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Employer Responses to Blogging

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Innovations in technology eliminate many of the minor inconveniences of life. In order to maintain the cosmic balance, however, they simultaneously create the potential for catastrophe. This aphorism has proved universally true since the dawn of the industrial revolution.

The information age, like global warming, permeates our professional and personal lives to a degree that few imagined when digital technology was in its infancy. In the analog days of the 1980s, we knew not that email, cell phones, laptops, and PDAs would become ubiquitous. As late as 1995, only 9% of the adult U.S. population was connected to the internet. We were thus understandably slow to realize the impact that the internet would have on labor and employment law.

Very few jobs in today's economy do not involve direct contact between the employee and the internet. It is estimated that 77% of American adults go online almost every day. Most employees have access to one or more employer-owned computers with internet connections. Employees use these computers not only to conduct the employer's business, but also to email friends and surf the web. In this way, they can download jokes; organize a carpool; transfer funds between accounts; discuss a topic in a chatroom; make travel reservations; pay bills and import viruses. We were quick to discover that emails that are sent from and received by corporate computers can sometimes be too candid for general distribution. Websites, likewise, may contain text and imagery that is inappropriate in a work environment.

The first generation of internet related employment policies were generated in this context. To protect their property interests in their hardware, software and proprietary

information and to limit their exposure to liability for harassment, many employers have enacted definitive policies on the use of Company computers.

A typical Computer and E-mail policy is built to serve these modest goals. It will state that computers, digital files, software and the e-mail system are restricted to business use. It will also eliminate an employee's expectation of personal privacy with regard to any message that begins or ends on a company computer, and with respect to anything that remains on the corporate hard drive. It will advise employees that they may be subject to discipline up to an including termination for sending or storing emails that malign customers or coworkers or contain obscene or otherwise objectionable material.

These policies, if carefully developed and uniformly applied, deftly serve the employer's interests with regard to the company computers that are provided for the employees' use. They do not, however, address an employee's use of his personal computer to establish and maintain and/or contribute to a blog in a manner that harm's the employer's interests.

The noun "blog" is a shortened version of the word "weblog." It describes a website that serves as the site owner's on-line journal and that provides others an opportunity to post comments and images on such websites and to engage in an attenuated on-line conversation. Bloggers' language, tone and grammar are typically informal. Their text sometimes is sexually explicit or otherwise outside the course of normal business communications. Photographs and images sometimes are attached to the comments. Blogs entries sometimes are candid to the point of exhibitionism, and evidence little apparent forethought about the consequences of the worldwide publication of the blogger's personal information.

For members of generations x and y, setting up a blog is child's play. There exist a number of third party blog-hosting sites offering free (e.g., Blogger.com, LiveJournal.com, Blog-city.com, Xanga.com and MSN Spaces) or nearly free (e.g., Typepad.com, SquareSquare.com, BlogIndentity.com and Bubbler.com) blog site opportunities.

Blogging is enormously popular. In 2003, the accumulated total of weblogs (the "blogosphere") was estimated to exceed 4 million. It is, no doubt, much larger today. Everyone online has started a blog site, left a comment on a blog site, or has at least backed into a blog site while searching the web. This trend shows no sign of abating. Employees everywhere are blogging, whether the employer is aware of it or not.

Oscar Wilde once observed that "A little bit of sincerity is a dangerous thing, and a great deal of it is absolutely fatal." A staffer for a United States Senator, who posted details of her intimate alliances in her personal blog, and then later found them published anew in a popular internet column.[1] discovered this to be true. Likewise, a popular ESPN columnist discovered that it is unwise to post disparaging remarks about the executives of his employer's parent company. These employees, and scores of others[2], have been "dooced"[3] or fired over the content of their blog[4].

Because an employee typically does not use a company provided computer to create, monitor and amend his personal blog, his conduct is not explicitly addressed by

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[1] The advice of Mae West would apparently apply here: "Keep a diary and one day it may keep you."

[2] Some bloggers have joined together to share information and resources in order to protect their ability to bog. See, e.g., the website of the Electronic Frontier Foundation, http://www.eff.org/bloggers, and the website of the Bloggers Rights Blog, http://rights.journalspace.com.

