Information Privacy and Security
Working Remotely, Social Networking, Employee Monitoring, and How to Avoid or Manage the Lawsuit That’s Coming

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Problem Areas

• Working remotely
• Employee monitoring
• Social networking
Working Remotely

Data Security
Working Remotely

- Email is still maybe the greatest threat to data security
“Following a jury trial, the Union was found to have been negligent and plaintiffs were awarded a collective sum of $275,000.”
Working Remotely

- Overtime issues
- Blurring of line between personal and work life can lead to unreported work time

- Do not let nonexempt employees work from home, have Blackberries, or remote access to computers
Working Remotely

- Geographic restrictions in noncompetes
- Consider addressing remote work directly in covenant
- Avoid inadvertently violating covenants with remote work assignments
Employee Monitoring
Employee Monitoring

• Stored Communications Act
  – Unauthorized access of electronically stored communications is illegal
    • Can include email accounts or social media websites
    • Employee permission must be voluntary. Pietrylo v. Hillstone Restaurant Group
Employee Monitoring

• Being Facebook friends with employees, managers, and peers is a **bad idea**.
Employee Monitoring

- GPS on company phone
- Peach Pass
- No violation of employee rights if they had no reasonable expectation of privacy
Social Networking
Social Networking

- National Labor Relations Act

- “Employees shall have the right . . . to engage in other concerted activities for . . . mutual aid or protection.”
Social Networking

• The Obama NLRB has taken a particular interest in social networking cases

• Two kinds of cases:
  – Retaliation for protected, concerted activity
  – Overbroad social media policy
Social Networking

What social media activity is protected under the NLRA and what is not?
“Lydia Cruz, a coworker feels that we don’t help our clients enough at HUB I about had it! My fellow coworkers how do u feel?”

“What the Hell, we don’t have a life as is, What else can we do???”
“Tell her to come do [my] f***ing job n c if I don’t do enough, this is just dum”
“Marianna stop with ur lies about me. I’ll b at HUB Tuesday..”
“I was happy to see that Knauz went ‘All Out’ for the most important launch of a new BMW in years…the new 5 series. A car that will generate tens in millions of dollars in revenues for Knauz over the next few years. The small 8 oz bags of chips, and the $2.00 cookie plate from Sam’s Club, and the semi fresh apples and oranges were such a nice touch…but to top it all off…the Hot Dog Cart. Where our clients could attain a over cooked wiener and a stale bunn…”
“It’s a Damn shame when ur own boss don’t even care about ur health. Smh I Damn there had a heart attack on the fukin floor I bet he would let me go home if I was w*$#$% I’m not even going to say it lmao.”
“So I just learned that a fellow coworker/bartender is a cheater! He has been screwing over our faithful customers! Very nice!”
Social Networking

• What’s the difference between protected activity and unprotected activity?
• The law is still developing
• Looks like an invitation to multiple employees will be protected, especially if they respond
• One-off venting or “e-griping” is not protected
“I’m a customer service rep at Atlanta Widgets. My boss, Roger Widget, is a racist, a liar, and a cheat. He lies on his taxes, he charges minorities twice as much for our product, and he made me cancel my vacation last year. If I were you, I’d buy from our competitors, and not even slow down if I saw Roger in the cross walk.”

What’s the verdict – protected activity or not?
Social Networking

• Ownership of social media accounts
• *PhoneDog v. Kravitz*
  – Employee changed hashtag after termination, but kept the 17,000 followers who had signed up under the old hashtag
  – Sued for misappropriation of trade secrets
  – Motion to dismiss denied – Twitter passwords and account followers might be trade secrets, depending on discovery
Social Networking

- Information security in the time of social media
Social Networking

- December 2010 BitDefender Study
  - 94% of people accepted a friend request from a fictional profile.
    - 20 people were then selected for a real-time chat with the fictional profile.
  - 73% of chatters gave out confidential company information
    - Future strategies, plans, and unreleased technologies/software
Avoiding or Managing Litigation

Between government enforcement efforts and disgruntled employees, litigation involving one or more of these issues is highly likely.
Avoiding or Managing Litigation

• Social media policy for employees
  – Specific carve out for NLRA section 7 rights (protected, concerted activity)
Avoiding or Managing Litigation

Social media policy for HR

Written protocol for when and how to look at job applicants’ social media usage
Avoiding or Managing Litigation

• Get a handle on your FLSA classifications for employees capable of remote work
Avoiding or Managing Litigation

• Protection from ne’er-do-wells both internal and external
  – Policy and training are key to internal protection

• Flexibility needed for remote work may be at odds with trade secret status
Avoiding or Managing Litigation

- Sometimes computer thieves may not leave behind a copy
- Disaster recovery plan for digital information
- Forensic examination is not a DIY project
Avoiding or Managing Litigation

- Employers aren’t always the defendant
- Monitor social media to know when you need to be the one filing a lawsuit
- Pay particular attention to former employees with restrictive covenants
- Pay attention to current employees likely to be targeted by former employees
QUESTIONS?