



# WHAT IS SOCIAL MEDIA? (AKA SOCIAL NETWORKING)

•USE OF INTERACTIVE INTERNET-CONNECTED TECHNOLOGY TO IMMEDIATELY DISSEMINATE MESSAGE TO POTENTIAL GLOBAL AUDIENCE

- FACEBOOK
- LINKEDIN
- TWITTER
- INSTAGRAM
- BLOGS
- YOUTUBE
- FLICKR



# RELEVANCE OF SOCIAL MEDIA USE TO EMPLOYMENT

“THE INTERNET RECORDS EVERYTHING  
AND FORGETS NOTHING. . .  
EVERY ONLINE ENTRY. . . CAN BE  
STORED FOREVER”

(“THE WEB MEANS THE END OF FORGETTING,”  
*NEW YORK TIMES*, OCT. 12, 1010)

# RELEVANCE OF SOCIAL MEDIA USE TO EMPLOYMENT

- SOCIAL MEDIA USE BLURS DISTINCTIONS BETWEEN PAID WORK TIME - UNPAID BREAK TIME, WORKPLACE CONDUCT - OFF DUTY CONDUCT, “PRIVATE” INFORMATION – EMPLOYMENT RELATED INFORMATION
- THE NUMBER OF EMPLOYEES WHO ENGAGE IN SOCIAL MEDIA/NETWORKING IS SIGNIFICANT AND INCREASING DAILY
- TYPES OF USES INTERSECT: “PURE” SOCIAL USE, VERSUS EMPLOYMENT USE, VERSUS NETWORKING/PURSUING OTHER CAREER OPPORTUNITIES



# EMPLOYEES ARE USING SOCIAL MEDIA

-  FACEBOOK: MORE THAN 1 BILLION USERS
-  LINKEDIN: MORE THAN 187 MILLION MEMBERS
-  TWITTER: MORE THAN 250 MILLION USERS

- EMPLOYEE USE:
  - 75% ACCESS AT WORK 1 X PER DAY FROM MOBILE DEVICE +
  - 60% ACCESS 2 PLUS X PER DAY FROM MOBILE DEVICE+
  - 43% HAVE OPEN ACCESS TO SOCIAL MEDIA SITES AT WORK+
  - >30% LARGE COMPANIES WILL BLOCK ACCESS TO SOCIAL MEDIA BY 2014; DROPPING 10% YEARLY \*

+2012 SILKROAD SOCIAL MEDIA & WORKPLACE COLLABORATION SURVEY

\* 2012 GARTNER, INC.( ANDREW WALLS) [HTTP://WWW.GARTNER.COM/IT/PAGE.JSP?ID=1940714](http://www.gartner.com/it/page.jsp?id=1940714)

# WHICH SITES ARE BEING USED?

- 70% TWITTER
- 65% FACEBOOK
- 51% LINKEDIN
- 19% INTERNAL (E.G., COMPANY INTRANET)

2012 SILKROAD SOCIAL MEDIA & WORKPLACE COLLABORATION SURVEY

COPYRIGHT © 2012 ANNE E. DENECKE, PC; DENECKE EMPLOYMENT LAW. NO DISTRIBUTION OR RE-PRINT PERMITTED WITHOUT WRITTEN PERMISSION. THESE MATERIALS ARE NOT INTENDED AND SHOULD NOT BE USED AS A SUBSTITUTE FOR SPECIFIC LEGAL ADVICE OR OPINIONS.

# USE OF MOBILE DEVICES IN THE WORKPLACE

- 75% ACCESS AT WORK AT LEAST DAILY FROM MOBILE DEVICE †
- EMPLOYEES USING PERSONAL MOBILE DEVICES TO ACCESS SITES EVEN WHERE EMPLOYER MONITORS, BLOCKS OR RESTRICTS ACCESS †
- 88% U.S. ADULTS OWN A CELL PHONE AS OF APRIL 2012; MORE THAN 55% USE TO GO ON LINE \*

† 2012 SILKROAD SOCIAL MEDIA & WORKPLACE COLLABORATION SURVEY

\* [HTTP://PEWRESEARCH.ORG/PUBS/2296/MOBILE-CELL-INTERNET-WEB-ACCESS-PHONE](http://PEWRESEARCH.ORG/PUBS/2296/MOBILE-CELL-INTERNET-WEB-ACCESS-PHONE)

COPYRIGHT © 2012 ANNE E. DENECKE, PC; DENECKE EMPLOYMENT LAW. NO DISTRIBUTION OR RE-PRINT PERMITTED WITHOUT WRITTEN PERMISSION. THESE MATERIALS ARE NOT INTENDED AND SHOULD NOT BE USED AS A SUBSTITUTE FOR SPECIFIC LEGAL ADVICE OR OPINIONS.

