

# Social Media and Your Employees

*Presented by:*

**Charles E. Johnson  
Julian H. Wright, Jr.  
Matthew F. Tilley**

**Robinson, Bradshaw & Hinson, P.A.  
April 24, 2012**

# *Hiring, Monitoring, and Firing Employees in the Age of Social Media*

# Should Employers Perform Pre-Hire Internet/Social Media Searches?

- Most of the internet is fair game.
- The expectation is employers will search.
- Can Facebook stop employers from looking?
- Can employers gain access to “private” areas of the internet on social media sites? If so, how?
- What to do with information when the employer has it.

# Is There Any Privacy In Cyberspace?

It depends, but typically precious little.

- Privacy settings on social media sites may or may not provide privacy protection for an employee.
- Employers may or may not be able to access “private” areas in cyberspace, particularly social media sites.

# Recent, Illustrative Cases Dealing With Social Media Issues

- *Land v. L'Anse Creuse Public School Bd. of Educ.*, 2010 Mich. App. LEXIS 999 (Mich. App. 2010)

“That mannequin at the Jobbie Nooner ...”

- *Snyder v. Millersville University*, 2008 U.S. Dist. LEXIS 97943 (E.D. Pa. 2008)

The “Drunken Pirate” Case

- *Pietrylo v. Hillstone Restaurant Group*, 2009 U.S. Dist. Lexis 88702 (D. N.J. 2009)

Coercing access does violate privacy.

# Other Issues to Consider in Monitoring Employees

## The Stored Communications Act. 18 U.S.C. § 2701.

The SCA prohibits individuals from “intentionally accessing without authorization a facility through which an electronic service is provided . . . and thereby obtaining . . . access to wire or electronic communications while it is in electronic storage in such system.”

- *Rene v. G.F. Fishers, Inc.*, 2011 U.S. Dist. LEXIS 105202 (S.D. Ind. 2011)

Beware the power of keylogger software.

## Other Social Media Issues to Weigh in Disciplining or Firing Employees

- Are the statements in social media protected by law?
- Are the statements in social media accurate and accurately attributed?
- Is the employer using materials from social media in a discriminatory way that is prohibited by law?
- Is the employer using materials from social media on a consistent basis?

# Elements of a Good Social Media Policy in Hiring, Monitoring, and Firing Employees

- The policy should govern use of information revealed by internet searches in hiring and the evaluation process.
- The policy should negate any expectation of privacy an employee or candidate may assert in publicly available information.
- The policy should provide that the employer will verify information obtained through social media or online generally.
- The policy should provide that the employer will comply with various applicable laws, including the NLRA and the SCA, among others.

# ***Blasting the Boss: Social Media and the Right of Employees to Engage in Concerted Activity***

# Virtual World vs. Real World

- Same laws and guidelines apply to social media as to other employee conduct.
  - Facebook is the new water cooler.
- But online documents are permanent and can be instantly and widely disseminated.

# Guidelines: Same Rules Apply in Virtual World

- Do not conduct company business on social networking sites (Facebook, Linked In) without express authorization to do so.
- Do not state or imply that you represent the company without express authorization to do so.
- Do not initiate or post communications with offensive language that incite violence or promote harm to the company or any employee

# Regulating Employee Conduct Outside the Workplace

- Can you restrict an employee's conduct on Facebook or other internet sites outside the workplace?
- North Carolina law prohibits an employer from failing to hire or discriminating against an employee because the employee "engages in or has engaged in the lawful use of lawful products if the activity occurs off the premises of the employer during nonworking hours and does not affect the employee's job performance or the person's ability to properly fulfill the responsibilities of the position in question or the safety of other employees." N.C. Gen. Stat. 95-28.2.

# Exceptions to Lawful Use of Lawful Products Statute

- If the restriction relates to bona fide occupational requirement and is reasonably related to the employment activities.
- If the restriction relates to the fundamental objectives of the organization.
- If the employee fails to comply with requirements of the employer's substance abuse prevention program.

# Facebook and the National Labor Relations Act

- Recent opinions by the General Counsel of the National Labor Relations Board limit employers' ability to regulate employee postings on Facebook or other social media sites.
- Some postings and communications are considered “concerted activity,” for which employees cannot be disciplined.

# Concerted Activity Must Be Permitted

- An employer can discipline an employee for misconduct in using social media, but not for “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”
- Concerted activity occurs when two or more employees discuss compensation, hours, or other terms or conditions of employment.

