Today

- Employee Expression – What Is and Is Not Protected
- Protecting the Employer’s Brand on Social Media
- Employer Responses to Negative or Harmful Social Media
- Using Social Media as a Selection Tool for Hiring
- Developing a Social Media Policy for Your Company
James Damore v. Google
To Fire or to Not Fire?
James Damore v. Google

- Systematic, illegal discrimination against conservatives and white men
- Google’s efforts to increase the gender and racial diversity exclude white people, men, and conservatives
- Fired for perpetuating offensive gender stereotypes
Juli Briskman v. Akima L.L.C.
To Fire or to Not Fire?
Juli Briskman v. Akima L.L.C.

• Gesture was “core political speech” protected by Virginia law done on her own free time on a Saturday – a peaceful protest
• Damage to the reputation and the business of Akima, a federal contractor
• Picture taken and posted by pool photographer
Employee Use of Social Media

What is Legally Protected?
Sources of Protection for Employees

1. “Protected concerted activity” under the NLRA
2. State laws protecting social media privacy
3. Other state law protections -
   • Pay equity laws (discussions about pay)
   • Public policy claims
   • Political affiliation (D.C.)

But, the First Amendment DOES NOT APPLY!
Protected Concerted Activity ("PCA")

National Labor Relations Act

- Gives all “employees” a federal right to act together for the purpose of “mutual aid or protection.”
  - Applies to both non-union and union employees.
- “Protected Concerted Activity” ("PCA") is the name for the right of employees to act in concert for their mutual aid or protection in connection with wages, hours, and working conditions.
- Employees also have the right to communicate with one another regarding workplace concerns and to express criticism about the employer.
What About Supervisors and Managers?

- They are *not protected* under the NLRA!
- Federal labor law does not give them a right to engage in protected concerted activity or to speak critically about the employer.
- Under the NLRA, supervisors and managers are not considered “employees” protected by labor law.
- An employer can fire a supervisor for criticizing company policies without violating the NLRA.
The NLRB vs. Social Media

- During the Obama Administration, the NLRB aggressively sought to protect employee use of social media, even for highly offensive speech.
  - *NLRB v. Pier Sixty, LLC*, 855 F.3d 115 (2d Cir. 2017)

- See NLRB General Counsel Memorandum OM 12-59 (May 30, 2012)
  - Issued by Former NLRB GC Lafe Solomon.
The NLRB is moving toward more business-friendly standards now that there is a Republican majority.

- 3 Republican appointees, 2 Democratic appointees.


- On December 14, 2017, the NLRB issued a new analytical framework for evaluating the legality of work rules, including social media policies.
- In *Boeing*, the Board overruled the subjective test in *Lutheran Heritage*, 343 NLRB 646 (2004) which the previous NLRB had used to strike down many social media policies.
The Board will no longer find unlawful the mere maintenance of facially neutral employer policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee ‘would reasonably construe’ a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the *Lutheran Heritage* test …

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Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on the NLRA, and (ii) legitimate justification associated with the rule.

*The Boeing Co.*, 365 NLRB No. 154, slip op. 2-3.
Online Privacy Protection

- Electronic Communications Privacy Act of 1986
  - Consent Exception, e.g., Employee signs acknowledgment or agreement that employer electronic systems will be monitored

- Twenty-five states, including Maryland and Virginia, have enacted laws restricting employers from requesting social media passwords from current or prospective employees.
  - Local laws:
    - Maryland: Md. Code, Lab. & Empl. § 3-712
    - DC: None (but note that employers may not discriminate on the basis of political affiliation)
Online Privacy Protection (cont’d)

- Maryland and Virginia
  - Statutes are similar but different.
  - Employer cannot require disclosure of password or take adverse action for failure to disclose or permit access.
  - Limited exceptions permitted for investigations based on receipt of information warranting certain types of investigations involving violation of company policies, securities laws, etc.
Social Media Posts – Protected?

- Police officer terminated for posting racist Snapchat
- Mayor decides to terminate her employment publicly on Facebook
Social Media Posts – Protected?

-----Original Message-----
From: Kevin Colvin [mailto:...
Sent: Wednesday, October 31, 2007 3:55 PM
To: Jill Thompson (North America)
Cc: Paul Davis (North America)
Subject:

Paul/Jill -

I just wanted to let you know that I will not be able to come into work tomorrow. Something came up at home and I had to go to New York this morning for the next couple of days. I apologize for the delayed notice.

Kind regards,

Kevin
From: Paul Davis (North America)
Sent: Thursday, November 01, 2007 4:54 PM
To: Kevin Colvin; Jill Thompson (North America); Kevin Colvin (North America)
Subject: RE:

Kevin,

Thanks for letting us know--hope everything is ok in New York. (cool wand)

Cheers,
PCD
You’re Fired!

