From the Conference Room to the Chat Room:

F YOU HAVE ever been involved in a lawsuit, you'll know what I mean. If you have not, this is your warning.

The best kind of evidence is from the heart—spur-of-the-moment statements that amount to a virtual paper-trail recording of everything someone says and does. I'm referring to social media evidence like Facebook and Twitter.

As a trial lawyer, I relish finding or receiving Facebook and Twitter pages from my opponents in a lawsuit. People love to rant and rave about their jobs on these sites. Such postings usually contain a treasure trove of evidence that can be used either in favor of, or

I recently defended a case for a company that was sued by a former employee, who was fired for performance issues. The employee hired a lawyer who alleged that the company's explanation for

against, a company.

the firing was pre-textual and the actual reason for termination was age discrimination.

In discovery (the part of the case where parties request and obtain relevant documents from the other side), I requested and obtained printouts of the employee's Facebook posts. What we found was shocking. For months, this employee used Facebook to disclose the company's trade secrets—bragging about the company's new inventions. This public disclosure of the company's confidential information had serious implications for the company—trade secrets must be kept confidential; otherwise, they are no longer trade secrets and can be scooped up by competitors.

In addition, this employee foolishly posted about what he had been up to since his termination. Instead of finding a new job, he was spending "every day at the beach." He also mentioned his plan to buy a brand new BMW with the money he was going to get from his lawsuit against his former employer. Needless to say, the case settled on terms favorable to my client shortly thereafter.

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The dangers

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The bottom line is, what employees post on social media sites can impact the company in many ways. Here are some things to consider in a social media world:

Social media posts can subject the company to liability. An employee's false post about its company's or a competitor's product can lead to claims for deceptive trade practices and false advertising.

Social media posts can lead to a loss of trade secrets. As illustrated in the above example, employees' posts may cause the company to disclose trade secrets or

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other confidential information. However, some postings can be unintentional. For instance, an employee may issue a post about a new product that is premature.

Social media posts can provide useful information for hiring or a basis for firing. Companies will learn a lot more information about prospective employees from their social media activity versus their résumé. In fact, some companies are asking job applicants to provide their passwords for their social media accounts prior to making the decision to hire the applicant. Be mindful, however, that employees' posts on social media sites can be protected speech. Refusing to hire, or firing, employees based on this speech can lead to discrimination claims against the company. Deciding whether to use social media posts as a basis to hire or fire is like walking a tightrope—it requires balancing many factors, and given the potential liability, it should be discussed with legal counsel first.

Companies should adopt a social media policy. A social media policy establishes the company's guidelines for social media communications and is a company's first line of defense to reduce risk. Be sure to include provisions in the policy that address trade secret protection and employees' statements about the company's and competitor's products. Furthermore, consider including provisions that address ownership of social media accounts, user names and content.

The following are some ideas for what should be contained in a social media policy:

- Social media posts should not disclose any confidential or proprietary information of the company or any third party.
- Employees should not comment on any aspect of the company's business; if they do, they must clearly identify themselves as an employee and include a disclaimer to the effect that the views expressed are solely those of the employee and do not reflect the views of the company.
- Employees' Internet postings must respect intellectual property, privacy and other laws.
- Employees must obtain company approval when posting about the company's business and competitors.
- The company reserves the right to request that certain posts or other content be removed from social media sites.

These are just a few examples of guidelines for a social media policy. In the meantime, let's hope your employees' Facebook or Twitter postings don't end up being used against your company in a dispute.



About the Author:

Lisa A. Lori, Esq., is a partner in the litigation department at Klehr, Harrison, Harvey, Branzburg & Ellers, LLP. Lori represents clients in a full-range of complex commercial litigation matters, including employment, intellectual property and general business torts. She also counsels clients on a variety of issues, including advertising, marketing, branding and regulatory compliance.

