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Employment Issues In A Social Media World



Labor and Employment Law

Agenda

- What is social media?
- Benefits and causes for concern
- Legal implications
- Developing company policies

What is Social Media?

- Communication
 - Blogs: Blogger, Live Journal, TypePad
 - Micro-blogging: Twitter and now “Flutter”
 - Social networking: MySpace, Facebook, LinkedIn
- Collaboration
 - Wikis: Wikipedia
 - Social tagging: Delicious
 - Social news: Digg

What is Social Media?

- Multimedia
 - Photo sharing: Flickr, SmugMug
 - Video sharing: YouTube, Metacafe
 - Podcasting
- Reviews and Opinions
 - Product reviews: Epinions
 - Business reviews: Yelp
 - Community Q&A: Yahoo! Answers

Benefits for Employers

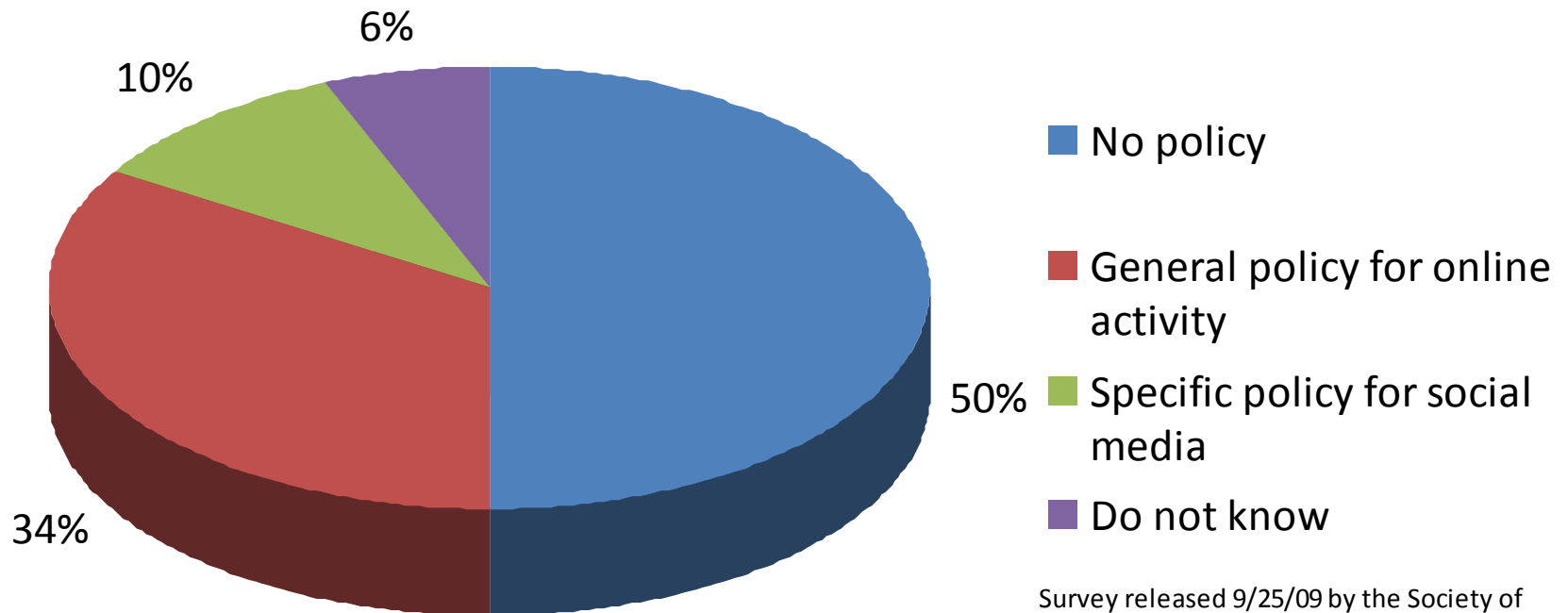
- Brings people closer together
- New opportunities for market research
 - What are people saying about your company?
 - Can identify trends in community
- Improved customer interaction
 - Allows fast, easy customer comments and ratings
 - Develops company credibility
- News
 - Hear about news in real time
 - Quickly and easily share news with customers

Causes for Concern for Employers

- Employee use:
 - Disclosure of confidential information
 - Disparagement of the company
 - Criminal and tortious activity via your network
 - Misuse of work time
- Employer monitoring
 - Time and cost
 - Morale
 - Legal issues
 - Negligence

What Are Employers Doing?