[3] The verb 'dooce" was introduced into the lexicon in 2002, after Heather Armstrong, a Los Angeles web designer, was fired because she shared impressions of her work colleagues in her personal blog, dooce.com. Armstrong subsequently offered sage advice to fellow bloggers: "Never write about work on the Internet unless your boss knows and sanctions the fact."

[4] Presumably web savvy employers Microsoft and Google have fired employees over blogging.

most employers' computer policies. Ironically, many bloggers are surprised when their employers view their blogs. They are surprised again, when they learn that the First Amendment protections against government interference with free expression don't protect them from their private employers' wrath.

Several important and legitimate employer interests can be adversely affected by an employee's blog. These include:

- The disclosure of confidential and proprietary information,
- The unauthorized use of trademarks, logos and other branding symbols,
- The publication of copyrighted materials and other intellectual property of the Company,
- Postings that place the employer, fellow employees, customers or the employer's product and services in a negative light,
- Exposure to liability because of employee blogs that create an atmosphere of racial or sexual harassment at the work place,
- The loss of workplace efficiency and cohesion,
- The loss of otherwise productive employees who were unaware that their online sincerity might prove fatal to their professional careers, and
- The enmity of a "dooced" employee who owns a public forum[5].

In the worst cases, a disgruntled employee may disclose confidential information causing adverse movement in the financial markets. His appropriation of the employer's logo, or his appearance in uniform, might be accompanied by racist, sexist or sexually explicit commentary or images, offending a significant segment of the employer's

[5] Fiorella LaGuardia once advised that one should "never pick a fight with someone who buys newsprint by the ton."

customer base. He might malign the Company's product, ridicule his co-workers, or disparage his superiors.

More often than not, offending blog sites are more benign. They might contain a picture of the blogger's cleavage, a vulgar cartoon or joke, mild sexual innuendo, links to more outrageous websites, or other matters that are less serious, with impacts on the Company that are unpredictable. Employers need blogging policies that address both ends of this spectrum.

Were it not for the past seven decades of development of labor and employment law, we could borrow from Heather Armstrong and draft a blogging policy to read simply "Never write about work on the Internet unless your boss knows and sanctions the fact." The difficulty presented by this approach, however, is that the law protects certain employee communications and punishes employers who interfere with employee rights.

Employees covered by either the National Labor Relations Act or Railway Labor Act have the right to engage in "protected and concerted activity." Protected activity under these laws extends to coarse internet discussions of employee wages, hours and working conditions and frank criticisms of management. See, e.g., *KSL Claremont Resort, Inc.*, 344 N.L.R.B. No. 105 (2005). These federal labor laws extend protection even to "rhetorical hyperbole." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974) A blogging policy that proscribes all commentary on the workplace will likely be found to be an unfair labor practice.

Surveillance of protected and concerted activity is a separate violation of the NLRA. An employer who accesses a blog site for the purpose of monitoring employee

union organizing activities violates the law. *Konop v. Hawaiian Airlines, Inc.*, 302 F. 3d 868 (9th Cir. 2002)

Not all work-related commentary is protected by federal labor laws. Employees who publish malicious, defamatory and insulting material known to be false, for example, enjoy no NLRA or RLA protection. *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966). Purely personal "griping", as opposed to voicing a group concern, may constitute an unprotected action. *N.L.R.B. v City Disposal Systems, Inc.*, 465 U.S. 822 (1984). Disparagement of the employer's product or service may also cause employee speech to lose its protected status. *Diamond Walnut Growers v. N.L.R.B.*, 113 F.3d 1259 (D.C. Cir. 1997)

It remains to be seen whether the whistleblower protections in the Sarbanes Oxley Act will inure to the benefit of bloggers. The Act offers protection for employees of publicly-traded companies who come forward to report violations of security laws and matter involving fraud against shareholders. To enjoy protection under the Act, however, an employee must make the report *to* (1) a federal regulatory or law enforcement agency, (2) a Member of Congress or (3) a person with supervisory authority over the employee. An employer who takes adverse action against a whistleblower whose otherwise protected disclosure was made on a blog in addition to a report to one of the statutorily designated recipients exposes itself to Sarbanes Oxley liability.

