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E-merging Legal Issues in Today's Electronic Workplace

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LEGAL ISSUES RELATED TO THE WORKPLACE USE OF ELECTRONIC COMMUNICATION DEVICES

- Trade secret misappropriation
- Harassment, discrimination, and retaliation
- Applicant tracking
- Free speech
- Privacy
- Defamation
- Employer liability for employee torts
- Wrongful termination claims

WHAT WE WILL COVER:

- **Employee Blogs/Social Networking Sites**
- **E-Recruiting**
- **New Twists on Old Risks**
- **Electronic Communications Policies**
- **Protecting & Preserving Workplace Information**

EMPLOYEE BLOGS SOCIAL NETWORKING SITES



BLOGS AND THE WORKPLACE

- **Issues:**
 - Employees making comments about their employers in personal blogs
 - Employees supplying confidential information to blog forums
 - Inappropriate blogs
 - Blogs that create copyright/trademark infringement issues
 - Blogs that violate securities laws

BLOGS AND THE WORKPLACE



“The reason I started my blog in the first place was as a form of therapy.”



“I have decided to continue to blog and spread my story about employer backlash.”

BLOGS AND THE WORKPLACE

“The average IQ in America would increase if a bomb were dropped on Wal-mart Stores.”

--David Noordewier



BLOGS AND THE WORKPLACE



SOCIAL NETWORKING SITES



EXAMPLE 1: FACEBOOK FUMBLE

- Former employee of Philadelphia Eagles, posted this status update:
 - *"Dan is ***** devastated about Dawkins signing with Denver...Dam Eagles r Retarded."*



EXAMPLE 2: TWITTER TWIT

- Job seeker offered a job Tweeted this:
 - *“Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.”*
- To which, someone at Cisco responded:
 - *“Who is the hiring manager. I’m sure they would love to know that you will hate the work. We here at Cisco are versed in the web.”*



EXAMPLE 3: PUBLIC SCHOOL TEACHERS *GONE WILD*



- **Charlotte Observer:**
 - According to the report, four other instructors have been disciplined for using the social network for posts showing "poor judgment and bad taste." One teacher listed drinking as a favorite hobby and described her job as "teaching chitlins in the ghetto of Charlotte."

LEGAL LANDSCAPE

Rule:

Employment at-will



LEGAL LANDSCAPE

Exceptions:

- Free speech rights
- Off-duty protection statutes
- Anti-retaliation provisions
- Protected concerted activity
- Whistleblower laws
- Public policy protection
- Securities laws and regulations

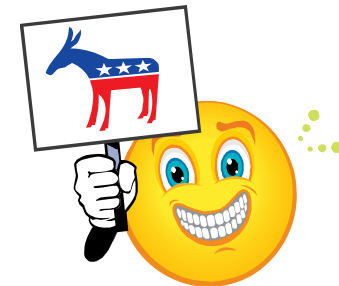
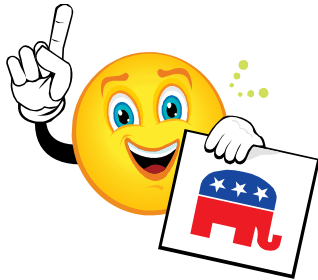
LEGAL LANDSCAPE

- Free speech rights
 - Federal Constitution: public employers only
 - State Constitutions may have broader application



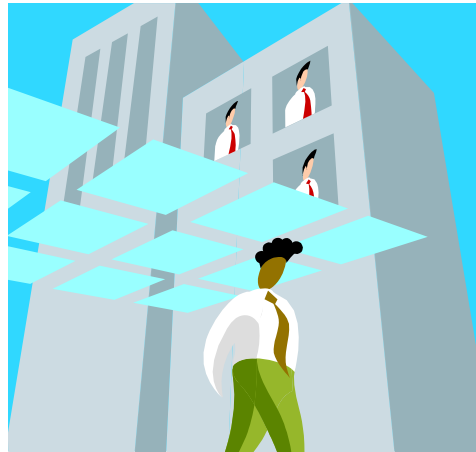
LEGAL LANDSCAPE

- State protection statutes
 - Off-duty protection statutes (NC Smokers' Rights law)
 - Political expression statutes



LEGAL LANDSCAPE

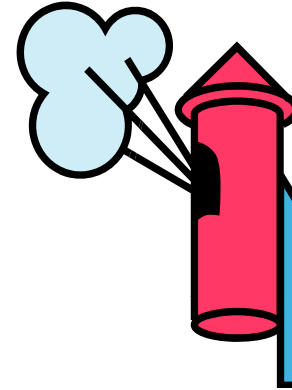
- Anti-retaliation provisions (Title VII, etc.)
- Protected concerted activity (NLRA)



LEGAL LANDSCAPE

- Whistleblower laws
 - Sarbanes-Oxley
 - State laws

- Public policy protection



LEGAL LANDSCAPE

- Securities laws and regulations
 - Improper disclosure of information
 - “Blackout” periods
 - Inaccurate information



E-RECRUITING/HIRING



"On the Internet, nobody knows you're a dog."

