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# Advancing Corporate Goals Through the Use of Social Media

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Thursday, Oct. 27  
2–3 p.m.



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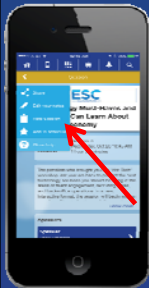
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Staying Social and Compliant:  
The Dos and Don'ts of Social Recruiting, Screening, and Monitoring

CADENCE M. MOORE, ESQ.  
DWIGHT D. MYFELT, ESQ.

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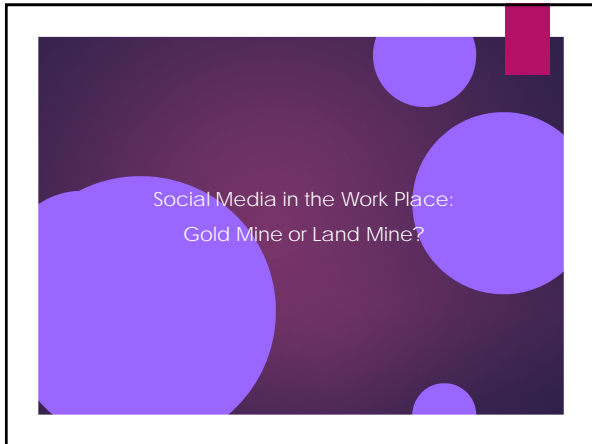
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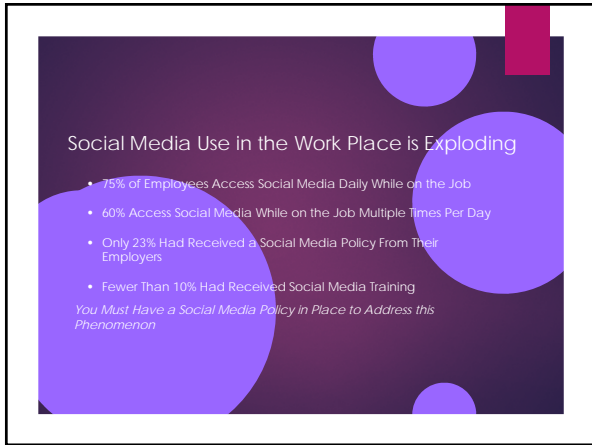
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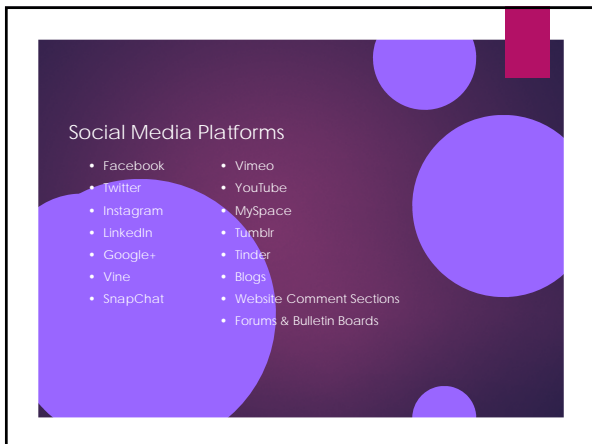
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**Advantages of Using and Allowing Social Media Use in the Work Place**

- Enhance Business Reputation
- Brand Promotion
- Increased Website Traffic
- Build Client Relationships
- Information Outlet
- Recruit Employees
- Promote Employee Relationships Within the Work Place
- Employee Morale

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**Disadvantages of Using and Allowing Social Media Use in the Work Place**

- Disparagement of Your Business and Your Competitors
- Harassment of Your Employees
- Disclosure of Confidential Information About Your Business, Your Clients, Your Employees
- Disclosure of Your Trade Secrets and Intellectual Property

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**Disadvantages of Using and Allowing Social Media Use in the Work Place**