# IS IT SOCIAL OR IS IT WORK?

- 49% CONNECT WITH CO-WORKERS
- 47% CONNECT WITH OTHERS
- 44% CONNECT WITH CUSTOMERS
- 42% PLATFORM FOR SHARING WORK-RELATED CONTENT
- 29% PLATFORM TO DRIVE NEW IDEAS/INNOVATIVE THINKING

+2012 SILKROAD SOCIAL MEDIA & WORKPLACE COLLABORATION SURVEY

COPYRIGHT © 2012 ANNE E. DENECKE, PC; DENECKE EMPLOYMENT LAW. NO DISTRIBUTION OR RE-PRINT PERMITTED WITHOUT WRITTEN PERMISSION. THESE MATERIALS ARE NOT INTENDED AND SHOULD NOT BE USED AS A SUBSTITUTE FOR SPECIFIC LEGAL ADVICE OR OPINIONS.



# WORKPLACE ACCESS TO SOCIAL MEDIA SITES

- 31% OF COMPANIES COMPLETELY PROHIBIT EMPLOYEES' ACCESS TO SOCIAL MEDIA SITES
  - DOWN FROM 54% IN 2009
- 51% PERMIT FOR BUSINESS USE ONLY
  - UP FROM 19% IN 2009
- 14% PERMIT FOR LIMITED PERSONAL USE
  - DOWN FROM 16% IN 2009



Social Media is Not Media...  
Social Media is SOCIAL.  
– *Kevin Lee*

2011 ROBERT HALF TECHNOLOGY SURVEY OF CHIEF INFORMATION OFFICERS

# EMPLOYEES' INTEREST IN ACCESSING SOCIAL MEDIA AT WORK

- 56% OF “MILLENNIALS” (BORN 1981 - 2000) SAID THEY WOULD TRY TO GET AROUND A BAN ON WORKPLACE POLICY BARRING SOCIAL MEDIA ACCESS
- 64% WOULD ASK ABOUT SOCIAL MEDIA USAGE POLICIES DURING JOB INTERVIEW
- 33% WOULD VALUE SOCIAL MEDIA FREEDOM AND WORK MOBILITY OVER SALARY



2011 CISCO SYSTEMS “CONNECTED WORLD” STUDY

COPYRIGHT © 2012 ANNE E. DENECKE, PC; DENECKE EMPLOYMENT LAW. NO DISTRIBUTION OR RE-PRINT PERMITTED WITHOUT WRITTEN PERMISSION. THESE MATERIALS ARE NOT INTENDED AND SHOULD NOT BE USED AS A SUBSTITUTE FOR SPECIFIC LEGAL ADVICE OR OPINIONS.

# EMPLOYMENT RELATED CHALLENGES

- USING WORK TIME FOR PERSONAL REASONS
- USING COMPANY EQUIPMENT/ELECTRONIC SYSTEMS FOR NON BUSINESS USE
- REPUTATIONAL HARM TO EMPLOYER AND EMPLOYEES
  - NEGATIVE/DISPARAGING COMMENTS ABOUT PRODUCTS, SERVICES; EMBARRASSING, HARMFUL TO GOODWILL
  - NEGATIVE COMMENTS ABOUT SUPERVISOR, MANAGEMENT, CO-WORKERS
  - DISCLOSING TRADE SECRETS, CONFIDENTIAL INFORMATION
- UNWANTED CRITICISM OF COMPETITORS



# LEGAL/POLICY FRAMEWORK

- **PRIVACY EXPECTATION KEY CONSIDERATION**
  - NO GENERAL RIGHT TO PRIVACY IN PRIVATE SECTOR WHEN USING SOCIAL MEDIA
- **MANAGE PRIVACY EXPECTATIONS THROUGH CLEAR AND CONSISTENT POLICY AND COMMUNICATION**
  - IF ALLOW USE OF EMPLOYER'S EQUIPMENT/TIME/ELECTRONIC SYSTEMS TO ACCESS SOCIAL MEDIA, SHOULD **SPECIFY NO PRIVACY EXPECTATION**

# LEGAL FRAMEWORK

## INVASION OF PRIVACY

- (A) LEGALLY PROTECTED PRIVACY INTEREST; (B) REASONABLE EXPECTATION OF PRIVACY UNDER THE CIRCUMSTANCES; (C) SERIOUS INVASION OF PRIVACY INTEREST
- KEEP INFORMATION SECRET (DON'T POST ON SOCIAL MEDIA)
- POLICY NEGATING PRIVACY EXPECTATION

