

# Social Media: The Rules of the Online Game, Part 1

Employers and workers alike know that “social media” has become a buzzword used to encompass everything from marketing strategies to how employees waste time at work. While most people know the basics of social media such as the sites and what they can do for you, most people don't realize that there are rules for what you can post, who you can post to, who you can search, and what you can control.

Although social media interactions mostly take place in the online world, there can be very real benefits and consequences for any employer, including claims of defamation and/or discrimination based on the business's use of these sites. In addition to employers and business owners, employees can face embarrassment, discipline, and even termination for doing the wrong thing on a social network. For example, it was recently reported that Apple Inc., which has strict rules regarding online comments by its employees, fired a store employee for making unflattering comments about Apple on his personal Facebook page.

This two-part series will examine the benefits and the rules for social media, including Facebook, Twitter, and online review sites. This part discusses the benefits and rules from the employer and business owner standpoint, describing what you need to know about online marketing, interactions with employees, and online reviews. Part 2 will view the benefits and procedures from an employee's perspective.

## MARKETING AND BENEFITS

Despite the rules that apply, using social media is an integral part of doing business today: employees and clients—both current and potential—look to your online presence just as they do your in-person presence. Company profiles on Twitter, Facebook, and LinkedIn can be a resource for potential clients and potential employees, as well as a useful forum for you to interact with each of these groups.

However, as in print media, any marketing and information provided via online social media must be truthful and not misleading. Most social media sites have their own policies and rules regarding promotions and content that you may post, which you should review before utilizing a site. Additionally, you should monitor the privacy functions of these sites and determine whether you want employees, clients, and/or the general public all viewing the same content, or whether you would like to specify what content specific groups should be allowed to access.

## ARE YOU “FRIENDS” WITH YOUR EMPLOYEES?

Employers must know the rules before utilizing any benefits of social media. As little as five years ago, employers may have safely assumed that social networking was only an issue with employees under the age of 25. However, Pew Research Center has reported that the use of social networking sites like Facebook and Twitter increased 100 percent in the

last year for those 65 and older, meaning one in four of that age group now has an account. These sites currently account for 25 percent of all time spent online in the United States, making social networking the No. 1 web activity. As such, social media is no longer something that employers and business owners can ignore.

An employer may initially wish to completely control or prohibit its employees' online comments and interactions in an effort to avoid any possible problems. However, not only is total control or prohibition implausible, the courts have also ruled it to be illegal. Just as the National Labor Relations Act prevents employers from keeping their employees from meeting outside of work to discuss working conditions, the courts have found that employees “meeting” online and talking about working conditions in any form, even in a Facebook post, is protected labor speech. As such, employers should follow some guidelines when it comes to regulating employees' online conduct.

First, a written policy should be circulated to and signed off on by every employee. The policy should detail what is and is not acceptable social networking behavior for employees. Your business has every right to ensure that your employees' online profiles do not reflect negatively on your company. In addition, the policy should make sure that certain information, including the names of your company's customers, any protectable



trade information, and/or confidential client information, is kept confidential. The policy should address the fact that the company's anti-discrimination, anti-harassment, and confidentiality policies still apply to employees when they are online, even after work hours. Keep in mind, though, that while some employer rights are retained, the policy cannot be so broad as to prevent any discussion of work.

Once a policy is established, employees should be given a chance to review and ask questions about what is considered proper and what could lead to discipline. Ideally, there should be a way for employees to report possible problematic activity and request advice as to appropriateness before posting on social media sites.

In addition to developing a written social networking policy for employees, beware of how you access your employees' online identities. You should disclose who you are if "friending" an employee, and you should never sign on to an employee's profile, whether or not you have permission to do so. While it may be tempting to see how an employee acts when the boss is not around, courts have considered some aspects of online profiles to be private, and you may be violating an employee's rights by accessing his or her site.

Finally, while employers are allowed to perform online research on any prospective employee before hiring, they still must follow all anti-discrimination policies and ensure that:

1. The research does not violate the prospective employee's privacy rights.
2. The research is accurate.
3. Certain protected characteristics that can be discovered on these sites, such as race, do not enter into the hiring decision.

### ONLINE REVIEW AND RATING SITES

Employees are not the only important social networking presence. Whether or not you actively maintain an online presence for your business, one is likely being built: a presence that is extremely important and can be viewed by any potential customers or employees.

While every business owner knows that word-of-mouth recommendations are useful for business, the new reality is that a Tweet or a Yelp review could be just as useful, if not more. *The Washington Post* reported a study by Michael Luca of Harvard Business School showing that a rating increase of one star on Yelp (an online rating and review site) leads to a 5-9 percent increase in revenue. While restaurant or store reviews and choices may be one thing, the use of online reviews in professional fields has also increased as people grow more comfortable in trusting online reviews and ratings.

An employer or business owner should not only regularly review what is being said in online reviews, but also know that there are some ways to control what is being said—and also some ways to get in trouble in this area. As an employer or business owner, you can use tools such as Google Alerts to keep up with what is being said about your company online and to use existing reviews, both positive and negative, to assess how your company is doing.

If you see that your company's status is either not what you would like to see or is nonexistent, there are some ways to encourage customers to provide reviews. The best course of action is to kindly ask your satisfied clients to take the time to write a review. However, be aware of the potential legal pitfalls to asking people to post favorable reviews for your business. The Federal Trade Commission has stated that as with

any product endorsement, it must be clear if the reviewer/blogger/rater has been paid or has any connection to the company. This means that you cannot give cash to customers to write a positive review, nor can your employees pose as customers online without disclosing their status. These rules extend to any promotion of your products, so if you decide to tout a product of yours on an industry message board, you must disclose your affiliation with the company.

One inescapable reality of online reviews is that some are bound to be negative. If you are concerned about the number or seriousness of negative reviews of your company, most online review sites allow you to directly respond. In addition, some review sites require some verification of truthfulness, and you can demand the removal of any false statements. Our law firm has had success in obtaining the removal of negative statements on behalf of clients, which can be laborious. Otherwise, there is frequently little that can be done about truthful negative opinions other than having thick skin and ensuring that there are offsetting positive comments and reviews.

### CONCLUSION

The best advice is to view your actions on social media sites just as you would any in-person interaction. If you would not rifle through a future employee's private information in person, don't do it online; if you would not pose as a satisfied client to lure in future clients, don't do it online; and if an employee is allowed to make a comment while talking to coworkers outside of work, they may be able to make it online. Working with legal counsel to develop an appropriate social networking policy and consulting legal counsel when using a new online marketing strategy can help a business utilize all that these forums have to offer, without running into an unanticipated and costly lawsuit. **PSD**

**David J. Lynam** is Principal of Lynam & Associates (lynamlaw.com), which has served as ASPE's general counsel for the last decade. The firm also serves other small and mid-market U.S. and international for-profit and nonprofit companies from its offices in Chicago and Barrington, Illinois. David is a graduate of the Loyola School of Law, attended the Hague Academy of International Law, and is admitted to practice before the Illinois Supreme Court, the U.S. Supreme Court, and the U.S. Tax Court. He gives professional legal education lectures on a variety of topics and is an author on contracts, professional liability, employment law, trademark law, and other legal issues. David is a member of the Chicago Bar Association and the Illinois CPA Society. You may contact the firm at [firm@lynamlaw.com](mailto:firm@lynamlaw.com) or 312-641-1500. To comment on this article, e-mail [articles@psdmagazine.org](mailto:articles@psdmagazine.org).