

## **FACE TO FACE WITH THE NEW MEDIA IN TODAY'S WORKPLACE**

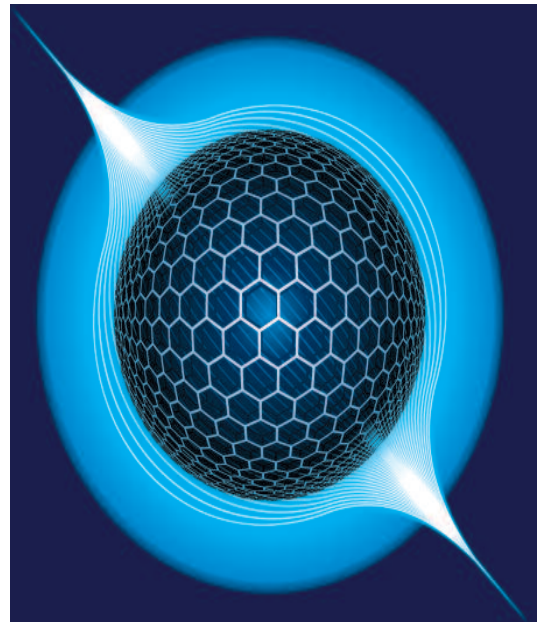
Facebook has become a major component in the lives of many of us, with over 500 million members, more than half of whom use it every day.<sup>1</sup> Some of these users are bound to be your employees and that brings us to the workplace, where a recent legal case over an employee who was fired after posting disparaging remarks about the boss on Facebook is garnering a lot of attention.<sup>2</sup>

In what seems to be a first-of-its-kind legal action by federal authorities, the National Labor Relations Board<sup>3</sup> (NLRB) has alleged that the employer illegally terminated its employee. This complaint could set a precedent for employers as more workers use social networking sites to share details about their jobs. "It's the same as talking at the water cooler," according to the NLRB's acting general counsel. "The point is that employees have protection under the law to talk to each other about conditions at work."<sup>4</sup>

Federal law has long protected employees against reprisal for talking to co-workers on their own time about their jobs and working conditions, including remarks that may be critical of managers. But this may be at odds with the desire of some employers to police the new media in order to protect their own interests.

## **SURVEY ON DATA LEAKS VIA SOCIAL MEDIA: ARE FACEBOOK, YOUTUBE AND TWITTER RISKS? CAN THEY GET YOU FIRED?**

- 24% of U.S. companies have disciplined an employee for violating blog or message-board policies in the past 12 months (up from 17%), while 11% terminated an employee for such a violation (up from 9%)



In this month's publication,  
we are highlighting:

- Potential exposures from new forms of media
- Potential new rules and real additional (new) enforcement activities

	0.00	Year to Date
<b>EARNINGS TOTAL</b>	4,389.30	5,277.30
Available Gross	351.14	418.18
e Gross	3,971.12	4,859.12
History & Other Deductions Current Year to Date		
l Withholding	311.17	311.17
onal Federal Withholding	0.00	*****
Withholding	135.96	135.96
onal State Withholding	0.00	*****
	0.00	55.00
		75.00

- 20% have disciplined an employee for violating social networking, while 7% terminated an employee for the violation (down from 8%)
- 21% have disciplined an employee for violating media sharing/posting policies (up from 15%), while 9% terminated an employee for the violation (up from 8%)

Source: Proofpoint’s study “Outbound Email and Data Loss Prevention” in *Today’s Enterprise*, 2010<sup>5</sup>

While the facts are no doubt different, the recent suit also needs to be reconciled with an opinion that the NLRB provided in May of this year, where the Board advised that there were **no labor violations** where an employer: 1) disciplined employees based on their Facebook postings and 2) engaged in surveillance or created the impression of surveillance through its review of Facebook pages and emails.<sup>6</sup>

Unsettled areas of law leave us feeling...well...unsettled, and we will no doubt remain that way until the courts have determined just what the new rules of play will be. Meanwhile, the NLRB itself has a Facebook page, and Facebook has just announced a new, long-anticipated communication platform, informally dubbed “Facemail” or “Facebook mail” as an alternative to traditional email.<sup>7</sup> This will no doubt present some new challenges as well.

