



Immix Law Group }

## Policies on Employee Use of Technology

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## Outline for today's discussion

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1 } *Employee Use of Social Media*

2 } *Regulation of Employers*

3 } *New Laws on Social Media*

4 } *New Business Practices*

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## 1 } *Employee Use of Social Media*

- › Baseline question: what is social media?
- › Social media is any technology that allows direct, person-to-person communication (usually of a non-transitory nature) with the ability of third-parties to either observe or join.
- › Oregon HB 2654 defines it broadly.

The definition of social media is evolving, but it anticipates the direction of technology use. It blurs the lines between “on duty” and “off duty” hours, as well as between technology for personal use and for professional use.

## 1 } *Employee Use of Social Media*

- › There are both risks and rewards in using social media
- › A well constructed and properly implemented social media Policy bears long term returns
- › **Question:** Should an employer adopt a social media policy?     **Answer:** yes.

Social media provides a powerful platform for marketing. The demand generation side of the business (marketing, sales) may pull an organization to new and innovative uses. Developing a culture of wise social media use will help decision makers grow their business.

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## 1 } *Employee Use of Social Media*

- › Some risks to be addressed include:
- › IP disclosures (trade secrets)
- › Securities regulation
- › Improper employee conduct
- › Wage and hour liability

Many technology policies from 5-10 years ago addressed only improper conduct by employees. That is still a requirement of an adequate policy, but social media has blurred some lines. Employees must understand their role, the requirements, and the prohibitions.

## 3 Rules of Engagement

- 1 } *Employee Use of Social Media*
  - › Ex. 1 – Intel’s social media policy
  - › [tinyurl.com/6dxley](http://tinyurl.com/6dxley)

- › **Don't tell secrets:** Never reveal Intel-classified or confidential information. If you're unsure, check with Intel PR or Global Communications Group. Off-limit topics include: litigation, non-published financials, and unreleased product info. Also, please respect brand, trademark, copyright, fair use, and trade secrets. If it gives you pause...pause rather than publish.
- › **Don't slam the competition (or Intel):** Play nice. Anything you publish must be true and not misleading, and all claims must be substantiated and approved. Product benchmarks must be approved for external posting by the appropriate product benchmarking team.



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1 } *Employee Use of Social Media*

- › Ex.2 – Australian National Botanical Gardens
- › <http://tinyurl.com/q7dm8kz>

## 1 } *Employee Use of Social Media*

### **5 ROLES AND RESPONSIBILITIES**

There are two capacities in which staff can use social networking sites. Within the official Australian National Botanic Gardens' pages, and within personal pages, which they have created and administer themselves.

#### ***5.1 Australian National Botanic Gardens social networking platforms***

When using social networking sites administered by the Australian National Botanic Gardens staff should:

- Request appropriate training or assistance from CVS staff
- Complete an *Online consultation comment authorisation* form available on DEWHA intranet or from CVS staff
- Adhere to the APS Values and APS Code of Conduct that apply in a physical work environment
- Promote the values and goals of the Australian National Botanic Gardens



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## 1 } *Employee Use of Social Media*

- › A) Make employees aware that they have obligations;
- › B) Link those obligations to standard practices / policies / NDAs, etc.;
- › C) Make it legible;
- › D) Make it public.

A social media policy doesn't need to address every possibility (i.e., trade secrets disclosure), because the employment agreement or NDA already governs. Just link the obligation to the use of technology.

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## 1 } *Employee Use of Social Media*

- › Use case: *Rodriquez v. Walmart Stores*, 2013
- › Application of a properly-scoped social media policy may be effective. In this case the policy provided that employees could use social media, but that the comments could not be “unprofessional, insulting, embarrassing, untrue or harmful.”

Violation of a social media policy can provide non-discriminatory grounds for adverse actions.

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## 2 } *Regulation of Social Media*

- › Clarifications, not fundamental change, in the regulations
- › Regulation may narrow the scope of your adopted social media policy
- › You may be regulated by an agency you don't recognize

Regulators will apply their grant of power to regulate employer actions into new mediums and technologies. However, compliance with regulations may become more difficult the further technology takes us from precedence.

