses to maintain a Blog or Social Networking Website account and refers to his or her association with Port, the employee does so at his or her own risk of facing discipline. For example, it is not a violation of this Policy to list Port as your employer on a Social Networking website, but it may be a violation of this Policy to identify yourself as a Port employee when posting inappropriate materials to an online public forum.

Port prohibits any on or off-duty assertion or representation by an employee that he or she is authorized to speak on behalf of Port, unless the employee has been given express authorization to do so by the Executive Director his designee.

Port prohibits employees from disclosing private or confidential personnel information that is directly or indirectly related to Port or any Port employee on any Blog or Social Networking Website.

Port prohibits employees from posting racially or sexually offensive language, pictures or graphics or posting discriminatory or offensive materials related to a Port employee on a Blog or on a Social Networking Website.

Any employee who identifies himself or herself as a Port employee on a Blog or Social Networking Site and who posts comments and/or pictures of himself or herself engaging in conduct considered by the Authority to be unbecoming to Port's image may be subject to discipline up to and including termination of employment when the conduct is related to the employee's job duties or responsibilities at the Authority or the conduct may adversely affect Port's business, reputation or operational interests.

All employees are prohibited for altering or editing anything on Port websites including but not limited to text, images, photos, logos, language and all other information without prior written authorization from the Executive Director or his designee.

All employees are prohibited from engaging in-on-or off duty Blogging or Social Networking activity as an agent or on behalf of Port including but not limited to soliciting for bids, proposals or other information, exchanging confidential information and/or awarding contracts or promises to pay for services to be rendered.

An Alternative (Less Strict) Draft of a Social Media Policy

PENALTIES

Any Employee who violates Port's Blogging and Social Networking Policy, or who knowingly allows others to do so, or who engages in on or off-duty online activity that violates any other Port policy, state or federal law is subject to disciplinary action up to and including termination.

Employees are reminded that they should have no expectation of privacy when using Port's computers and electronic communications systems.

Port may also in its discretion take other types of action including but not limited to on-going monitoring of Internet activity, on-duty loss of access to the Internet, suspension and legal action where appropriate.

Blogs and Social Networking Websites are very public forums. Port employees must be aware that the statements they make in these online forums are public statements for which employees are personally responsible for, and that such statements may subject employees to individual liability and affect their employment with Port.

If you have specific questions or to report violations related to this Policy, please contact the Human Resources Manager, General Counsel or Public Affairs Manager.

Social Media

Conclusions

- **Social Media**
 - Takes into account
 - Port's sites
 - Employees' own accounts
 - **Not going away; exponentially increasing**
 - **Legal issues just being identified (Supreme Court quote in *Quon*)**
 - Port HR, Legal and Public Affairs staffs need to have a **policy** and become savvy in this area - there are benefits and perils
 - Should ports get involved in **seeking statutory protection** against potential legal liabilities?
- **Consider inclusion of the following provisions in your Social Media policy:**
 1. Subject to any overriding laws, **employees do not have an expectation of privacy** in the use of government computers and other devices, and their online and other **computer activities may be monitored by the employer.**
 2. Blogging, social networking, and other **personal Internet activity** may not be done on company time or with the use of company computers. (Or do you allow for some limited, reasonable use of work computers for personal matters? If so, what are your potential liabilities?)

Social Media

Conclusions

3. Employees must comply with all of the employer's policies, including, but not limited to, the code of conduct and the discrimination and harassment policies.
4. Blogs and social networking sites are individual interactions, not corporate communications, and **employees must not represent or imply that they are expressing the opinion of the company. Online posts should include a disclaimer that the views expressed are those of the employer.**
5. **Employees are personally responsible for the contents of their online profiles and blogs.**
6. **Never disclose any confidential, trade secret, or proprietary information of the company.**
7. A request or requirement that employees **keep company logos or trademarks off their blogs and profiles and not mention the company in commentary**, unless for business purposes.

Social Media Conclusions

8. A **prohibition on using company email addresses to register for social media sites.**
9. An instruction not to post or blog during business hours, unless for business purposes.
10. A prohibition on **posting false information about the company or its employees, customers, or affiliates.**
11. A **clear statement that misuse of social media can be grounds for discipline, up to and including termination.**
12. Employers should send a message to employees: Respect yourself, your coworkers, and your company. **Employers must impress upon employees not to put anything on the Internet that will embarrass, insult, demean, or damage the reputation of the company, its products and customers, or any of its employees.**

Social Media

- By establishing clear policies and keeping abreast of applicable law and its developments, problems with personal Internet use can be minimized to the greatest extent possible.
- Questions?
- Thanks for listening!