E-RECRUITING/HIRING BENEFITS

- **It's Fast**
- **It's Cheap**
- **Large Applicant Pool**
 - **Standardization**
- **More Information = Better Matches**



E-RECRUITING/HIRING RISKS

- **Skewed Applicant Pool
(Younger? More Affluent?)**
- **Faulty Resume Screening Software**
- **Applicant Flow**



E-RECRUITING/HIRING RISKS

- **Too Much Information**
 - From Employer
 - From Applicant

State Law Differences



E-RECRUITING/HIRING RECOMMENDATIONS

- **Don't Abandon Traditional Methods**
- **Remember – Old Rules Still Apply**
 - **Limit Information Provided and Collected**
- **Remove postings promptly**
 - **Inactive or Filled**



NEW TWISTS ON OLD RISKS

- Harassment
- Employee Torts
- Trade Secret Misappropriation

INTERNET USE & E-MAIL

- **Hostile work environment**
 - Employers have a legal duty to take prompt corrective action to prevent harassment from all forms of communication, electronic or otherwise.
 - The employer's response can be a defense to harassment by a non-supervisor.
 - No longer just the "he said, she said" battle.

HARASSMENT IN CYBERSPACE

Blakey v. Continental Airlines, N.J. (2002)

- Employer posted schedules and assignments for pilots on Internet bulletin board.
- In chat area, male pilots posted negative remarks about a female pilot.
- Female pilot sues airline for harassment.

HARASSMENT IN CYBERSPACE

Blakey v. Continental Airlines, N.J.
(2002)

Result?

- Employer has duty to stop employment related harassment.

- *Issues*
 - Was bulletin board “related to workplace?”
 - Did employer have notice?

HARASSMENT IN CYBERSPACE

Blakey v. Continental Airlines, N.J.
(2002)

Lessons?

- Don't need to troll cyberspace looking for harassment of employees
- BUT
 - If you are paying for or sponsoring the chat room, it is likely it is "connected" to the workplace.
 - Should have a policy
 - If you are uncertain of whether activity is "connected," pursue corrective action

INTERNET USE & E-MAIL

Do you need to monitor Internet use?

Doe v. XYZ Corp, N.J. (2005)

- XYZ Corp put on notice that employee accessing porn
- XYZ reviewed websites and found child pornography involving stepdaughter.
- Did not report to authorities.
- At time, employee sexually abusing stepdaughter.
- Employee arrested, stepdaughter sued XYZ Corp

INTERNET USE & E-MAIL

Was employer negligent for failing to monitor and report unlawful activity?

Doe v. XYZ Corp, N.J. (2005)

- Employee downloaded over 1,000 images at work.
- Employer had software to monitor activity.
- Employer had a policy giving it a right to monitor employee computer use and Internet activity.
- Employer knew about conduct.

INTERNET USE & E-MAIL

Result?

Doe v. XYZ Corp, N.J. (2005)

- Employer had a duty to the stepdaughter to inform the police to extent in knew or should have known about activity
- A corresponding duty exists to take effective internal company action (either discipline or termination)

INTERNET USE & E-MAIL

Lessons?

- **Enforce policy prohibiting unlawful Internet activity**
- **Employers cannot ignore Internet-based criminal activities when known**
- **Employers must consider reporting the unlawful conduct to authorities**

CELL PHONES: DRIVING WHILE TALKING/TEXTING

- **Examples:**
 - **Cooley Godward**
 - Attorney struck teenager while talking with client
 - Cooley settled
 - Judgment against attorney for \$2 million, felony conviction, license suspended
 - **Smith Barney**
 - Broker ran red light and hit motorcyclist while talking to a client.
 - Smith Barney paid \$500,000

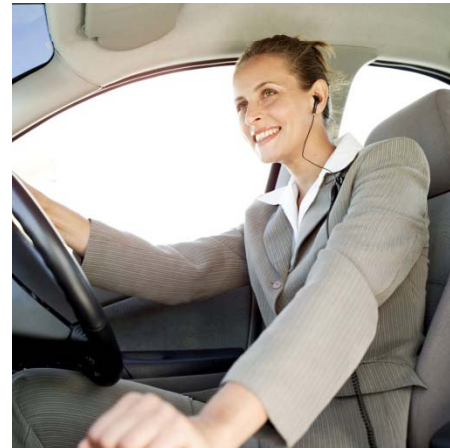
CELL PHONES: OTHER RISKS

- To be a “trade secret,” reasonable efforts must be taken to protect the information
- Can take pictures, videos, scan, fax and E-mail
- Perfect device for stealing confidential information
- Similar issues with iPods and other PDA



CELL PHONES: DRIVING WHILE TALKING/TEXTING

- **Legal Basis:**
 - Respondent Superior/ “course and scope” liability
 - Potential for more trouble in mandatory “hands free” cell phone use states