- Creation of Liability for Inappropriate Behavior Done Within the Course and Scope of Employment for Posts About Fellow Employees and Competitors (Trade Libel)
- Disclosure of Information Which Violates Financial Disclosure Law (Insider Trading)
- Discrimination in the Recruitment and Hiring Process

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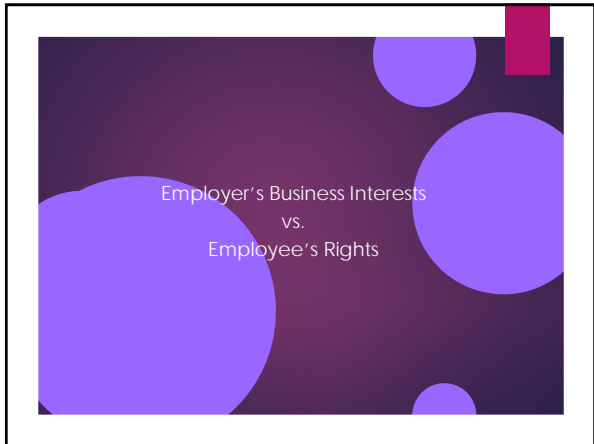
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**Employment Discrimination in General**

- Employers Cannot Discriminate on the Basis of Race, Sex, Disability, Religion or any Other Status Protected by Law
- Employers Cannot Foster or Allow the Development of a Hostile Workplace
- Employers' Social Media Policies Must Not Promote or Allow Either of the Above

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**United States Constitutional Law**

- The First Amendment
- Employers Are Not Required by the First Amendment to Tolerate All Forms of Speech in the Workplace
- Employees Do Not Have the Right to Freely Disparage Their Employers

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**Federal Law**

*The National Labor Relation Board (NLRB)*

- Non-Union Work Sites Also Covered
- Employers Cannot Discourage Employees From Engaging in Concerted Activity for Mutual Aid or Protection
- Social Media Policies Cannot be so Sweeping That They Prohibit the Kinds of Activity Protected by Federal Labor Law, Such as Discussion of Wages or Working Conditions Among Employees
- An Employee's Comments on Social Media are Generally Not Protected if They Are Mere Complaints Not Made in Relation to Group Activity Among Employees

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State Law

*State Employment Discrimination Law*

*State Social Media Policy Laws*

- Prohibit Employers from Requiring Employees or Applicants to Disclose User Names, Passwords, or Other Means for Accessing Personal Accounts
- Prohibit Employers from Requiring Employees and Applicants to Log Into Their Accounts in the Presence of Their Employers
- Prohibit Retaliation for Refusing to Provide Access to Social Media Accounts

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Ownership of Social Media  
in the Work Place

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What is Ownership in the Context of Social Media?

*PhoneDog v. Kravitz*

@PhoneDog\_Noah

- Twitter Account and Password Can Constitute a Trade Secret
- Use of After Termination of Employment Can Constitute Misappropriation

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What Can You Own?

- Account Name
- Login Information
- Content
- Contacts
- Usage Data

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Indicia of Ownership

- For Whose Benefit Was the Account Created?
- Who Created or Directed the Creation of the Account?
- Who Generated the Content of the Account?
- Was That Person Paid to Generate Content?
- How Many People Access the Account to Add Content?

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Indicia of Ownership

- Does the Employer Maintain the Account Access Information?
- Has the Employer Monitored Use of the Account?
- Who has Access to the Analytical Information Generated for the Account?
- How Much Personal Information is Posted on the Account?

