

The Impact of Social Networking on Common Employment Practices: Privacy in and Beyond the Workplace

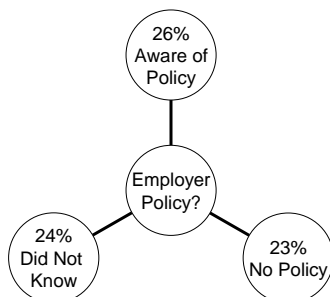
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Employee Social Networking

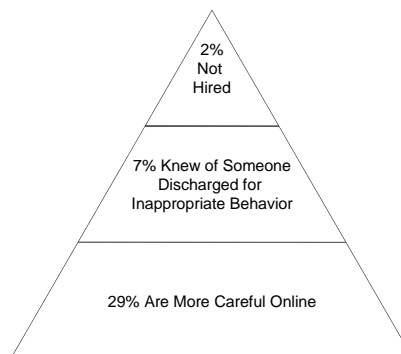
- Approximately 5% of workers maintain personal blogs.
- 16% of employees have posted information critical of their employer on their blog.
- 43% of U.S. workers access social networking sites at work.

From "Employer or Big Brother: the Quandry Over Employee Blogging and Social Networking," by Ginger McRaei, Employment Practices Solutions, Inc., 2008

Employee Social Networking By the Numbers (cont.)



Statistics From the Wall Street Journal's blogs.wsj.com



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Hypothetical #1 Recruiting Through Social Media

- Sally, a recruiter for Acme Corporation, is searching for a candidate to fill the head of its Acme Rocket Power division.
- She would like to use social media sites to reach out to and communicate with potential candidates.
- What should Sally keep in mind?

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Recruiting Through Social Media Who's Doing it?

- Accenture (@Accenture_Jobs)
- AT&T (@ATTjobs)
- Burger King (@BKCareers)
- DaVita Inc. (@DaVita Jobs)
- Expedia (@Expedia_Jobs)
- Hershey Company (@Hershey Company)
- Hyatt Hotels (@Hyattcareers)
- Intel (@Jobsatintel)
- KPMG US (@KPMGUSCareers)
- Kroger (@KrogerWorks)
- McCormick & Schmick (@Careers_At_MSSR)
- Microsoft (@JobsBlog)
- Raytheon (@Raytheon_Jobs)
- UPS (@UPSjobs)
- U.S. State Dept. (@DOScareers)
- **And many more....**

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How to do it...

- Have a presence, optimize it, keep it active and up to date.
 - Employee programs – Spend time advertising the benefits of working for you.
 - Career advice – Create a built-in following by becoming a source of information for individuals looking for jobs in your industry.
 - Description of a good candidate – Use Twitter to let people know what kinds of individuals you're looking for.
 - New hires – Show your pride. When you've filled a position, let your followers know.
 - Advertise your employees – Link to their own Twitter accounts, and re-tweet articles and news about them.
 - Events and appearances – Let everyone know about speaking or recruiting events.

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Recruiter Do's & Don'ts

- Do send private messages about job openings
don't make solicitations via public posts
- Don't invite people you don't know to join your network – message instead.
- Do respect requests not to be contacted.
- Don't use software programs to harvest contact information of potential recruits.
- Don't collect sensitive candidate data like SSN over social networks.

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Hypothetical #2 Background Checks

- Sally has a person in mind for the position she was filling. Because the job involves a lot of explosives, this person will need to be reliable, dependable and trustworthy. Sally would like to check out his background and character on popular social media platforms.
- What privacy pitfalls does Sally need to look out for as she conducts her background check?

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Too Much Information?

What shouldn't an employer know about Jane?

Jane Smith's Details	
Status:	Married
Here for:	Networking, Friends
Orientation:	Straight
Hometown:	Austin, Tx
Body type:	5' 4" / More to love!
Ethnicity:	White / Caucasian
Religion:	Agnostic
Zodiac Sign:	Cancer
Smoke / Drink:	No / Yes
Children:	Proud parent
Education:	Some college
Occupation:	stay at home mom
Income:	\$45,000 to \$60,000

Female
51 years old
WARRIOR & Survivor of Breast Cancer ~

General
Trying to stay healthy with diet and exercise. My diabetes never takes a day off. Making fun of people on tv specifically, commercials and game show contestants.

Music
Jazz, Blues, Latin Jazz And R&B

Movies
Pulp Fiction, Goodfellas and too many others to mention...

Television
Sopranos, Two And A Half Men and anything David E. Kelley writes (Currently Boston Legal, Picket Fences was my favorite all time).

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Too Much Information?

