

Blogging Warning Impact of What You Say May be Widespread

By Jerry Lutkus

- B**y now they have become the poster children for the new electronic frontier of blogging:
- The Delta Airlines flight attendant who was fired after posting suggestive pictures of herself in a Delta uniform on a personal web blog
 - The Starbucks supervisor who was fired for profanity-laced comments about a manager that he published on his personal blog
 - The Microsoft print shop worker who was fired after he published on his blog site pictures he took of Apple computers being unloaded on Microsoft's campus
 - The Google employee who was fired after publishing his negative impressions of Google on his own personal web blog

Web blogs are becoming America's electronic Hyde Park – the new speaker's corner where all measure of free speech exists, virtually without restriction.

Consider for a moment this post from a blogger's site responding to another blogger's lament that his employer censored his off-duty writings:

"This article strikes close to home, as I had the exact same thing happen to me the other month. I published a parody of a letter that I have received from my ISP, unaware that my ISP partly owns the company I work for. As with you, the channel of feedback did not flow through me, but culminated in a meeting with my boss. I was threatened with serious consequences as well. Unfortunately, I am a low-level worker in a low-level job. I am easily and quite readily replaceable. My boss took it upon himself to read the remainder of my web blog and quite literally made fun of me for some things I had written. It instilled in me a sense of censorship on my personal life, and in reality it made me extremely mad, uncomfortable, and stressed out. More so than I usually am for sure... When you work at low-level jobs and are easily expendable, you are reminded almost daily of this unfortunate circumstance. You are not praised for any job well done, you are only punished for mistakes and reminded that you are representative of the company and have a responsibility to uphold the company's mission ALL THE TIME. This includes inside work, outside work, and probably even after you're done working for the company. The culture of fear is alive and well, there's no more free speech, not for me. Good luck with your situation. Let's try to get our free speech back."

The most misunderstood aspect of this new electronic forum, however, is the whole notion that there is a First Amendment component to it. One only need go back to the text of the First Amendment to remember that it protects only against the state interfering with an individual's right of free speech, and thus has no application to private employers. Bloggers can waive the First Amendment flag, but it offers no protection to the private sector blogger who speaks out on a corporate or individual blog and offends his boss.

Blogging 101

The bloggers' lament also identifies what appears to be a generational gap between younger employees who are raised in this electronic free speech environment of MySpace.com and Face Book and the older management who may not even know what a blog is. For the uninitiated, a blog is a "web log" which is an Internet-based site, often arranged chronologically by date, where individuals can post text, video, audio and links to other web sites or blogs. The links are interspersed with journal or diary-like entries by the blogger and can be accessed by the public.

Bloggers often post their thoughts, their comments, their life experiences, their rants and then seek comments and responses from others who participate in their blog. The use of blogs is increasing at a rapid pace. According to Technorati.com, a search engine devoted to tracking blogs, there are more than 55.9 million blogs, 75,000 new blogs a day, 1.2 million posts daily – or about 50,000 blog updates an hour.

Estimates are all over the ballpark on the impact of blogging in the workplace. In a recent survey of 279 human resource professionals by the Society for Human Resource Management, just 3% of companies reported disciplining bloggers and none reported firing anyone for blogging (despite the anecdotal incidents noted above). Another study suggests that as many as 5% of the American workplace maintain blogs, while only 15% of employers have policies addressing blogging.

Whichever numbers ring true, a couple of things are clear: blogging is increasing exponentially, while the number of employers with blogging policies is not keeping pace.

Potential impacts

The risks for an employer in connection with individual blogs are apparent:

- Decreased productivity from workplace blogging
- Disclosure of confidential and proprietary company information
- Dilution of the company's trademark and copyrights by off-duty blogging use (not to mention the risk of embarrassment when trademarks are used in connection with offensive statements on the blog)
- Potential loss of business due to insensitive or inaccurate blog posts
- Defamatory statements about employees, managers, clients or suppliers
- Potential harassment and hostile environment claims arising out of improper blog posts
- Securities law issues associated with the premature release of company information



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- Disclosure of company business plans and targets
- Use of blogs by disgruntled employees who, when they discuss wages, terms and conditions of employment, may draw themselves within the protection of the National Labor Relations Act for engaging in protected concerted activity

While the risks are apparent, there are benefits to blogs. Many employers, including Hewlett Packard, Sun Microsystems, IBM and General Motors, have created corporate blog sites. They provide ready and quick access for the company to communicate directly with employees as well as customers, competitors and the media. It offers a vehicle in which employees can air their views regarding company policy, procedure, research and development, and the future of the company. It often creates an open and available forum for profitable exchanges. However, the company-supported blog offers many of the same risks that are associated with the personal bloggers with the additional threat that the company sponsorship can create vicarious liability for the company if the blogs are not policed effectively.

Employer actions

So what can an employer do to protect itself from risks associated with blogs?

By now, most employers have policies that deal with electronic communications – use of the Internet, e-mails, company computers, cell phones, BlackBerries and PDAs. Employers need to examine those electronic communications policies (or immediately implement a policy if you do not have one) to make certain these policies explicitly cover and include blog activity. Do not presume that your employees will understand that your electronic communications policy as written covers blogs unless it specifically says so.

Restrictions on employees' personal blogs are a little more difficult to regulate, but your policy should express to employees what your expectations are for their personal conduct when they blog. You should inform them of the following:

- that you do not expect that they will use a company trademark or logos in their blogging activities;
- that they should always conduct themselves in a professional manner, using professional language;
- that they should refrain from criticizing or commenting upon the company's clients or vendors;
- that they should use disclaimers wherever appropriate to indicate they are expressing their personal opinion;
- that they will not post confidential, proprietary or trade

- secret information of the company or its customers;
- that they will not publish defamatory statements; and
- that they should not post statements that conflict with the company's anti-harassment policies and objectives.

In addition to these items, consider whether your electronic communications policy should also prohibit the use of digital cameras (including camera phones) on company premises, thus minimizing the risk that proprietary and confidential information can be captured digitally and then spread onto the Internet.

Finally, the company should make it a practice to monitor the Internet, searching for use of the company's name, products, trademarks, copyrights, and/or names of personnel. Another recommended use is in connection with the hiring process.

This is an area in which technology, free speech, and basic and perceived rights are colliding head on. Technology is accelerating, the risks are growing and employers need to be ready.

Though Indiana does not have any such protection, be careful as some states, most notably California, New York, New Jersey, Colorado, Montana and North Dakota, have enacted statutes that restrict an employer's ability to discipline employees for some types of off-duty conduct.

INFORMATION LINK

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