- Employee updated Facebook status: “OMG I HATE MY JOB” with insult about boss (oops! she forgot she had “friended” her boss) He wrote back a few hours later and fired her on Facebook!

- Employee tweets customer’s full name with caption: “[name] would be a great name for a porn star.” Customer’s lawyer called the next day.

- Radio producer terminated for racist tweets while drunk.

- Hospital nurse posted and tagged the hospital on Facebook: “Soooo sleepy here in the ICU. Will someone please code and give me something exciting to do? #isthatbad?”
Discipline

Proceed with caution

– How was the information obtained? Public vs. private posts; credibility of source?
– What was the basis for viewing the employee’s social media accounts?
Using Social Media to Recruit and Hire Employees
Recruitment & Hiring
Who Does it?

- 60% of employers use social media to screen applicants
- Of those employers:
  - 36% have “friended” or followed candidates with private accounts.
  - 68% of those requests are granted (Down from 80% in 2015)
So Much for the Employment Application….

- An employer’s use of social media to evaluate a potential hire can provide the employer with “knowledge” of certain information that it is legally proscribed from asking about --
  - Race, color, age from his/her photo
  - Sexual orientation from pics of spouse/significant other
  - Social habits – photos of parties, drinking, etc.
  - Health information or family medical history
  - Religion from family pictures

- “Lack of knowledge” defense – gone!
Recruitment & Hiring
Risks

Invasion of Privacy?

- Does the applicant have a “reasonable expectation of privacy” in what he or she has posted online?
- Key Question: Is the applicant’s profile accessible to the public at large or only through friends?
- Problems arise when an employer uses deception to access an applicant’s or employee’s social media account.
Recruitment & Hiring
Best Practices for Mitigating Risk

✓ Adopt and enforce a policy governing the use of social media in the hiring process: Use the same search criteria for similarly situated jobs/employees.

✓ Notify candidates that a search of publicly available social media will occur.

✓ Separate the Social Media Researcher: Insulate hiring officials from direct access to an applicant’s social media activities. Use a designated reviewer.

✓ Search only publicly available information: Never ask candidates to provide passwords, accept friend requests or otherwise disclose private social media information.

✓ Delay the social media search until after making a conditional offer: This will avoid allegations that the employer improperly awarded/withheld offers based on protected classifications.

✓ Look for specific things to report to hiring officials: Inappropriate photos; ties to a competitor; activities contrary to company values or business agenda.

✓ Document the reasons and notify the candidate: If the candidate is not hired because of information learned on social media, document the reasons and notify him or her of them.
Class action lawsuits filed by Outten & Golden

- Claims of age discrimination.
- December 2017 -- Class action lawsuit hits T-Mobile, Amazon, Cox, and hundreds of large employers for allegedly using Facebook to exclude millions of older Americans from job ads in violation of ADEA.
- Micro-Targeting based on User Demographics
- Facebook Dropdown Menu: “Why am I receiving this Ad?”
Protecting the Employer’s Brand on Social Media
Social Media Strategy

- Virtually every organization needs a social media strategy to communicate and build its brand.
  - Fortune 100, non-profits, retailers, media companies...
- To have an effective social media strategy, a company must control who has the power to speak on its behalf.

Follow us on

Facebook
Instagram
Twitter
LinkedIn
Question – Do You Know?

- Who has access to your company’s official Twitter, Facebook, and LinkedIn handles?
- What do you do if your P.R. Intern goes rogue?
- What happens if HR puts the employee who handles your company’s Twitter account on a performance improvement plan, and he or she wants to use the company account to tweet about what a horrible employer you are?
- What are the terms of your agreements with social media platforms?
Protecting Your Social Media Strategy

- Establish a policy identifying specific company officials with authority to use or approve the content of social media posts by the company.
- Identify who has authority to communicate on the company’s social media channels.
- Ensure company has the ability to remove negative posts from its designated channels.
- Checks and balances – Ensure a separate company official has authority to revoke or disable passwords and access.
Employer Responses to Negative or Harmful Social Media Posts
Social Media Attacks by Former Employees

- Cyber-Defamation aka Internet Badmouthing
  - Job rating websites (Glassdoor or JobBite)
  - Consumer complaints (Complaints Board, Ripoff Report, or Yelp)
  - Employer’s own Internet message board
  - Facebook, Twitter, etc. (personal & company accounts)
Social Media Attacks by Former Employees

- “Demoralizing over worked under paid and under appreciated.”

- “Purgatory…. Management was nothing but a revolving door of morons…."