Jane Smith's Details	
Status:	[REDACTED]
Here for:	Networking, Friends
Orientation:	[REDACTED]
Hometown:	Austin, Tx
Body type:	5' 4" / More to love!
Ethnicity:	[REDACTED]
Religion:	[REDACTED]
Zodiac Sign:	Cancer
Smoke / Drink:	No / Yes
Children:	[REDACTED]
Education:	Some college
Occupation:	[REDACTED]
Income:	\$45,000 to \$60,000

Female
[REDACTED]
[REDACTED]
WARRIOR
[REDACTED]
[REDACTED]

General
Trying to stay healthy with diet and exercise... [REDACTED]
Making fun of people on tv specifically, commercials and game show contestants.

Music
Jazz, Blues, Latin Jazz And R&B

Movies
Pulp Fiction, Goodfellas and too many others to mention...

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An Approach NOT to Take

City of Bozeman required applicants to provide usernames and passwords for social networking sites.

- Whistleblower brought to public.
- Bozeman ended the practice.
- Investigation launched.

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No Pretexting



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Privacy Framework in Canada

- Statutory Framework: PIPEDA is Federal legislation governing all the provinces except BC, AB, QC (but overlap)
- In BC, AB, QC, provincial privacy legislation for the private sector
- Public sector privacy in all of the provinces

Private Sector Privacy Principles

- Private Sector Privacy Principles: Knowledge and consent of an individual are required for collection, use and disclosure of personal information except where inappropriate
- Purposes for collection, use and disclosure must be reasonable

Private Sector Privacy Principles

- Risks and remedies – complaints to privacy commissioners, issues of admissibility particularly before labour arbitrators
- Organizations usually obtain consent by giving notice – the conduct of the individual in accepting the service or proceeding to participate in the activity will constitute the consent

Private Sector Privacy Principles

- Notice must be comprehensive, must not be hidden in small print, must be brought to the attention of the individual at the time the information is being collected

Is Employer Required to Give Notice?

- Exception to consent/notice requirement where personal information is publicly available (which is defined as including information that appears in printed or electronic publication that is available to the public)
- However the collection must still be for reasonable purposes related to the application/hiring process
- Note the terms of use for the SN being used
- Facebook, SRR requires users to agree that:
“If you collect information from users, you will obtain their consent, make it clear that you (and not Facebook) are the one collecting their information, and post a privacy policy explaining what information you collect and how you will use it.”

Is Employer Required to Give Notice?

- Other obligations under Canadian privacy legislation – organizations are required to retain personal information if it has been used to make a decision that directly affects an individual, for a one year time period (some provinces)
- Individuals have access rights to their own personal information

Hypothetical #3 Internal Social Media Platforms

- John, a program manager at Acme Corporation, is coordinating development of Acme's first internal employee social networking site.
- The site will help it's employees across the world feel more connected and help them collaborate and share more ideas.
- What employee privacy issues does John need to think about as he creates this site?

Privacy Principles

FTC

Fair Information Practice Principles:
Section 5 Fairness

EU Data Directive

Article 29 WP Opinion 5/2009 on Online
Social Networking

Canada

VIEW ALL PROFILES

2. MY PROFILE

First Name: City:

Last Name: State:

Don't Display Last Name


Country:

Email:

[EDIT MY PASSWORD](#)

Privacy Principles

- Notice/Awareness
- Choice/Consent
- Access/Quality
- Security
- Enforcement



Other Tips for Your Internal Social Network




- Employee Photos
 - Review badge photo forms
 - Are they too restrictive?
- Home address/contact information
 - Recommend voluntary input or limit access
 - Easy to change/remove



Hypothetical #4

Employee Monitoring and Investigations

- A rumor is going around that an Acme Corporation employee has leaked sensitive information on FriendSpace about Acme's formula for a top secret brand of explosive bird seed.
- Jane, a supervisor of Acme Corporation, comes to Bob, her HR manager, wanting to investigate and possibly somehow get access to this person's FriendSpace Account.
- What should Bob tell Jane?

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Use of SN During Employment

- Authority for proposition that employee's duty of loyalty to the employer exists in communications outside of the workplace
- Off duty conduct involving breach of confidentiality obligations, breach of duty of fidelity, or harassment can also give rise to discipline of employees

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Use of SN During Employment

THREE CASES:

- First:
 - Employee disciplined for making disparaging statements about employer, comments about residents of retirement home (with pictures), with no privacy settings
 - Employer did not have a policy or workplace rule
 - Arbitrator upheld discharge

Use of SN during employment

- Second:
 - Employee posted insulting comments about co-workers under an alias, however, individuals could easily be identified.
 - Co-workers gave evidence that they were negatively affected by the posts, trust relationships had been damaged
 - Arbitrator upheld dismissal.

Use of SN during employment

- Third:
 - Employee reinstated after he had been fired for maintaining a blog with posts about violence and supporting Nazism, with references to the employer
 - Those references were found to be coincidental and not directed at the employer
 - The post did not target employee's customers nor the business of the employer; grievor had also apologized on the blog.

