

## Are Your Employees Blogging You into Bankruptcy?

By Karen L. Gabler, Esq.



Consider the case of “Jim,” a financial advisor and investment manager. He hired “Tara” to handle his customers’ financial affairs. Tara is young, delicate, and sensitive. Unfortunately, she wasn’t the best employee, and Jim was forced to terminate her employment. Tara sued for harassment, claiming that she was deeply offended by inappropriate text and e-mail messages from Jim containing jokes, commentary, and profanity.

My research into Tara’s Internet activity revealed photos posted on her public MySpace page showing Tara drunk, engaged in various sexual activities, and in partial stages of undress. When I questioned Tara at her deposition about her claimed discomfort with profanity and inappropriate jokes and showed her the photos I had located, she quickly decided to settle her case for pennies on the dollar.

Great result for Jim? From a legal perspective, absolutely. From a business perspective, though, how secure would Jim’s clients feel about their financial representative if they found Tara’s public photos themselves? Technology is growing by the nanosecond, far too quickly for the law to keep up. There are numerous social media opportunities available, but little legal protection for employers in this developing public arena.

To be competitive in today’s market, business owners must make effective use of social media for information, public relations, and sales purposes. To ensure the utmost business protection, however, it is incumbent upon employers to set boundaries on their employees’ social-media activities, inside and outside the workplace. As noted by **Brian Hemsworth** [CAL] and **Jerri Hemsworth** [WH1-GL], marketing communications and brand specialists with NewmanGrace, “Social media has become a great tool for marketing, but much like any tool, it can also be dangerous. While the speed of communication has accelerated, so, too, has the speed of dishonesty and constant breaches of ethical boundaries.”

Employers should consider the following broad protective methods to avoid damage to the company as a result of their employees’ electronic communications and social-media activity:

**1. Documentation:** At a minimum, employers must implement effective and thorough policies on social-media activity, confidentiality and electronic communications. Employees should be reminded in writing that all electronic communications (including e-mail, Internet activity, telephone calls, voicemails, text messages, instant messages, tweets, posts, and blogs) can and will be monitored by the company. Employees should receive this advisory whether or not the company actually does the monitoring on a regular basis.

Employees must also be specifically informed in the company’s policies that they should have no expectation of privacy in their communications and electronic activities. Courts have refused employers the right to cite social media, Internet, or other electronic communications if the company’s employees

reasonably believed that their activities or content might be private—usually because the employer failed to notify employees in writing that they forego their privacy rights when they are engaging in social-media activities by using company equipment, acting on company time, or revealing company information.

**2. Ownership.** In today's tough economy, employers are quick to cut seemingly unnecessary (and costly) benefits to employees. To avoid the expense of providing laptops, remote access, cell phones, or wireless accounts, employers often require employees to obtain their own equipment and accounts. Unfortunately, when an employer allows an employee to use his or her personal equipment or accounts to conduct business for the company, the employer loses control over the communications and work product processed on that equipment or through those accounts. When employees leave the company, they take their cell-phone numbers, e-mail addresses, and social-media accounts with them.

However, when an employer distributes cell phones and laptops to employees and pays for the cellular account and wireless access, the employer owns and controls the phone number, e-mail inbox, Internet accounts, and all social-media or other electronic communications created by the employee while on working time, using company equipment, or otherwise controlled by the employer.

Included in "ownership" is the company's brand, logo, customer information, or other trade-secret, confidential, or proprietary property. While the employer may not prevent the employee from engaging in social-media activities on his own time and while using his own equipment, the employer does have the right to pursue a claim against an employee who posts defamatory content on the Internet. Similarly, although an employer cannot safely terminate an employee who vents about a fellow employee in his social-media posting, the employer can certainly terminate the employee who harasses a fellow employee in violation of the company's anti-harassment policy, even when the harassment occurs when the employee is off duty.

**3. Monitoring:** Employers should actively monitor their employees' communications and Internet activity, internally and externally. "Every social media outlet is an opportunity for you to promote your brand; it's also an opportunity for others to comment and rant," said **Jonathan Fitzgarrald** [CAL], a personal branding expert who directs business development and marketing for Greenberg Glusker. "Careful and regular monitoring of your social-media profiles ensures that you are controlling the message (and thus your image) rather than it controlling you."

One of the best ways to locate mention of your company, products, or personnel on the Internet is to use Google Alerts. Enter the search terms you wish to monitor, and Google Alerts will send an email notifying you when those terms appear. "Nothing can replace human-to-human networking opportunities such as ProVisors, particularly in public relations," notes **Jennifer Goddard Combs** [V-EC~WLK1], president of The Goddard Company. "But I'm a big believer in social media, too. Google Alerts helps The Goddard Company provide the level of service our clients expect. It would be impossible to track all their media coverage and national publicity hits without it."

Ultimately, as an employer, you should keep in mind that you are (or should be) the owner of your company, your technological equipment, your electronic communications accounts, your employees' time, and your reputation. With the advent of technology, we are drowning in information, but starved for knowledge.

Make sure that the information publicly available about your company is not the information your employees choose to post, but instead is the knowledge you want to publish.

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