

**Get Out of MySpace:  
Managing Employee Use of Social Networking Media**

**WCPA 2009 SUMMER CONFERENCE**

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*“Never before have so many people with so little to say said so much to so few.”*  
**“Blogging” at Despair, Inc. [www.despair.com/blogging](http://www.despair.com/blogging)**

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## I. OVERVIEW

### A. Objectives

1. Understanding when it is appropriate to intervene in an employee's use of online social networking
2. Understanding how to effectively intervene in an employee's use of online social networking
3. Understanding pitfalls that exist when an employer intervenes in an employee's use of online social networking

### B. Preliminary considerations

1. While technological innovation and the surge of social networking results in new legal concerns, the fundamental legal principals that we already follow serve as sound guideposts for predicting the future.
2. There is a difference for employers between curiosity and good timing.
3. The policies and rules employers already have implemented and follow may address the employer's concerns raised by employee use of online social networking.

## II. FUNDAMENTAL LEGAL PRINCIPLES

A. Discrimination - What did you learn from the social networking site and why timing matters?

B. Nexus standards for discipline of off-duty conduct – Does the employee's behavior:

1. harm the Department's reputation;
2. render the employee unable to perform his duties or appear at work; or
3. lead to a refusal, reluctance or inability of other employees to work with the offending employee.

C. Privacy laws

D. Collective bargaining laws (MERA)

E. First Amendment and Freedom of Association

1. Framework for Freedom of Speech claims
  - a. Application of *Garcetti v. Ceballos* – Is the employee speaking as an employee or as a citizen? If the employee is speaking as an employee,

or as part of his or her job duties, and not as a citizen, then the speech is likely unprotected.

- b. If the employee is speaking as a citizen, then is the speech on a matter of public concern or private concern? If the employee is speaking on matters of private concern, then the speech is likely unprotected.
  - c. If the speech is on a matter of public concern, then does the employee's interest in commenting on matters of public concern outweigh the employer's interest in promoting efficiency of its public services. *Pickering-Connick* balancing applies.
2. An officer's offering of explicit videos of himself on online auctions was not protected speech. *City of San Diego v. Roe*, 543 U.S. 77 (2004).
  3. An officer's participation in a sexually explicit website with his wife was not protected speech or protected by any privacy rights. *Dible v. City of Chandler*, 515 F. 3d 918 (9th Cir. 2008) (Department's Moonlighting Policy violated by officer).
  4. A teacher involved with NAMBLA and its newsletter was not protected. *Melzer v. Bd. of Educ. of City of New York*, 336 F.3d 185 (2d Cir. 2003).
  5. A teacher's MySpace page was not protected speech and even if it was, the content demonstrated "a potentially unprofessional rapport with students" that warranted the District's decision to nonrenew the teacher's employment. The Court also determined that MySpace.com was not the type of organization for which an employee could claim protection under Freedom of Association, nor was their evidence that MySpace.com speaks out on matters of public concern. *Spanierman v. Hughes*, No. 06CV01196 (Conn. D. Ct. 2008).
  6. A dispatcher's on-duty MySpace chat with an off-duty coworker, which was "just mine and ur business!!!!!!!!!!!!!!!" wherein the dispatcher provided the coworker with the home address of a woman who the off-duty coworker suspected was sleeping with her husband, was not protected speech. *Frith v. Baldwin Cty. Comm.*, 2009 WL 921062 (S.D. Ala. Mar. 31, 2009).

#### F. Technology Laws – Stored Communications Act

1. Intentional access of stored communications without authorization or in excess of authorization is a violation of the SCA. 18 U.S.C. §§ 2701–11. Liability includes damages, statutory penalties, and attorneys fees.
2. An exception to liability exists with respect to "conduct authorized by a user of that service with respect to a communication intended for that user." 18 U.S.C. § 2701(c)(2). The Ninth Circuit found that two employees invited to participate in a website that was critical of their employer arguably were not "users" under the SCA, because they never accepted the invitation to join the site and the only access under their profiles was by the employer's Vice President. Therefore the

two employees could not “authorize” access to the employer. *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002).

3. Although a policy and meeting where the policy was stated to apply to text messages made with a department-issued pager should have made it clear to an employee that the City had the right to review his text messages, the “operational reality” at the Department was significantly different because management failed to follow its rules. Instead, a supervisor’s informal policy that text messages would not be audited if the officer paid the overage charges gave employees a reasonable expectation of privacy in personal and sexually explicit text messages made with the Department pager. Therefore, unilateral acquisition of specific text messages during an internal investigation constituted a violation of the SCA. *Quon v. Arch Wireless*, 529 F.3d 892 (9th Cir. 2008).
  4. Employer’s access of employee’s MySpace account, to review a MySpace group that posted unsavory criticisms about their employer, was not “conduct authorized” by a user and therefore in violation of the SCA and an invasion of privacy. *Pietrylo v. Hillstone Restaurant Group*, 2008 WL 6085437 (D. N.J. 2008) and subsequent trial in 2009.
  5. Is it even possible for an employer to establish “authorization” or consent under the SCA?
- G. Policy and Rules. Nursing student’s “crass and uncouth” blogging rant about the birthing process that she witnessed as part of school work was not “unprofessional” under the School’s Honor Code. Instead, it was “nonprofessional” and therefore not in violation of the Code. *Yoder v. Univ. of Louisville*, 2009 WL 2406235 (W.D. Ky. Aug. 3, 2009).

### III. WHAT NEXT?

- A. Review and, if necessary, develop policies addressing employee social networking. If current policies are insufficient, then consider developing a Social Networking Policy. Consider substantial revisions as well to Technology Use Policies and Department policies regarding the dissemination of Department information.
- B. Establish parameters for reviewing social networking information during the hiring process, such as during background investigations. Reviewing a social networking site should never be a substitute for a thorough and detailed background investigation which includes interviews of individuals the applicant commonly associates with outside of the workplace.
- C. Manage problematic employees - Don’t be afraid to investigate
  1. Identify the source—the citizen complaint or internal department notification of problematic conduct.
  2. Determine how you will obtain communications subject to the complaint

3. Determine whether any policies and rules have been violated
4. Report criminal behavior for a separate criminal investigation
5. Provide notice to the employee and meet to review the situation
6. Determine who posted the offending material and obtain admissions – the possibility of fabrication in the online world is very real, such as a disgruntled person creating a fake social networking identity of an employee.
7. Assess the public or private nature of the speech and assess the level of disruption to the Department's mission and ability to provide efficient services.
8. Consider discipline or other corrective action

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