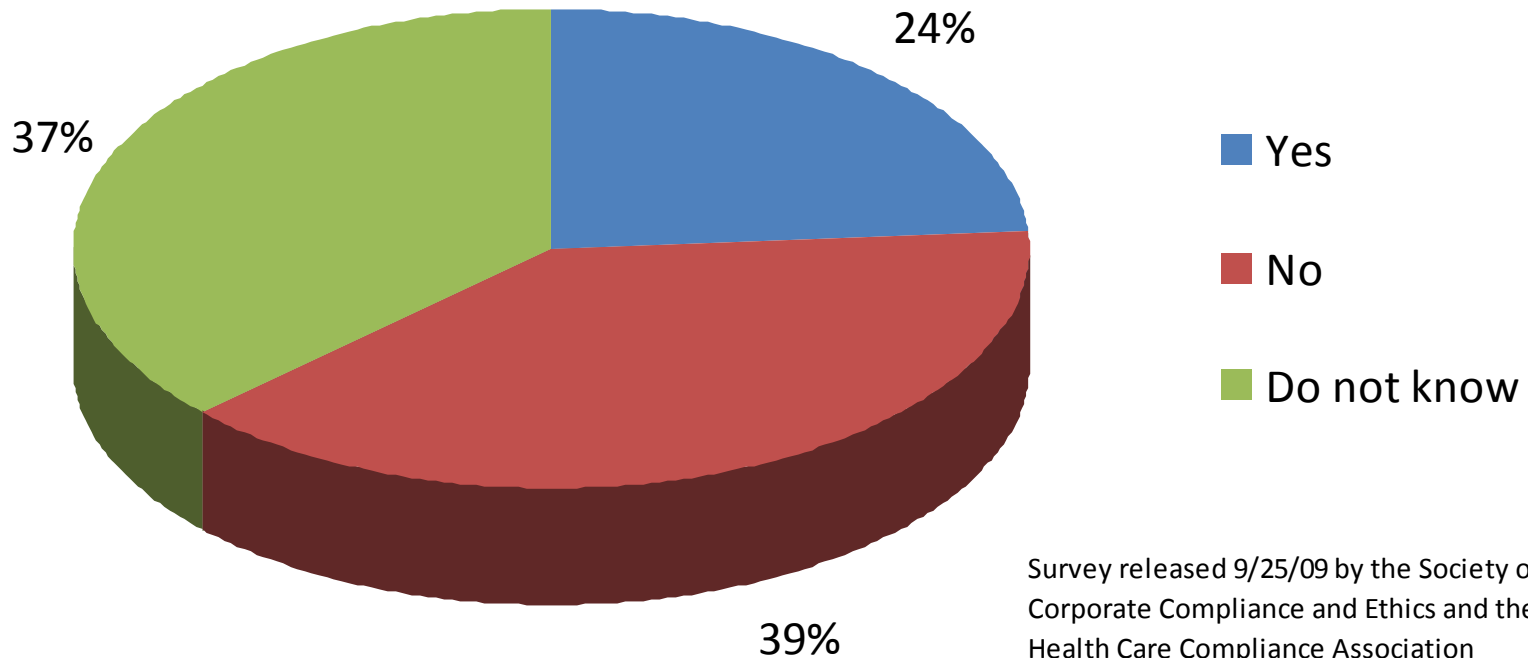
Does your company have a social media policy?



Survey released 9/25/09 by the Society of Corporate Compliance and Ethics and the Health Care Compliance Association

What Are Employers Doing?