# Protected Concerted Activity on Facebook

- Calling a supervisor a “scumbag” on a personal Facebook page during discussion of supervisory action with other employees.
- Requesting criticism of a co-worker and posting comments regarded by the co-worker as “cyber-bullying” as part of a Facebook conversation among several co-workers.
- Criticizing an employer’s sales event, along with posting embarrassing photographs, where employees were concerned about the effect of the event on their commissions.
- Criticizing an employer’s tax withholding policies in a Facebook discussion among current and former employees.

# Some Offensive Conduct Not Protected

- Posting by news reporter of unprofessional tweets, including criticism of a television station, where the tweets were not part of a discussion with co-workers.
- Facebook posting by bartender calling employer's customers "rednecks," saying he hoped they choked on glass as they drove home drunk, and criticizing employer's tip-sharing policy, where no co-workers participated.
- Posting on U.S. Senator's Facebook by EMS employee who criticized her employer's compensation rates and disclosed confidential information about a service call, where employee did not discuss her posting with any other employee.
- Facebook posting by employee at a nonprofit facility for homeless people about the employer's mentally disabled clients, where the employee did not discuss her Facebook postings with any co-workers.
- Facebook comments by a customer service employee who criticized an assistant manager and called her a "super mega puta," even though the employee discussed his comments on Facebook with co-workers.

# Communications with Employees

- Transparency
- Open door
- Grievance policy
- Discourage employees from taking concerns outside the company

# ***Policies for Use of Internet, Email, and Social Media on the Job***

# Internet, Email, and Social Media Policies

- **Tensions**

- Control use of social media vs. attracting and retaining best employees
- Marketing potential vs. legal and reputational risks

- **Application of existing law to new media**

- Same law governs both the real and virtual worlds
- Existing Company policies apply to use of social media

# Issues to Consider

- Whether to prohibit, permit, or encourage use of social media by employees
- Warnings about lack of privacy and potential monitoring by employer
- Notice company may use information from social media when making employment decisions
- Guidelines for use of company time and equipment for personal use of email and social media
- Whether to use social media in marketing; ownership and expectations regarding contacts and communications made on behalf of company
- Prohibitions against disclosing confidential information and making statements that are defamatory, discriminatory, or expose company to harm

# No Expectation of Privacy

- **Company Time and Equipment**
  - Companies generally have right to monitor, limit, or prohibit use of internet, email, and social media on company equipment and company time
  - Employees should be notified that company may monitor and retain information on company equipment
- **Personal Use: *Social Media is Not Private***
  - Posts on social media sites are not private
    - See *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (N.Y. Supp. Ct., Suffolk County Sept. 21, 2010)
  - Employees should be notified that (i) personal use of social media reflects on company and should be professional (ii) company monitors and may take action based on personal use of social media

# Allowing Personal Use of Company Time and Equipment

- **Practical considerations**
  - Allow *limited* personal use and monitor
- **Guidelines for personal use**
  - Neither excessive nor inappropriate
  - Does not expose company to harm (including reputational harm)
  - Complies with existing company confidentiality, data security, anti-discrimination, and anti-harassment policies
  - No expectation of privacy; reservation of company's right to monitor and retain any information on company equipment

# Social Media Policies

## Two Approaches

- (1) Employees who only use social media for personal use
- (2) Employees who use social media on behalf of the company

# Personal Use of Social Media

- **Separate Work from Personal Use**
  - Use personal email account to set up social media
  - Do not use company trademark or IP
  - Avoid conducting company business on or through personal email or social media
  - Avoid discussing company business, products, or services without permission
  - Maintain client and customer confidentiality
  - Do not state or imply speaking on behalf of company unless expressly authorized to do so

