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Employer Social Media Sand Traps

A [previous Two for Tuesday article](#) briefly explained the various EPLI exposures facing businesses. Now we'll delve deeper into the new and muddy waters of social media. Some laws being applied to social media cases were written [years or decades](#) before the advent of it.

Employers may often have legitimate business reasons to monitor employee use of social media for productivity, to protect employer's confidentiality, ensure their reputation/brand is not defamed, or protect other employees from harassment or cyber-bullying. Employees, however, have a right to a degree of privacy in their social media activity.



In the Hiring Process

Social media can be used in screening potential employees outside of the normal interview process. A majority of employers "cyber-vet" job applicants using social media but there are hazards doing this. A job applicant's social media profile may reveal characteristics such as race, health, marital status, etc. which cannot be considered by an employer's in their hiring decision.

Using a third-party vendor or a human resources department to conduct the social media search can be a helpful step. Accessing a candidate's personal information may suggest an improper motive in a failure-to-hire situation. Any hiring decision based on legally considerable social media content should be documented and the content archived.

Authorized Use Policies

A best practice to guide employees' expectations of privacy is adopting a comprehensive Authorized Use Policy (AUP). As the use of social media continues to evolve, however the "dos and don'ts" of AUPs have to adapt to keep up.

Using Company Equipment

Employees should clearly know that company issued electronic equipment (computers, cellphone, etc.) will likely be monitored even if password protected or off-hours. Employers should inform that company-issued electronic devices be used solely for work-related purposes.

Employers should prohibit the transmittal and downloading of material that is harassing, offensive, discriminatory or unlawful. The employer should let the employee know that any unauthorized use may result in discipline, including suspension and termination of the employee. Any illegal behavior should be reported to the appropriate authorities. All harassment, discrimination and retaliation policies should clearly state that inappropriate behavior through social media may be the subject of discipline.

Addressing Employee Misuse of Social Media

Employee behavior that affects an employer's ability to operate efficiently, and an employee engaging in unprofessional/hurtful conduct to other employees, clients, or customers is actionable.

Examples of impermissible social media activity can be distilled through NLRB cases. For example, advocating insubordination is not protected and can justify termination. Similarly, crude and insensitive jokes can be actionable.

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Can the Employer be Liable?

Employers need to protect themselves against incurring liability for an employee's misuse of social media. Courts tend to focus on two areas to determine employer liability: whether the social media forum is related closely to the employer such that it can create employer liability; and whether the employer was aware of, or should have been aware of, the misuse.

While employers do not have to monitor private communications of employees, actively monitoring employees' social media activity can create a duty on the part of the employer to take action. An employer should take action if it becomes aware of discriminatory or harassing posts on social media and has a duty to report illegal conduct or can be liable just as if the conduct was occurring in the workplace.

Coverage for these claims, and their high cost of defense, is usually available through the **Employment Practices Liability - Wrap+** from Travelers. Travelers offers modular coverage offered as a stand-alone product on [Big "I" Markets](#) and also as part of **Wrap+ Executive Liability**. EPLI-Wrap+ is currently available to insureds in all states with the exception of: CA, LA, NE, NV, VT and WV.

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