\* *MORENO v. THE HANFORD SENTINEL, INC.*, CAL. SUP. CT. NO. 06CECG04125AMC (2009)

## DEFAMATION

- POSTINGS/COMMENTS ABOUT COMPANY PERSONNEL, EX-EMPLOYEES, APPLICANTS, COMPETITORS, CUSTOMERS/CLIENTS

# LEGAL FRAMEWORK

- UNAUTHORIZED USE/DISCLOSURE OF CONFIDENTIAL INFORMATION
  - INADVERTENT DISCLOSURE INCLUDING “BITS AND PIECES”



- WHISTLEBLOWER PROTECTION
  - SARBANES-OXLEY (PUBLICALLY TRADED COMPANIES)
  - ORS 659A.199: GOOD FAITH REPORT OF INFORMATION EMPLOYEE BELIEVES IS EVIDENCE OF VIOLATION OF LAW, RULE, REGULATION

# LEGAL FRAMEWORK

- HOSTILE WORK ENVIRONMENT/DISCRIMINATION

POTENTIAL LIABILITY FOR EMPLOYEES' SOCIAL MEDIA STATEMENTS, ESPECIALLY IF USING EMPLOYER'S TIME/EQUIPMENT/SITE

“SEXTING” (BRETT FAVRE AND NY JETS EMPLOYEE)

# LEGAL FRAMEWORK

## RETALIATION

- “DE-FRIENDING” OR MAKING DEROGATORY STATEMENTS USING SOCIAL MEDIA AFTER EMPLOYEE COMPLAINS
- MAKING COMPLAINT CONCERNING LACK OF PAYMENT OF WAGES ON SOCIAL MEDIA SITE: *MORSE V. JP MORGAN CHASE & CO.*, CASE NO. 8:11-CV-779-T-27EAJ (M.D. FLA. JUNE 23, 2011)
- FEDERAL LAWS:
  - ELECTRONIC COMMUNICATIONS PRIVACY ACT
  - STORED COMMUNICATIONS ACT
  - COMPUTER FRAUD AND ABUSE ACT



# SHOULD WE HAVE A POLICY?

- WHAT IS THE GOAL?
- POLICY V. GUIDELINES
  - POLICY: CAN AND CANNOT/WELL-DEFINED RULES
  - GUIDELINES: LOOSER EXPECTATIONS; MAY BE MORE DIFFICULT TO ENFORCE
- 23% COMPANIES HAVE SPECIFIC SOCIAL MEDIA POLICY +
- 31% COMPANIES HAVE GENERAL GUIDELINES FOR USE OF TECHNOLOGY +
  - 9% COMPANIES SPECIFICALLY MONITOR SOCIAL MEDIA USE+
  - 23% COMPANIES HAVE NO POLICY/GUIDELINES

+ 2012 SILKROAD SOCIAL MEDIA & WORKPLACE COLLABORATION SURVEY

# DRAFTING CONSIDERATIONS

- COVER INTERNAL BUSINESS AND EXTERNAL PERSONAL USES
- JOIN THE CONVERSATION — AUTHOR SHOULD BE FAMILIAR WITH IMPACT AND POTENTIAL OF SOCIAL NETWORKING
- MONITOR THE CONVERSATION — UNDERSTAND WHAT IS BEING SAID, DISCUSSED AND SHOWN
  - FIND OUT WHAT CUSTOMERS, CLIENTS AND COMPETITORS SAYING

# EXTERNAL PERSONAL USE

- AVOID OVERBROAD POLICIES.

NARROWLY DRAFT TO ADDRESS  
SPECIFIC POLICY OBJECTIVES;  
E.G., PREVENTING THE DISCLOSURE OF  
THE COMPANY'S PROPRIETARY  
INFORMATION

INCLUDE STATEMENT THAT POLICY DOES NOT  
APPLY TO ACTIVITIES PROTECTED BY  
SECTION 7 OF NLRA

# EXTERNAL PERSONAL USE

- REQUIRE DISCLAIMER THAT VIEWS ARE PERSONAL
- REMINDER TO BE RESPECTFUL OF POTENTIAL AUDIENCE (POTENTIALLY, CURRENT AND POTENTIAL CUSTOMERS AND CLIENTS, SUPERVISORY/MANAGERIAL PERSONNEL & CO-WORKERS)
- CONSIDER GENERATIONAL DIFFERENCES IN HOW MUCH IS APPROPRIATE TO SHARE ON-LINE