The Occupational Safety and Health Act, Title VII of the Civil Rights of 1964 and the Fair Labor Standards Act all contain prohibitions against retaliation for the assertion of rights under those statutes. An employer who disciplines an employee for blog content

that falls within those the protected activity under those statutes, does so at considerable risk.

Public employers operate under a different set of rules. While they are not subject to the NLRA, the RLA or SOX, they are bound by the federal and state Constitutional protections afforded to free expression. This protection is not absolute. The case law requires a three part analysis to determine whether an employees speech is protected: 1) The speech must be fairly characterized as relating to a matter of public concern; 2) the public interest in allowing the speech must outweigh the interests of the government as the employer in restricting the speech; and 3) the speech must have played a substantial or motivating role in the government's decision to take an adverse employment action. See, *Bryson v. Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989).

Employers who are parties to collective bargaining agreements in the public or private sector typically are subject to the additional limitation that all discipline must be for "just cause." Labor arbitrators usually require the employer to demonstrate some measurable adverse impact of the speech as part of the "just cause" analysis. See, e.g., *Elkouri and Elkouri, How Arbitration Works*, BNA, 6th ed. pp. 938-41, 1253.

The application of a blogging policy may raise issues of disparate treatment under Title VII. An employer who terminates a female employee because of the content of her blog, for example, will be held to account if similarly-situated male employees are not disciplined in a like manner. *McAlester v. United Air Lines, Inc.* 851 F.2d 1249 (10th Cir. 1988)

Finally, there is the specter of state labor and employment laws. Many states have instituted state whistleblower statutes. New York, North Dakota and Colorado prohibit

the discipline of employees for off-duty misconduct that is not in itself illegal. California prohibits adverse actions based on the employee's expression of political positions.

Given the minefield described above, employers are well advised to consult with their labor and employment lawyer prior to creating a blogging policy or taking adverse action against an employee who is alleged to have violated the policy.

-Model Blogging Policy-

1. Employee participation in on-line weblogs ("blogs") is subject to the following provisions:

   A. Company provided digital equipment, including PCs, laptop computers. Email accounts, PDAs and cell phones are to be used **exclusively** for Company business.

   B. Employees will not use Company provided digital equipment to create, maintain, amend, view, access, download, contribute to or store a blog.

   C. Management has access to all Company provided digital equipment, and may from time to time, and without notice, inspect the condition of that equipment and the communications, content, data and imagery stored therein. Employees who access, view, create or save any communications, content, data or imagery in such Company provided digital equipment should not expect privacy in such communications, content, data and imagery.

D. Employees who participate in blogging activity, including maintenance of a personal blog, or the entry of commentary on another website, are prohibited from:

1) Displaying Company trademarks, logos or branding materials in any manner.

2) Displaying or disclosing the Company's, or any other Company's intellectual property or copyrighted material owned by the Company.

3) Displaying or disclosing any trade secrets, or confidential or proprietary information about the Company, and/or any parent, subsidiary, employee, supplier or customer.

4) Displaying false or misleading information about the Company, and/or any parent, subsidiary, employee, supplier or customer.

5) Disparaging the Company's customers, product and/or services.

6) Displaying discriminatory, retaliatory, defamatory, libelous or slanderous, threatening, or sexually explicit texts and/or imagery, on any website that also identifies in any way the Company, and/or any parent, subsidiary, employee, supplier or customer.

7) Displaying any information that violates any other Company policy.

8) Displaying any content that purports to represent the position, viewpoint, statements, opinions or conclusions of the Company, and/or any parent, subsidiary, employee, supplier or customer.

E. The prohibitions set forth in Paragraph D. above apply to all employee blogs, without regard to whether the blog is accessible by the public or requires a password.

2. The Company reserves the right to monitor any and all employee blogs to insure compliance with this policy. Employees will cooperate with such monitoring.

3. An employee who violates this blogging policy may be subject to disciplinary action, up to and including termination of employment.

4. By signing this document the employee acknowledges that he has received and reviewed the Company blogging policy.

_____	_____
Company Representative	Employee
_____	_____
Date	Date