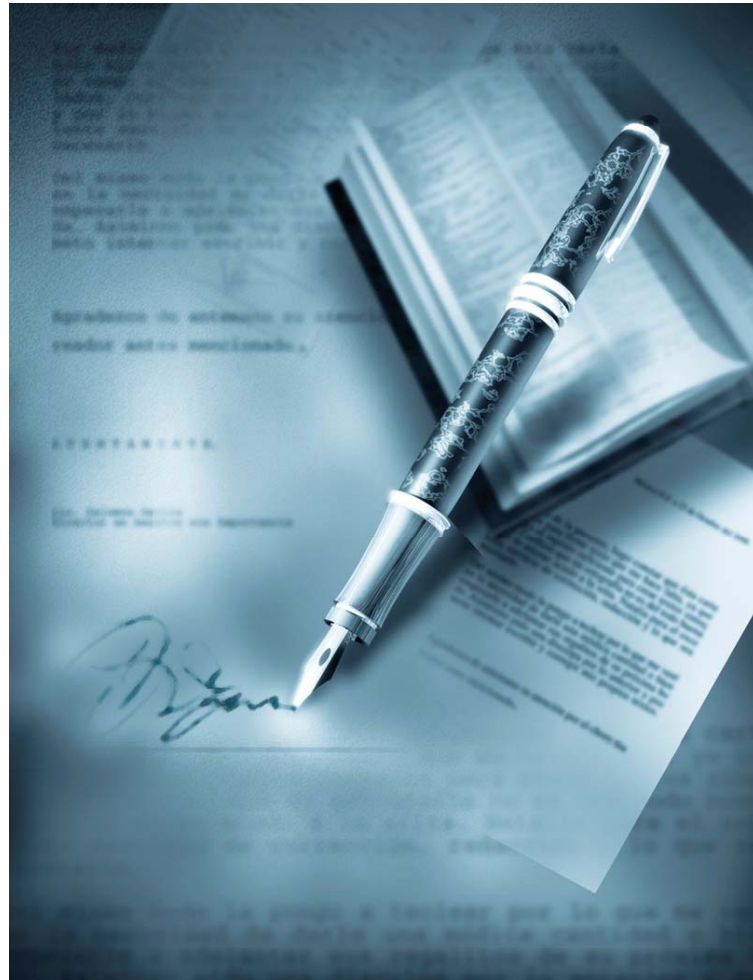


CELL PHONES: DRIVING WHILE TALKING/TEXTING

- **Cell Phone and Texting Driving Policy**
 - Prohibit use of cell phones while driving?
 - Require employees to pull over for calls?
 - Limit to "hands free"?
 - Should employer provide?
 - No texting while driving
- Follow through with discipline
- DMV check



MANAGING YOUR RISK



NEED FOR UPDATED ELECTRONIC COMMUNICATIONS POLICY

- Many outdated
- Discourage or encourage posture?
- Avoid corporate embarrassment
- Legal compliance

DEVELOPING A POLICY

- One size will not fit all
- General v. Specific
- Employee relations considerations



TIPS FOR DEVELOPING ELECTRONIC COMMUNICATIONS POLICY

- **Reiterate that electronic equipment is company property**
- **Clear statement of prohibited conduct**
- **Violation of policy may subject employee to disciplinary action**
- **Educate employees**
- **Include contact person for questions**

THE REALITY

- **Hard-line, hard to enforce**
- **Case-by-case:**
 - **Balance competing legal and business concerns**
- **Eliminate privacy expectations**

PROTECTING & PRESERVING WORKPLACE INFORMATION



PROTECTING WORKPLACE INFORMATION

- **Requires employers to consider:**
 - How is information stored?
 - Who has access?
 - How do you transmit data?
 - What are your security procedures?
 - How will you respond to a security breach?

PROTECTING WORKPLACE INFORMATION

- **Identity Theft**
 - Fair Credit Reporting Act
 - North Carolina Identity Theft Protection Act
- **Trade Secrets and Confidential Business Information**

PRESERVING WORKPLACE INFORMATION: E-DISCOVERY

- "A lawsuit is suppose to be a search for the truth but I want the 'smoking gun.'"
- New Federal Rules of Civil Procedure
- Statistics – American Management Association
 - 1 in 5 employers have had employee e-mail and instant messages subpoenaed in the course of a lawsuit or regulatory investigation
 - 13% have had lawsuits triggered by employee e-mail

STEPS TO PRESERVE

- Familiarity with document retention policy
- Identify key players
- Litigation Hold
- Repeating instructions
- Monitoring compliance
- Asking employees to produce documents
- Segregating and safeguarding archival media



LITIGATION HOLD

- **Filed or threatened litigation**
- **Unique responsibility**
- **No retaliation**
- **No destruction of documents**
- **Overrides document destruction policy**
- **Negative consequences**



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