# EXTERNAL PERSONAL USE

- ARE SUPERVISORS ALLOWED TO “FRIEND” SUBORDINATES? RISK V. BENEFIT
  - SUPERVISORS CANNOT FRIEND DIRECT REPORTS, BUT EMPLOYEES CAN FRIEND THEIR SUPERVISORS (WHO CAN ACCEPT OR REJECT REQUEST)
  - SUPERVISORS CANNOT FRIEND REPORTS
  - EMPLOYEES PERMITTED ONLY TO FRIEND PEERS
  - EMPLOYEES MAY NOT FRIEND ANY CO-WORKER

COPYRIGHT © 2012 ANNE E. DENECKE, PC; DENECKE EMPLOYMENT LAW. NO DISTRIBUTION OR RE-PRINT PERMITTED WITHOUT WRITTEN PERMISSION. THESE MATERIALS ARE NOT INTENDED AND SHOULD NOT BE USED AS A SUBSTITUTE FOR SPECIFIC LEGAL ADVICE OR OPINIONS.

# EXTERNAL PERSONAL USE

- REMINDER THAT USE MUST BE IN COMPLIANCE WITH ELECTRONIC COMMUNICATIONS POLICY AND OTHER RELEVANT POLICIES
- INSTRUCTION THAT NO REFERENCES TO CLIENTS, CUSTOMERS, PARTNERS OR VENDORS W/O EXPRESS ADVANCE WRITTEN PERMISSION
- REQUIREMENT TO ADHERE TO ALL COPYRIGHT LAWS, AND TO REFERENCE/CITE TO SOURCES APPROPRIATELY

COPYRIGHT © 2012 ANNE E. DENECKE, PC; DENECKE EMPLOYMENT LAW. NO DISTRIBUTION OR RE-PRINT PERMITTED WITHOUT WRITTEN PERMISSION. THESE MATERIALS ARE NOT INTENDED AND SHOULD NOT BE USED AS A SUBSTITUTE FOR SPECIFIC LEGAL ADVICE OR OPINIONS.

# HIRING: TO SEARCH OR NOT TO SEARCH?

## THE TEMPTATION:

- OFFERS IMMEDIATE ACCESS TO WEALTH OF INFORMATION ABOUT CANDIDATE
- MINIMIZES STERILIZED NATURE OF APPLICATION/ INTERVIEW PROCESS; REVEALS THE REAL PERSON

## THE RESTRAINT:

- POTENTIAL LEGAL LIABILITY: INADVERTENT EXPOSURE TO PROTECTED CLASS INFORMATION

COPYRIGHT © 2012 ANNE E. DENECKE, PC; DENECKE EMPLOYMENT LAW. NO DISTRIBUTION OR RE-PRINT PERMITTED WITHOUT WRITTEN PERMISSION. THESE MATERIALS ARE NOT INTENDED AND SHOULD NOT BE USED AS A SUBSTITUTE FOR SPECIFIC LEGAL ADVICE OR OPINIONS.

# USE OF SOCIAL MEDIA IN HIRING/ BACKGROUND CHECKS

- KEY: EMPLOYER'S POSSESSION/KNOWLEDGE OF INFORMATION
- BACKGROUND CHECKS
  - EMPLOYERS CAN USE INFORMATION OBTAINED FROM SOCIAL NETWORKING SITES
    - BUT.....
- COMPARE WITH WRITTEN APPLICATION
  - CAN'T ASK ON APPLICATION = EVIDENCE OF DISCRIMINATION
  - ARGUABLY, NO DIFFERENCE IF AWARENESS OF APPLICANT'S PROTECTED CLASS STATUS THROUGH SEARCH OF SOCIAL MEDIA SITES





# HIRING: THE LEGAL CONSIDERATIONS

- **STATE AND FEDERAL DISCRIMINATION STATUTES**
  - RACE, SEX (GENDER), RELIGION, NATIONAL ORIGIN, AGE, MARITAL STATUS, DISABILITY, VETERAN STATUS, SEXUAL ORIENTATION, POLITICAL AFFILIATION, WORKERS' COMPENSATION CLAIM
    - **PLAINTIFF ALLEGING FAILURE TO HIRE ON BASIS OF AGE (AS INDICATED BY COLLEGE GRADUATION DATE ON LINKEDIN) ALLOWED TO GO TO TRIAL (NEIMAN V. GRANGE MUTUAL CASUALTY Co. (C.D. ILL. 4/26/12))**
    - SEARCH REVEALS APPLICANT IS ON A MILITARY VETERAN'S WEBSITE; PICTURES OF APPLICANT WEARING A BURQA; DISCUSSING AA MEETINGS; "LIKING" POSITIVE ARTICLES ABOUT DEMOCRATIC POLITICIAN SUCH AS PRES. OBAMA