Use of SN during employment

- Recommended:
 - Have a policy which spells out consequences for inappropriate blogging or posting, including:
 - use of pseudonyms;
 - breach of non-disclosure obligations;
 - posting of derogatory comments; and
 - breach of the duty of fidelity.

The Future – Expectation of Privacy?

- In determining what is a legitimate expectation of privacy – will expectations erode over time as technology advances?
- Who determines what is normatively desirable?
- Determinations of whether a privacy interest exists in particular information may, in future, be judged by the nature of the technology, whether the individual was involved in illegal activity

The Future – Expectation of Privacy?

- Cases over what constitutes a reasonable expectation of privacy across Canada have led to interesting results
- Alberta instructor disciplined for inappropriate sexual relationship with students – issue of admissibility of e-mails from instructor's hotmail account on College owned laptop
- E-mails found to be admissible
- Ontario teacher charged with possession of child pornography – School Board turned over the laptop to the police – police searched without warrant
- Lower court found reasonable expectation of privacy because School owned laptop was password protected and teacher was allowed to use the laptop for his own purposes

The Future – Expectation of Privacy?

- On appeal found that there was no reasonable expectation of privacy on an objective basis
- Alberta case involving employee using company computer equipment to send pornographic e-mails
- Court of Appeal found that there is no reasonable expectation of privacy on the workplace computer
- Common to all decisions was a consideration of the employer's policy, as well as the employer's practice in allowing personal use of the company equipment
- Message: ensure policy language is adequate, and is regularly brought to attention of employee

U.S. Restrictions on Monitoring

- National Labor Relations Act
- Collective Bargaining Agreements
- Off-Duty Conduct Statutes
- Invasion of Privacy
- Violation of Public Policy
- Stored Communications Act

And Remember No Pretexting!

- What is it?

-----Original Message-----

From: Gentilucci, Anthony R.

Sent: Monday, January 30, 2006 12:00 PM

To: Hunsaker, Kevin

Subject: RE: phone records -- privileged communication

The methodology utilized is social engineering, he has investigators call operators under some ruse, to obtain the call record over the phone, its verbally communicated to the investigator, who has to write it down. In essence the Operator shouldn't give it out, and that person is liable in some sense, Ron can describe the operation obviously better, as well as the fact that this technique since he, and others, have been using it, has not been challenged. I think its on the edge, but above board. We use pretext interviews on a number of investigations to extract information and/or make covert purchases of stolen property, in a sense, all under cover operations.

Tony

33

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The Houston's Case

- Employees start a private group – other employees are invited to join.
- Employees post confidential information and derogatory info about managers.
- Employee brings the information to management's attention.
- Management asks employee for password to view site.

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The Houston's Case

- Employees who started site are fired.
- Terminated employees bring claims for invasion of privacy / violation of SCA.
- SCA claim survives summary judgment.
- Issue is whether employee who provided password was coerced.
- Jury returns verdict in favor of employees.

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State Laws on Employee Monitoring

- Connecticut (Conn. Gen. Stat. 31-51q) -
 - Violation to terminate based on an employee's exercise of 1st Amendment rights activity
 - So long as does not substantially or materially interfere with:
 - the employee's bona fide job performance or
 - the employee/employer working relationship.
- New Jersey S.Ct. - Stengart v. Loving Care
 - Private employer – corporate policy not specific to personal emails
 - Common law tort – "intrusion on seclusion" – reasonable expectation of privacy
 - Attorney Client Privilege not waived

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Best Practices

- Develop guidelines about public posts discussing the workplace.
- Ensure employees understand there is no expectation of privacy if the posts, blogs or communications take place during work hours, make use of company-provided equipment or have a negative impact on the work environment.

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But What About the Quon Case?

- The city of Ontario, California has a written policy expressly warning employees **not** to expect any privacy in electronic communications on City equipment.
- Ontario SWAT team member Sgt. Quon uses his Department-issued text-messaging pager to exchange hundreds of personal messages—many sexually explicit—with, among others, his wife, his girlfriend, and a fellow SWAT sergeant, while he's on duty.
- After the Department reviews transcripts of the text messages, Quon and his text-messaging partners sue the police chief and the City, alleging a Fourth Amendment violation and Arch Wireless for violating the Stored Communications Act.

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The Quon Case – How Would You Rule?

- Does a member of a city's SWAT team have a **reasonable expectation of privacy** in text messages transmitted on his SWAT pager, where the police department issued an official no-privacy policy?
- Does it make a difference that the policy did not expressly mention pagers?
- Does it make a difference that a non-policymaking lieutenant announced an "informal policy" of allowing some personal use of the pagers?
- Should the police department have used "less intrusive methods" of reviewing text messages transmitted by the SWAT team member on his SWAT pager?

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Wrap-up

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