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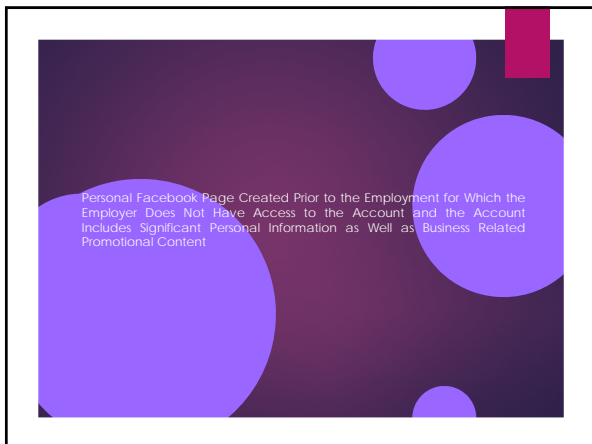
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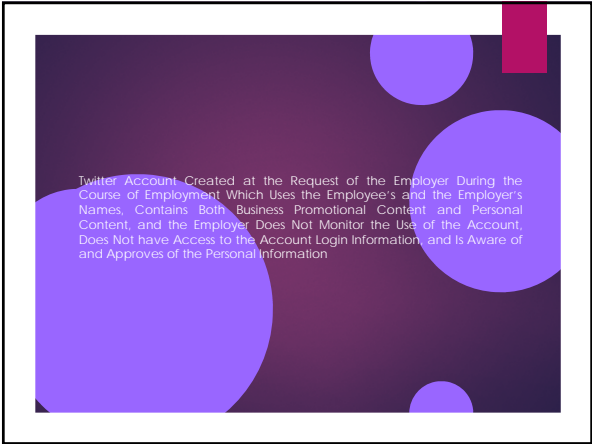
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Twitter Account Created at the Request of the Employer During the Course of Employment Which Uses the Employee's and the Employer's Names, Contains Both Business Promotional Content and Personal Content, and the Employer Does Not Monitor the Use of the Account, Does Not have Access to the Account Login Information, and Is Aware of and Approves of the Personal Information

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### What Can You Do to Establish Ownership?

- Have A Written Policy About The Creation Of Social Media Accounts
- Be Involved In Creation Of The Accounts
- Require Disclosure Of Access Information For The Accounts

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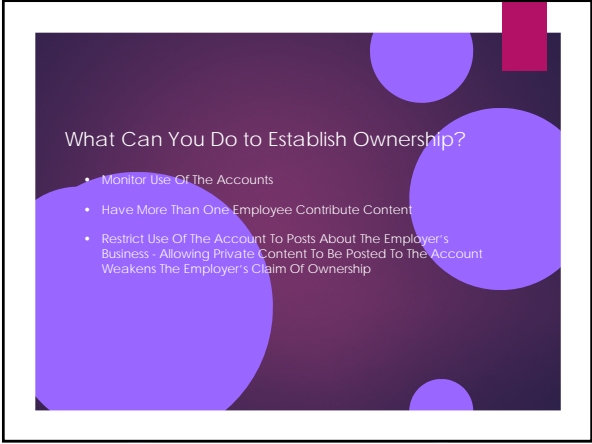
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### What Can You Do to Establish Ownership?

- Monitor Use Of The Accounts
- Have More Than One Employee Contribute Content
- Restrict Use Of The Account To Posts About The Employer's Business - Allowing Private Content To Be Posted To The Account Weakens The Employer's Claim Of Ownership

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What Can You Do to Establish Ownership?

- Have A Policy In Place Which Indicates The Account Is The Property Of The Employer
- Avoid Creation Of An Account Which Features The Use Of An Employee's Name.
- Set Expectation About Ownership Of The Accounts Prior To Their Creation

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Controlling Employees' Use of Social Media

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Monitoring Employee Online Activities

- Can You Prohibit Use of Social Media During Work Hours?
- Can You Block Access to Social Media Websites From Work Computers?
- Are You Allowed to Monitor Employees' Private Social Media Accounts?
- Can You Force Employees to Provide Access to Their Personal Accounts?

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Monitoring Employee Online Activities

- Can You Prohibit Employees From Posting Work Related Content to Their Personal Accounts?
- Can You Force Employees to Remove Content From Their Personal Accounts?
- Can You Discipline an Employee For What You Deem to be Inappropriate Social Media Activity?