- “Corrupt, unprofessional and racists…. Never saw a company of this low standards in work ethics. So much of favoritism, abuse, kickbacks, lies and unprofessional bunch of senior mgmt. sick place. Complained to HR and then starts the witch hunting.”
  – *Job Bite*, March 2013; anonymous IT manager (company redacted).
10 Steps for Responding to Attacks by Former Employees

1. Take a deep breath.
2. Take another deep breath.
3. Don’t overreact.
4. Don’t overreact.
5. Seriously, don’t overreact.
6. Think about whether the content is legally protected.
10 Steps for Responding to Attacks by Former Employees (cont’d)

7. What interests are in danger – Trade Secrets or IP? Defamation/Reputational Damage?

8. Quantify the actual harm to the company if the content is not removed – what audience is actually seeing it?

9. Consider low profile options first – Can you request that the social media site remove or delete?

10. If more direct action is required, will taking action draw more attention to the harmful content?
   - Demand employee to remove
   - Demand that site/platform remove
   - Respond to the merits of the post
   - Litigation – defamation/tortious interference, etc.
Social Media Policies

What’s in Yours?
Social Media Policies

Controlling the Company’s Message –

1. Identify the social media channels that the company will use and establish protocol for control of passwords, etc.

2. Identify officials with authority to speak on behalf of the company on social media.

3. Establish protocols for approval of content to be posted on behalf of the company, either on its own channels or elsewhere.

4. Prohibit all others from holding themselves out as representing or speaking for the company on social media.

5. Consider* restrictions on use of company logo and trademarks, by anyone other than individuals authorized in #1.
Employee Usage -

1. General – You are responsible for everything you say online. Think through the consequences before you post. Assume your posts will be received by co-workers and current and potential customers/clients.

2. Company policies extend to conduct or statements that occur via social media, e.g., workplace harassment, bullying, workplace violence, non-discrimination.

3. No disclosure of trade secrets, proprietary, confidential information,* business plans or proposals, non-public financial information, sensitive personal information or 3rd party information subject to an NDA.
Social Media Policies (cont’d)

Employee Usage (cont’d) -

4. No disparaging the company’s products or services or customers/clients.

5. Endorsements or testimonials regarding the company’s products or services are governed by FTC Rule. (16 CFR Part 255.5).

6. Banking/financial employers – incorporate FINRA guidance on social media – no misrepresentations or misleading conduct.

7. Include a proviso protecting NLRA and other statutory rights – “nothing herein is intended to infringe . . .”

8. Consider more restrictive limitations –
   – No personal use during work hours/ on company devices
   – Encourage managers/supervisors to avoid connections with subordinates except for business purposes.
   – Special rules for employees w/ security clearances (CI Risk).
Transparency

- Any employee who comments on the company’s business on social media must -
  - fully disclose his or her connection with the company, and
  - Affirmatively state that all opinions and thoughts that he or she expresses are his/her own and do not necessarily represent the position of the company.
Drafting Tips

- To avoid writing overly broad prohibitions that could run afoul of the NLRA, use lawful examples to illustrate what is prohibited.
- Remember – NLRA Rights do not apply to supervisors or managers, so they can be subject to more restrictive rules.
- You can’t anticipate everything – make it elastic but not overbroad.
Final Thoughts

- Area of the law is still evolving
- Issue Spotting
  - Hiring/recruiting/applicant
  - PCA
- Lawful Policies – Drafting is key
- Don’t become a Social Media Horror Story
Questions?

THANK YOU!
Appendix
Maryland employers **may not:**

- Request or require an employee or job applicant to disclose his or her user name, password, or other means for accessing a personal account on an electronic communications device.
- Refuse to hire, discharge, discipline, or threaten an employee for refusing to disclose his or her user name, password, or other means for accessing a personal account on an electronic communications device.

Maryland employers **may:**

- Conduct an investigation based on the receipt of information about the use of a personal web site or social media account by an employee for business purposes, in order to ensure compliance with applicable securities or financial laws or regulations.
- Investigate an employee’s actions based on the receipt of information about the unauthorized downloading of an employer's proprietary information or financial data to a personal web site or social media account by an employee.
Virginia employers may not

- Require a current or prospective employee to disclose the username and password to his or her social media account, or to add an employee, supervisor, or administrator to the list of contacts associated with his or her social media account.