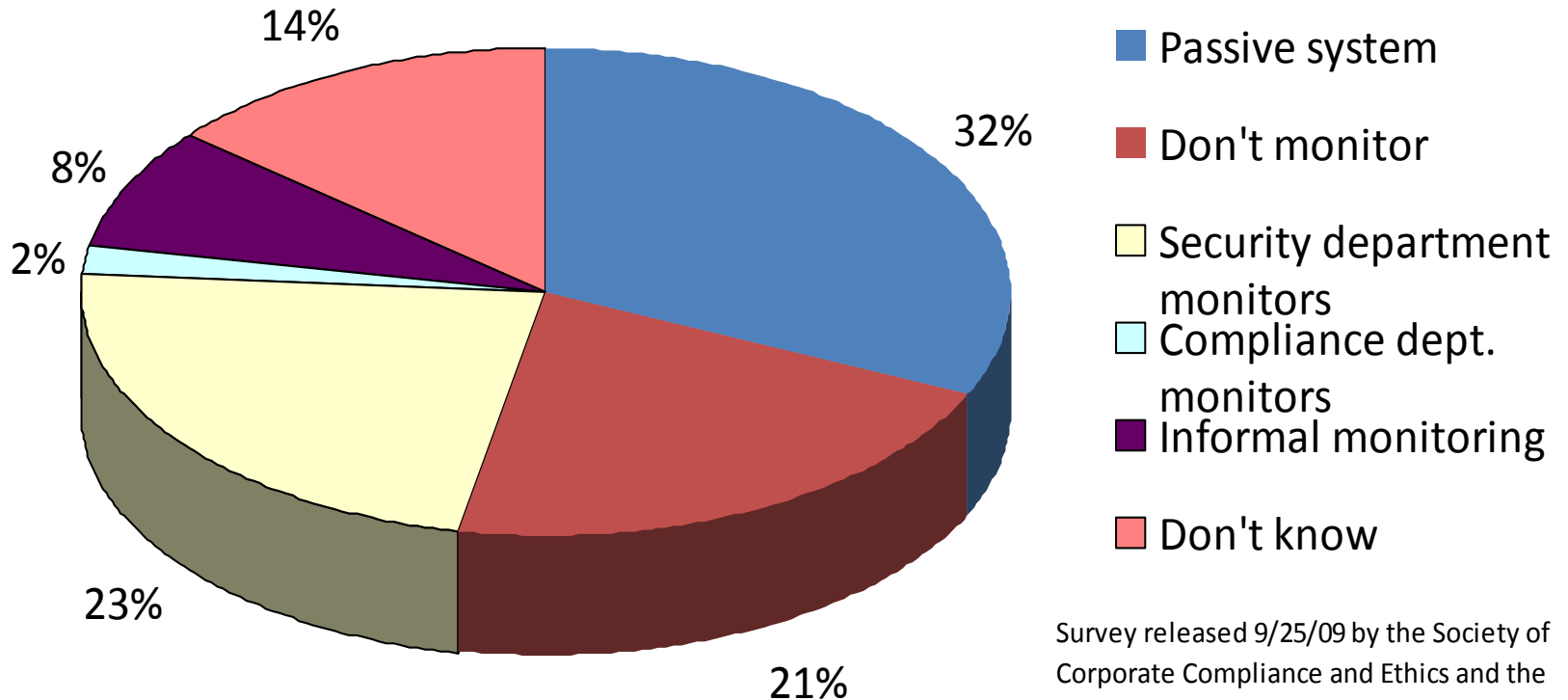
Have you disciplined an employee for activity on Facebook, Twitter, or LinkedIn?



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What Are Employers Doing?

How is employee activity monitored on Facebook, Twitter, LinkedIn and other social networking sites?



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Legal Implications for Employers

- From employee use
 - Negligence claims
 - Vicarious liability for business torts
- From employer action
 - Discrimination and retaliation
 - NLRA concerted activity
 - First Amendment speech
 - Invasion of privacy
 - Wiretapping Act
 - Stored Communications Privacy Act

Negligence Issues for Employers

- EE criminal activity via your network
 - Did the company know about it?
 - Did it do enough to prevent it or detect it?
 - How did the company respond
- EE complaints about workplace issues
 - Negligent hiring, retention, supervision
 - Did the company know or have reason to know?
 - What did it do in response?
- May create new duties for yourself based on information found online

Vicarious Liability

- Defamation
- Disclosure of confidential/proprietary information
- Standard for liability:
 - Authorized act before it happened
 - Ratified act after it was committed
 - Act committed within scope of agency (in connection with and in furtherance of company business)

Discrimination Issues

- Online profiles are full of insightful content
 - Lying about credentials
 - Unprofessional behavior/appearance
 - Reference to prior employment
- But they also may contain prohibited information at the hiring stage:
 - Religious beliefs
 - Age
 - Disability
 - Criminal record
- Harassment – what do you do if you find out on the internet?