# HIRING: THE LEGAL CONSIDERATIONS

- **RELIGIOUS DISCRIMINATION**
- *GASKELL v. UNIVERSITY OF KENTUCKY*, 2010 WL 4867630 (E.D. Ky. 2010): PLAINTIFF APPLIED FOR DIRECTOR OF OBSERVATORY. SEARCH COMMITTEE MEMBER LEARNED ON INTERNET THAT CANDIDATE HAD WRITTEN ABOUT ASTRONOMY AND THE BIBLE, RESULTING IN REJECTION OF APPLICANT'S CANDIDACY

# HIRING: THE LEGAL CONSIDERATIONS

- **GENETIC INFORMATION NON-DISCRIMINATION ACT (GINA)**
  - COVERED ENTITIES CAN NOT USE “GENETIC INFORMATION” IN ANY HIRING/ EMPLOYMENT DECISION (E.G., LEARN APPLICANT HAS FAMILY HISTORY OF CANCER)
- **FAIR CREDIT REPORTING ACT**
  - BEFORE ANY THIRD PARTY INVESTIGATION OF “CONSUMER REPORT” (NOT JUST CREDIT RELATED) FROM “CONSUMER REPORTING AGENCY”, NEED TO
    - OBTAIN APPLICANT’S CONSENT
    - PROVIDE NOTICE OF ANY INFORMATION LEAD TO ADVERSE ACTION (.E.G., FAILURE TO HIRE)
    - PROVIDE A COPY OF REPORT TO APPLICANT
      - UNSETTLED IF EMPLOYER CONDUCTS CHECK ITSELF

# HIRING: THE LEGAL CONSIDERATIONS



- **OREGON LAW: USE OF CREDIT HISTORY**
  - ONLY LIMITED EXCEPTIONS FOR EMPLOYERS USING CREDIT HISTORY FOR EMPLOYMENT PURPOSES; MUST BE SUBSTANTIALLY JOB-RELATED AND PROVIDE WRITTEN NOTICE OF REASONS FOR CREDIT CHECK
- **AMERICANS WITH DISABILITIES ACT (ADA)**
  - PRE-EMPLOYMENT MEDICALLY-RELATED QUESTIONS PROHIBITED
- **OREGON LAW: SMOKERS**
  - PROHIBITED FROM REQUIRING APPLICANT NOT TO SMOKE AS CONDITION OF EMPLOYMENT DURING NON-WORKING HOURS

# BEST PRACTICES FOR USE IN HIRING PROCESS

- **BEST PRACTICES** FOR SEARCHING SOCIAL MEDIA SITES

- **USE ONLY ONE DESIGNATED PERSON WHO IS NOT DECISION-MAKER**
- ONLY THAT PERSON CONVEYS RELEVANT, NON-DISCRIMINATORY INFORMATION TO EMPLOYER
- ALTERNATIVELY, ENGAGE IN SEARCH ONLY AFTER CONDITIONAL EMPLOYMENT OFFER
- ALSO CONSIDER NOTIFYING CANDIDATES THAT SOCIAL MEDIA/INTERNET BASED SEARCH WILL BE CONDUCTED AND OBTAIN CONSENT SIMILAR TO NOTIFICATION/RELEASE LANGUAGE ON WRITTEN APPLICATION

# BEST PRACTICES FOR USE IN HIRING PROCESS

- POLICIES:
  - CONSISTENCY:
    - CONDUCT SEARCH ON ALL APPLICANTS
    - SEARCH SAME SITES FOR EVERY CANDIDATE
  - USE SAME COMPANY/PEOPLE TO CONDUCT ALL SEARCHES
  - SCREEN OUT PROTECTED INFORMATION
  - VERIFY INFORMATION
  - DOCUMENT SEARCH

COPYRIGHT © 2012 ANNE E. DENECKE, PC; DENECKE EMPLOYMENT LAW. NO DISTRIBUTION OR RE-PRINT PERMITTED WITHOUT WRITTEN PERMISSION. THESE MATERIALS ARE NOT INTENDED AND SHOULD NOT BE USED AS A SUBSTITUTE FOR SPECIFIC LEGAL ADVICE OR OPINIONS.

# BEST PRACTICES FOR USE IN HIRING PROCESS

- DO NOT “FRIEND” OR FOLLOW A CANDIDATE
- EDUCATE & TRAIN MANAGERS ON WHAT THEY CAN AND CANNOT DO

THANK YOU!

ANNE E. DENECKE  
DENECKE EMPLOYMENT LAW

[adenecke@deneckelaw.com](mailto:adenecke@deneckelaw.com)

503.517.8207