## NO NEW RULES ON GENDER PAY DISPARITY

The Senate recently failed to pass the Paycheck Fairness Act (PFA), which passed in the House of Representatives almost two years ago. The PFA, which would have further addressed wage discrimination based on gender, captured only 58 votes of the 60 that were needed.

Critics of the bill held that sufficient legal protections are already in place and that passage of the bill would invite a wave of frivolous suits against employers while requiring more rigid and less merit-based pay practices.

### CURRENT GENDER FAIRNESS RULES

The Equal Pay Act of 1963 made it illegal for firms to pay different wages to women and men who performed equal work at jobs in the same establishment. Title VII of the 1964 Civil Rights Act outlawed discrimination against women and minorities in all aspects of employment, including compensation. Additional protections came with the 1978 Pregnancy Discrimination Act; Title VII’s 1991 amendments which boosted penalties for discrimination; and the 2009 Lilly Ledbetter Act, which reset the time clock for filing discrimination claims.

Under the existing Equal Pay Act, an employer charged with gender discrimination in pay can offer evidence that any differential in pay is based on nondiscriminatory factors, such as work experience and education. The PFA would have limited the use of these factors by requiring that employers demonstrate that these factors were relevant to the job or position in question. It would also have changed the rules governing class-action lawsuits. Under the Equal Pay Act, contrary

to most class action procedural rules in the U.S., workers are included in class-action suits only if they elect to *opt in*. The PFA would have changed this to the more typical *opt-out* system, while removing any caps on compensatory and punitive damages.

Although the proposed bill was not passed, employers should be mindful of the potential for increased enforcement focus on equal pay issues and consider preemptive audits and reviews of pay practices, as this is clearly an area of legislative interest and scrutiny. Meanwhile, we'll continue to monitor legislative developments relative to this exposure.

## LAW & ORDER AND ERISA PLANS

This year, the Department of Labor (DOL) began its Contributory Plans Criminal Project to combat the criminal abuse of contributory benefits plans (i.e., employee benefits plans to which the participants contribute their own funds). The focus of this project is on protecting all types of contributory plans – both pension and health and welfare.<sup>8</sup>

Contributory plans can be vulnerable to criminal abuse in a number of scenarios. Employers, or others with control over plan assets, might convert (or steal) employee payroll contributions for their own personal use or misapply employee contributions to cover business expenses. Unscrupulous service providers might target contributory benefits plans for their personal profit.

To date, the results of the new program have been impressive. In just 11 months the DOL has:

- Initiated 191 investigations
- Referred 97 investigations to prosecutors
- Obtained 20 indictments with seven guilty pleas

While we watch and wait to see what lessons can be learned from this initiative, it may be useful to note that these are the types of losses that might well be covered under an ERISA fidelity bond or the ERISA rider to one's crime (aka fidelity) bond.

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<sup>1</sup> "More Than 250 Million People Use Facebook on a Daily Basis," <http://mashable.com/2010/11/16/facebook-social/>, November 17, 2010.

<sup>2</sup> Googling "fired over comments on Facebook" yielded 14.1 million results (November 17, 2010 at 1 PM EST).

<sup>3</sup> The National Labor Relations Board is a federal agency charged with safeguarding employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions.

<sup>4</sup> “Feds: Woman illegally fired over Facebook remarks,”

[http://news.yahoo.com/s/ap/20101109/ap\\_on\\_hi\\_te/us\\_facebook\\_firing](http://news.yahoo.com/s/ap/20101109/ap_on_hi_te/us_facebook_firing), November 9, 2010.

<sup>5</sup> From Proofpoint’s seventh annual survey on outbound messaging and content security issues, performed by Osterman Research during June and July 2010; *The Bottom Line: Key Findings 2010*. The study examined responses from 261 email decision makers at large U.S. firms (with 1000 or more employees). Proofpoint, Inc. is an email security and compliance vendor based in Sunnyvale, CA, <http://www.proofpoint.com>.

<sup>6</sup> Advice memorandum from the Office of the General Counsel, May 5, 2010, as part of the MONOC Cases, specifically focusing on possible violations of Section 8(a)(1) and (3).

<sup>7</sup> “Is Facemail Going to Drive General Counsel Insane?” Corporate Counsel, November 22, 2010, Facebook will preserve these messages – text, chat, or smoke signals – forever – which would likely be longer than most firms’ document retention policies.

<sup>8</sup> <http://www.dol.gov/ebsa/newsroom/fscpcp.html>.

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