Retaliation Issues

- “Complaints” about discrimination or harassment
- Arguably could be protected activity
- Same anti-retaliation rules apply as in the workplace
- Public employers: First Amendment

NLRA Concerted Activities

- Section 7 protects employees' right to form, join, and assist labor unions, engage in collective bargaining, and to engage in other concerted activities for mutual aid or protection
- Discussion of salary, wages, hours, work conditions vs. disparagement of company, products, services, clients, etc.

NLRA Concerted Activities

- Tension between company monitoring to protect its image and employee right to engage in concerted activities
- Issue will be very fact- and context-specific
 - Avoid broad rules
 - No knee-jerk reactions

Wiretapping Act

- Prohibits the intentional interception of a wire or electronic communication or the intentional disclosure of the contents of such an interception
 - Telephone conversations
 - Emails in transmission
 - Criminal and civil liability

Wiretapping Act - Exemptions

- Consent
 - No violation if one party consents
 - But mere knowledge of capability to monitor is not implied consent
- Business extension
 - Provider furnished the intercepting device (i.e. no Radio Shack devices)
 - Interception was in the ordinary course of business (i.e. only business conversations)

Stored Communications Privacy Act

- Amended Wiretapping Act to address electronic communications after transmission
- Prohibits third parties from accessing electronically stored communications either “without authorization” or “exceeding an authorization”
 - Emails
 - Social networking accounts
 - Blogs and video blogs

SCA – An Example

- Two restaurant employees fired for complaining about management and posting sexual remarks about managers and customers on password-protected MySpace account after third employee gave manager her password to access the account
- Jury found that third employee was “impermissibly pressured into revealing the password [in violation of the SCA].”
- NOTE: Consent is the key!

Invasion of Privacy

- Unreasonable intrusion into private affairs
 - Accessing an employee's google account
- Public disclosure of private facts
 - E.g. employer would likely face liability for disclosing that it terminated an employed for alcohol abuse
- Prevention
 - Consent
 - Publicly available vs. restricted

Social Media Policies

- Consider your business environment
 - Morale
 - Expectations of employees
 - Microsoft – “be smart about it”
 - Google, Amazon.com – give employees time to work on independent projects
- Consider whether a policy is necessary or desirable

Social Media Policies

- **If implementing a policy, don't overreach**
 - Legal issues
 - Public perception issues
- **E.g., City of Bozeman job application:**
 - “Please list any and all, current personal or business websites, web pages or memberships on any Internet-based chat rooms, social clubs or forums, to include, but not limited to: Facebook, Google, Yahoo, YouTube.com, MySpace, etc.”
 - Application included space for passwords
 - Policy abandoned after outcry

Social Media Policies

- May not need to develop new policy:
 - Add language to existing policies about “social media” and “social networking sites”
 - Business practices/code of ethics
 - Confidential information
 - Client/customer contact
 - Public/media relations
 - Clarify that online activity still is subject to:
 - EEO policy
 - Standards of conduct

Social Media Policies

- If implementing a policy, establish expectations and set reasonable, specific limits on content
 - Not on work time
 - No association with company (or disclaimer)
 - No disclosure of confidential information
 - No disclosure of customer information
 - No disparagement of company
 - Still subject to EEO policy
 - Encourage complaints to HR before posting
 - E.g. Philadelphia Eagles/Brian Dawkins
 - Potential for disciplinary action

If You Have Your Own Site

- Limit number of employees with access
- Establish policy about what can be posted
- Appoint management employee in charge of supervising the site and make all changes subject to his/her review
- Prohibit negative comments about competitors
- Prohibit posting financial information with approval