

Should employees use Facebook at work?

Guest Column: Brian Lamoureux
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As a lawyer who focuses on social media issues, I am often asked whether employers should “block” their employees from accessing Facebook during working hours. These employers are concerned that their employees are wasting time online, engaging in inappropriate online behavior and exposing their companies to liability.

In a perfect world, all employees would studiously do their work at their desks, and not visit any websites unrelated to work. However, as we all know, the reality is that Facebook is the new Solitaire, and companies are struggling to strike a balance between controlling their work environment and giving their employees room to engage with others online.

This question involves two critical issues – cultural and legal. The work-culture issues are outside the scope of this essay, but suffice to say, some employers view social media access as critically necessary for team-building, marketing, employee morale and general camaraderie within the office. Conversely, other employers view social media as completely unnecessary and distracting from the tasks at hand.

This article focuses instead on the legal issues, of which there are many. Employers are most concerned about potential liability caused by their employees. For example, an employee could post some confidential or negative information about a client or customer on Facebook. This could give rise to a claim that the employee – and by extension, the employer – breached some duty owed to the client or customer.

Another common Facebook-specific issue involves harassment. Years ago, sexual and other harassment used to occur in hallways, conference rooms and later, via email. Now, much of this harassment has found a new home online, specifically on Facebook. Status updates, pictures, “likes,” “pokes,” and chats are all fertile ground for harassment. Compounding matters is that employers often are unaware of this behavior, unless and until someone brings it to their attention. Worse yet, unlike traditional harassment, this behavior often occurs after working hours, on the weekend, or on personal mobile devices not owned or controlled by employers. Simply put, the explosion of Facebook in the workplace has made it much more difficult for employers to police their workplace.

You may be wondering, “Who cares? Why is it important for me to know what’s happening among my employees online? They’re all adults. I don’t want to know.” This is a natural reaction to a complicated problem. However, employers simply cannot bury their heads in the sand and pretend that their legal obligations end when their employees login to Facebook.

To the contrary, employers have a duty under federal and state law to ensure that all aspects of their workplace are free from harassment.

Certainly, employers are generally insulated from liability unless they're aware of the harassment. But, this begs the question: if the harassment occurs via Facebook during working hours on computers owned by the employer, could an employee claim that the company "permitted" the harassment by failing to have policies or restrictions in place to stop the harassment? This is an open legal question, but it is just a matter of time before an employee sues an employer for failing to implement policies or restrictions that might have prevented the online harassment under the employer's nose.

If you think this risk is remote and far-fetched, think again. Most employers have electronic communications policies which state that the employer reserves the right to review and monitor all computer and network activity and to ensure that company computers are being used for work-related purposes and in compliance with all laws. Does this policy now require employers to ensure that their employees don't use company computers and bandwidth to harass other employees on social media? A strong argument can be made that it does.

It should come as no surprise that Facebook stores virtually everything that occurs on its network indefinitely. Very few people are aware of Facebook's "download your information" feature. This tool stores dozens of pieces of information about all of your activity on Facebook, such as your IP addresses, sent and received messages, searches you've conducted on Facebook, friend requests that were sent or received, events to which you have RSVP'd, etc. This is a treasure trove of information which is very easy to have Facebook email you in a zip file. It is impossible to delete any of this data unless you delete your Facebook account entirely.

Courts are already starting to deal with this evidence in litigation cases. Lawyers are demanding that other parties download and produce this Facebook file. Facebook users spend billions of minutes each day on the site. Therefore, in a sexual-harassment case or a discrimination case, for example, I can think of no more fertile ground for discovery than scrubbing the litigants' social media profiles for information and leads to other evidence.

So, if your company's culture would support pulling the plug on Facebook at work, you should give some strong thought to doing so. This won't stop employees from taking "digital smoke breaks" and using their mobile devices to access social media sites, but it will at least remove their ability to do so using your networks and resources. •

Brian Lamoureux is a partner with Pannone Lopes Devereaux & West.