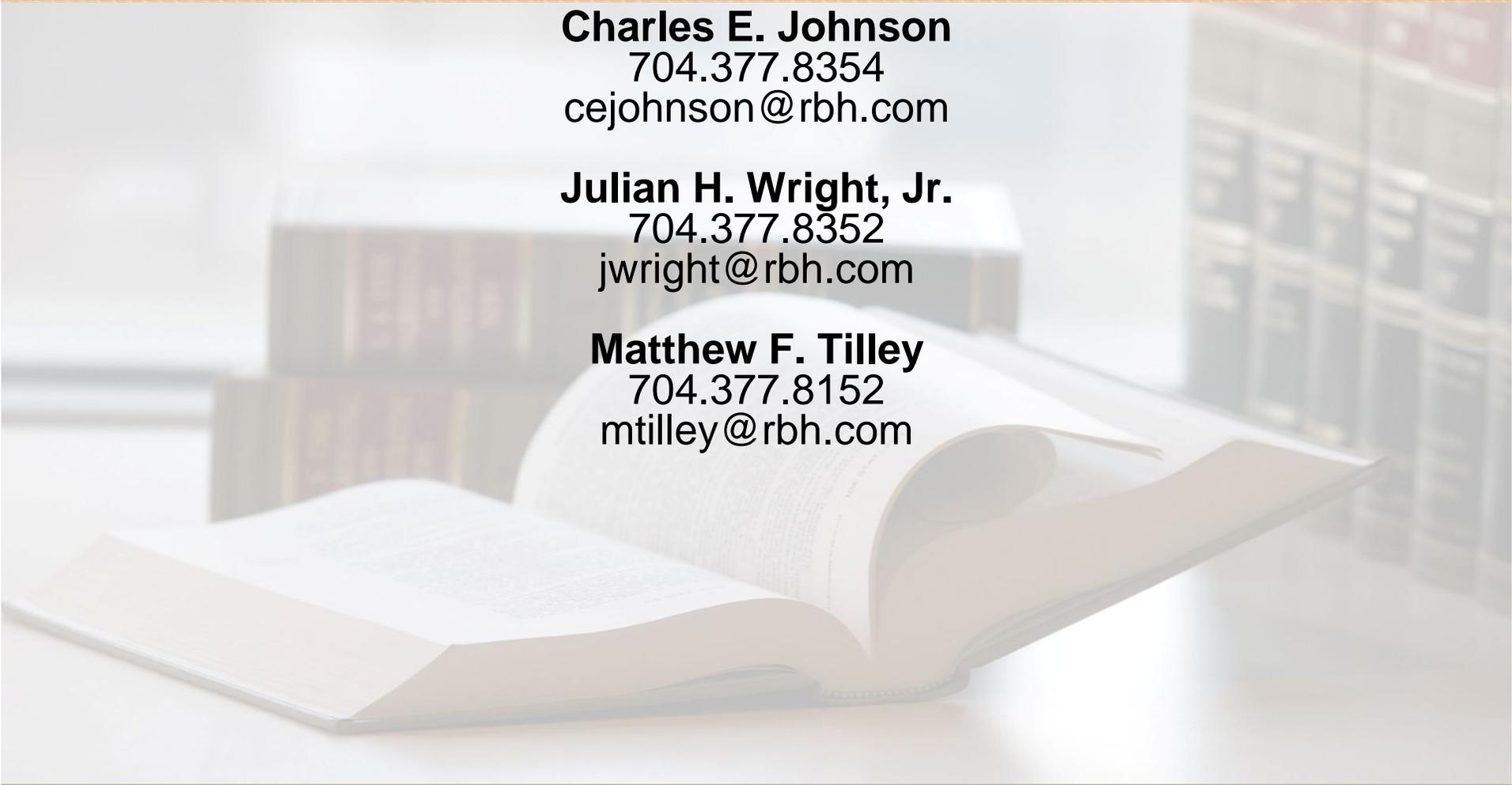
# Use of Social Media on Behalf of Company

- **Treat Posts on Social Media as Any Form of Advertising**
  - Posting by employees on social media and blogs may be considered voice of the company
  - Limit use to certain employees
  - Develop in cooperation with marketing department and counsel
  - Consider whether to create company accounts / pages or allow employees to use personal accounts
- **Comply with regulations regarding advertising**
  - Employees should state affiliation with employer when marketing through social media
    - *See FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255.*
  - Statements about company products and services should be factual and accurate
  - Develop guidelines for discussing competitors and responding to negative comments

# Use of Social Media on Behalf of Company

- **Establish Ownership of Intellectual Property, Accounts, and Contacts through Contract**

- Obtain agreement from employee assigning intellectual property to company
- Obtain agreement that company owns twitter accounts, blogs, etc. opened on company's behalf
- Social Media Contacts
  - Ownership of contacts made through social networks, such as LinkedIn, is uncertain.
    - Contacts likely not subject to trade secret protection because not confidential. See *Sasqua Group v. Lori Courtney*, 2010 U.S. Dist. LEXIS (E.D.N.Y. Feb. 9, 2010).
  - Consider non-competition, non-solicitation, and confidentiality agreements with employees who perform work through social media



**Charles E. Johnson**  
704.377.8354  
cejohnson@rbh.com

**Julian H. Wright, Jr.**  
704.377.8352  
jwright@rbh.com

**Matthew F. Tilley**  
704.377.8152  
mtilley@rbh.com