- Threaten or take action against a current employee, or fail to hire an applicant, for refusing to disclose his or her social media account credentials or add an employee, supervisor, or administrator to the list of contacts in his or her social media account.
Virginia employers **may**:

- View publicly available info about a current or prospective employee.
- Ensure compliance with corporate legal requirements (including the rules or regulations of self-regulatory organizations).
- Ask an employee to disclose his username and password in order to comply with formal investigations and related proceedings, where employee’s account activity is reasonably believed to be in violation of law or employment policies.
- Receive an employee’s account information inadvertently, or through the use of an electronic device supplied by the employer or a program that tracks an employer’s network, but the employer cannot use such information to access his/her social media account.
Lawful Off-Duty Conduct

New York - N.Y. Labor Code §201-d

Makes it unlawful for an employer to make hiring or firing decisions, or otherwise discriminate against an employee or prospective employee because of that individual's . . . legal recreational activities outside of work hours, off of the employer's premises, and without use of the employer's equipment or other property.
Lawful Off-Duty Conduct

**California** – CA Labor Code §§ 96(k), 98.6

Makes it unlawful to discharge or otherwise discriminate against an employee for lawful conduct occurring during nonworking hours away from the employer's premises.
Lawful Off-Duty Conduct

**Colorado** - Colo. Rev. Stat. § 24-34-402.5

Makes it illegal for an employer to terminate an employee because that employee engaged in *any lawful activity* off the employer's premises during nonworking hours unless the restriction relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees; or is necessary to avoid, or avoid the appearance of, a conflict of interest with any of the employee's responsibilities to the employer.
Lawful Off-Duty Conduct

North Dakota - N.D. Cent. Code § 14-02/4-03

Makes it a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to treat a person or employee adversely or unequally with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.
Employers may not:

(1) prohibit an employee from:
   (a) inquiring about, discussing, or disclosing the wages of the employee or another employee; or
   (b) requesting that the employer provide a reason for why the employee's wages are a condition of employment;

(2) require an employee to sign a waiver or any other document that purports to deny the employee the right to disclose or discuss the employee's wages;
Employers may not (cont’d):

(3) take any adverse employment action against an employee for:

(a) inquiring about another employee's wages;
(b) disclosing the employee's own wages;
(c) discussing another employee's wages if those wages have been disclosed voluntarily;
(d) asking the employer to provide a reason for the employee's wages; or
(e) aiding or encouraging another employee's exercise of rights under this section.
Exception:

An employer may, in a written policy provided to each employee, establish reasonable workday limitations on the time, place, and manner for inquiries about or the discussion or disclosure of employee wages.

These limitations may include prohibiting an employee from discussing or disclosing the wages of another employee without that employee's prior permission.
Maryland: Equal Pay for Equal Work
Md. Code, L&E § 3-304.1

- Employees who have access to the wage information of other employees as a part of the employee's essential job functions may be permitted to disclose that information if the discussion or disclosure is in response to a complaint or charge or in furtherance of an investigation, a proceeding, a hearing, or an action under this subtitle, including an investigation conducted by the employer.

- Employees who have access to wage information as part of their essential job functions may disclose their own wages or wage information about another employee obtained outside the performance of the essential functions of the employee's job.
Maryland: Equal Pay for Equal Work
Md. Code, L&E § 3-304.1

Nothing in the law may be construed to:

• require an employee to disclose the employee's wages;
• create an obligation on any employer or employee to disclose wages;
• permit an employee, without the written consent of an employer, to disclose proprietary information, trade secret information, or information that is otherwise subject to a legal privilege or protected by law; or
• permit an employee to disclose wage information to a competitor of the employer.
DC Wage Transparency Act
D.C. Code §§ 32-1452 and 1453

• Employers may not prohibit an employee from inquiring about, disclosing, comparing, or otherwise discussing the employee’s wages or the wages of another employee.

• Employers may not discharge, discipline, interfere with, or otherwise retaliate against an employee who inquires about, discloses, compares, or otherwise discusses the employee’s wages or the wages of another employee or is believed by the employer to have done so.
DC Wage Transparency Act
D.C. Code §§ 32-1452 and 1453

• Employers may prohibit an employee with regular access to information regarding the wages of other employees in the course of the employee’s work, such as a human resources employee, from sharing such information, unless the disclosure is in furtherance of or response to an investigation, action, or hearing, or there is a legal obligation for the employer to furnish the information.
• Employers are not required to disclose the wages of one employee in response to an inquiry by another employee.
• Employees are not required to disclose their wages in response to an inquiry by another employee.
Trademarks and Company Logos

- NLRB Advice Memorandum from the Office of the General Counsel, March 21, 2012, Giant Food LLC, Cases 05-CA-064793, -065187, and -064795.
  - Provisions of Giant Food’s social media policy prohibiting employees from using the Employer’s logo, trademark, or graphics were unlawful.
  - “Although the Employer has a proprietary interest in its trademarks, including its logo if trademarked, employees’ use of its name, logo, or other trademark while engaging in Section 7 activity would not infringe on that interest.”