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## 2 } *Regulation of Social Media*

- › Use case: the National Labor Relations Board takes authority from the National Labor Relations Act. Beginning in 2012, the NLRB began limiting the application of an employer's social media policies.

Specific to the NLRA, there must be opportunity for employees to engage in dialogue on issues such as workplace condition and pay. That dialogue may occur on social media. Employers may not interfere with such discussion.

## 2 } *Regulation of Social Media*

- › Use case: the EEOC in 2012 had opportunity to weigh in on the ability of employees to use social media. In *Knowlton v. La Hood*, the commission held an FAA worker who went on a Chick-fil-A lunch run could reasonably allege harassment based on what a co-worker wrote on Facebook.
- › (As an aside, Chick-fil-A was implicated due to negative press on social media).

Notably, the EEOC held that the fact the employee alleging harassment had never been on Facebook, and had no actual knowledge of the posts, could not be the basis of dismissal of the claims.

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## 2 } *Regulation of Social Media*

- › EEOC (cont.) – Consider that 40% + of hiring managers in a recent survey reviewed applicants’ social media prior to hire.
- › What if a hiring manager discovers protected class information on the basis of such review?

Five to ten years ago, most large employers would have cautioned hiring managers to avoid “friending” direct reports. Expectations have changed, and by and large employers should anticipate such relationships.

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## 2 } *Regulation of Social Media*

- › Use case: the FTC has since 2010 implemented, then repeatedly updated, guidance about paid endorsements via social media.
- › The FTC has reiterated that the same consumer protections apply online and in social media, but the context makes a difference.

Particularly with services like Twitter, advertising disclosures may be difficult to implement. Required disclosures must be clear and conspicuous, but that may be a problem given physical space constraints.

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## 2 } *Regulation of Social Media*

- › FTC (cont.) – the FTC has since 2010 been active to prevent “Astroturf” (false grass roots) advertising.
- › This continues to be challenging primarily with celebrity advertisements.

Consider Ellen Degeneres appearing at the 2014 Oscars with her Samsung phone, followed by posting of a “selfie” on Twitter.



### 3 } *New Laws on Social Media*

- › In 2014 a new law became effective in Oregon governing employer behaviors, providing privacy protection to employees.
- › 6 states passed social media privacy laws in 2012. 36 states introduced some type of social media protection law in 2013, with at least 28 states revisiting the issue in 2014.

A balance between the legitimate interests of the employer in application of their policy with the reasonable expectations of privacy for the employee.

### 3 } *New Laws on Social Media*

- › Oregon social media law makes it unlawful for an employer:
  - 1) to request or require an applicant to disclose their username/password;
  - 2) to compel an employee to “friend” the boss;
  - 3) to compel an employee to access a social media account in the presence of the employer (to “shoulder surf”).

HB 2654 was passed and signed 2013, effective 2014. It addresses employee social media accounts but excludes from the prohibition employer social media accounts used by employees.

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### 3 } *New Business Practices*

- › The SBA suggests the following when considering social media:
  - › A) Start with your employees
  - › B) If you're not sharing your own content, be warned
  - › C) Endorsements must be disclosed.
- › *Sounds simple, right?*

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### 3 } *New Business Practices*

- › Use case: Zappos
- › Zappos social media policy: Be real and use your best judgment
- › Zappos announced in May, 2014 that they would no longer post jobs and accept resumes. Instead, Zappos will host a social media site and allow a variety of users to interact, including job seekers and hiring managers.

Zappos famously hires for cultural fit, and will pay any newly hired employee \$2,000 to quit.

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### 3 } *New Business Practices*

- › Use case: Zappos (cont.)
- › What questions do you want to answer, what policies apply:
  - Does the audience include both employees and non-employees?
  - Do the same policies apply to hiring managers and peers?
  - Do you distinguish between internal applicants and external applicants?
  - Does it make a difference whether Zappos hosts its own social media site or puts it on Facebook?
  - How do customers differ from job seekers, if at all?

END } *Thank you*

Successfully advising on use of social media means considering both risks and rewards.