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Disciplining Employees for Inappropriate Use of Social Media

*NLRB Standard of Review*

1. Was The Employee's Conduct Or Activity Concerted?
2. Did The Employee's Conduct Or Activity Seek To Benefit Other Employees?
3. Was The Employee's Conduct Or Activity Carried Out In A Way That Caused It To Lose Protection?

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Using Social Media to Recruit Employees

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Use in of Social Media in the Recruiting Process Is on the Rise

- 93% Of Recruiters Will Review A Candidate's Social Media Profile Before Making A Hiring Decision
- 73% Of Recruiters Have Hired A Candidate Through Social Media
- 55% Of Recruiters Have Reconsidered A Candidate Based On Their Social Media Profile

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What are the Risks of Using Social Media to Hire?

- Potential Discrimination Claims
- Fair Credit Reporting Act (FCRA) and State Law Compliance, Including Password Protection Laws
- Angering Viable Candidates Who View This as a Privacy Issue

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Safeguarding Your Use of Social Media When Recruiting

- Use Several Different Social Media Advertisements Along With Your Traditional Recruiting Practices
- Consider Using A Third-Party To Conduct Background Checks; Review Those Checks For Compliance With FCRA And State Laws To Make Sure Protected Class Information Will Be Filtered Out Of Background Check Results

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**Safeguarding Your Use of Social Media When Recruiting**

- Confirm All Information Obtained Actually Belongs To The Prospective Employee
- Avoid Connecting With Friends Of A Prospective Employee To View Information

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**Creating a Social Media Policy**

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**Best Practices for Your Social Media Policy**

- Have a Written Policy
- Work With an Attorney to Create Your Policy to Comply With all Federal and State Laws
- Make Your Policy Comprehensive Enough to Cover All Social Media Use Issues
- Make Your Policy Simple and Easily Understood

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Best Practices for Your Social Media Policy

- Make Sure Your Policy Works Together With the Rest of Your Employment Policies
  - Harassment and Discrimination Policies
  - Reference in Confidentiality Agreements
  - Reference in Non-Compete Agreement
  - Reference in Termination Documentation

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Twenty Things Your Social Media Policy Should Do

1. Makes it clear that employees' online activities have consequences for your entire organization.
2. Makes it clear (in a staffing setting) that your social media policy extends to employees' use of social media while at third-party work sites.
3. Prohibits the disclosure of confidential and proprietary information, including trade secrets and intellectual property.
4. Prohibits the disclosure of client confidential information.

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Twenty Things Your Social Media Policy Should Do

5. Prohibits the disclosure of confidential information about other employees.
6. Prohibits the disclosure of information which would violate financial disclosure laws (insider trading).
7. Prohibits disparaging comments about other employees.
8. Prohibits disparaging comments about competitors.

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Twenty Things Your Social Media Policy Should Do

9. Prohibits discrimination on the basis of race, sex, disability, religion or any other status protected by law or company policy.
10. Encourages employees to be honest and accurate when posting.
11. Prohibits disclosure of employer policies, procedures, and internal business related communications.
12. Restricts posting of private information on employment related accounts.

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Twenty Things Your Social Media Policy Should Do

13. Prohibits malicious, obscene, threatening, and intimidating posts toward other employees or competitors.
14. Sets expectations with regard to ownership of employment related social media account names, access information, content, and usage data.
15. Establishes a policy for the creation of employment related social media accounts.

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Twenty Things Your Social Media Policy Should Do

16. Establishes a policy for disclosure of login information and ongoing access to the accounts during the course of employment.
17. Establishes expectations for ownership of account names, access information, and content of social media accounts after employment is terminated.
18. Indicates employee access to employment related social media accounts will be restricted after employment is terminated.

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Twenty Things Your Social Media Policy Should Do

- Obtains written agreement in advance of termination of employment with regard to ownership of social media accounts.
- Includes training on the Social Media Policy.

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Thank You for Attending



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