



Social Networking: The Lurking Dangers for Employers

By Andrew A. Kimler, Esq.*

THE USE OF THE INTERNET by employers to either screen prospective job applicants or to investigate the activities of current employees has resulted in a steady increase in litigation based upon violations of either state or federal laws. Among other things, violations of law may involve an employee's privacy rights or civil rights. In this article, we will focus on the potential exposure employers face in connection with such activities and we will set forth various suggestions and guidelines in order to minimize the risks for employers who use the internet to either recruit or gather information on employees and/or applicants.

At the outset, it is important to emphasize the extensive use of social networking by Americans. Reports suggest that Facebook has more than 400 million users, while LinkedIn has in excess of 39 million and Twitter has at least 5 million. Studies show that employees visit social networking sites such as Facebook, Myspace, LinkedIn or Twitter quite often. In that regard, nearly 50% reportedly visit social networking sites one to five times a week. Moreover, approximately 50% of the employees who access such sites during work hours do so for personal reasons.

Because of the extensive use of such sites, many employers utilize them to screen prospective employees. Employers who observe evidence of drug and alcohol use as well as provocative photographs frequently reject applicants. While there is no specific statute that prevents an employer from searching networking profiles to screen applicants or to monitor current employees, employers should nevertheless consider the hazards they may encounter by engaging in these activities.

Non-Work Conduct

Generally speaking, a New York employer may not discriminate against an employee or refuse to hire an applicant based upon that individual's lawful recreational activities that are conducted away from the worksite during non-working hours. However, an employee's off-duty conduct is not protected if it creates a "material conflict of interest" that is related to trade secrets, proprietary information or some other business interest. While it appears that no New York court has applied this law to social networking sites, it remains possible that an employee's online activities can fall within the purview of this law. Nevertheless, there are other statutes that protect employees from an employer's access to a social networking site.

* I wish to acknowledge my assistant, Ms. Esther Alessandro, for the research assistance she provided in the preparation of this article.

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Privacy Claims

The Courts have routinely found that employees have no reasonable expectation of privacy in their workplace computers, especially where the employer has a policy that clearly informs employees that company computers cannot be used for personal e-mail activity and that they will be monitored. In that regard, it has also been held that employees have no reasonable expectation of privacy where an employer has an explicit policy banning personal use of office computers and which permits monitoring. Under such circumstances, an employee who uses an employer's computer or e-mail system, cannot claim a right to privacy with respect to e-mails contained on the employer's computer. In such instances, employees have no expectation of privacy in e-mails sent from or received and stored on an employer's computers.

On the other hand, an employer's access to third-party communication service provider systems may expose the employer to invasion of privacy claims. For example, the Stored Communications Act ("SCA") imposes a variety of penalties if a person

"... an employer's access to third-party communication service provider systems may expose the employer to invasion of privacy claims."

accesses an electronic communication service, or obtains an electronic communication while it is still in electronic storage, without authorization. More specifically, a majority of courts that have addressed the issue have determined that e-mail

stored on an electronic communication service provider's systems after it has been delivered, as opposed to an e-mail stored on the personal computer of an employer, is a "stored communication" subject to the SCA.

An interesting example of this involved a New York employer who obtained a former employee's username and password to his Hotmail account, which he left on the employer's computers. She then used that information to go into his Hotmail account and read and printed his e-mails. More specifically, the employer logged directly into the Hotmail system where the e-mails were stored and viewed and printed them directly off of Hotmail's system. Thus, it was determined that the employee's access to the employee's e-mails while they were in "storage" on the service provider's systems constituted a violation of the SCA.

In another case an employer gained access to its employees' password-restricted My Space page. The chat group could only be accessed by invitation and access was limited by a personal password. The site indicated that it was private and that it was a place where a restaurant's employees could vent about their jobs and engage in "gossip." Eventually, one member of the chat group provided the restaurant's management with access information and after management viewed the My Space page, two of the employees were fired. Award-

ing both compensatory and punitive damages, a federal court found that the employer violated the SCA since it did not have any authorization to access the site and the employee who divulged the information to management was deemed to have been coerced. Thus, it was determined that the employer accessed a "stored communication" without authorization and with knowledge that it was "private" and for "members only."

Attorney-Client Privilege

An offshoot to the privacy issue is the attorney-client privilege with respect to the monitoring of e-mails. In that regard, the courts are split on whether e-mails sent using an employer's e-mail account remain privileged. In one case a federal court ruled that the privilege applied primarily due to the fact that the employee was not aware that his employer had access to the e-mails. In that case, the employer did not inform its employees that it would have regular access and save e-mails and the employer did not ban the personal use of the employer's e-mail system. On the other hand, another federal court ruled that the privilege was waived with respect to e-mails sent by the employee to his attorney from work since it was "unreasonable" for an employee to believe that his e-mails, sent directly from his company's e-mail address over its computers, would not be stored by the employer and made available for retrieval. In another case, a federal court ruled that e-mails sent to an attorney from a company computer were not privileged since employees were on notice that the company's handbook precluded any expectation of privacy.

Discrimination Concerns

As we discussed above, employers "google" and explore social network sites to obtain information about prospective employees. Such activities, however, may expose an employer to possible discrimination claims based upon the personal information an employer can glean from such sources. For example, Facebook can provide various bits of information of an individual's personal life, which an employer would never inquire about in a face to face interview. More specifically, Facebook provides information such as gender, date of birth, religious views and sexual orientation. All of this would be considered off limits during a conventional interview. Once an employer possesses such information, however, it may face discrimination claims from applicants who are rejected and who claim that the employer's decision was based upon information contained on a particular social network site. Likewise, some social networking sites allow users to post a photograph that would reveal to a prospective employer the gender, race and some indication of an applicant's age. Such information can also provide a basis for a discrimination claim by an applicant who is not hired.

The use of social networking sites as a means for recruitment may also subject an employer to discrimination claims based upon the "disparate impact" this may have on a protected class of individuals. In that regard, disparate impact involves the application of an otherwise neutral employment practice that adversely affects members of a protected class. For example, it may be argued that members of a certain race, gender or age group are more likely to utilize social networking sites.

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Federal Homebuyer Credit Expires, But Not The Great Deals

By John P. Gordon, Esq.

ON MAY 1, 2010, the \$8,000 federal first-time homebuyer tax credit officially expired. Anybody in contract as of April 30, 2010 may also make it in under the deadline. Those who already received the credit should keep in mind that there are requirements for staying in the home. Moving out can force you to pay back the credit.

Even though you may have missed the deadline, you can still find great deals. Prospective buyers who were ineligible for the credit or did not act in time to take advantage of it may even find a slight dip in the market as a result of the federal subsidy disappearing. Regardless, home prices are much lower than a few years ago. Leading indicators suggest that home prices in New York have leveled off. Although nobody can predict where the market will go from here, the housing market may have reached bottom. Considering that there are foreclosures, short sales, and bank-owned properties that can yield discounts well below normal market prices (although these come with their consequent risks), this market is being labeled a perfect storm for buyers.

Rates are still low for those who can qualify for a mortgage. With tightened lending standards, some potential borrowers who previously qualified may have a problem. Nevertheless, there are programs for people who do not qualify for a conventional mortgage, either because of their lack of savings for a 20% down payment, low credit scores, low income, or a combination of these factors.

Virtually all levels of government have some programs, such as the FHA and the Veterans' Administration, SONYMA, as well as state and local government down payment assistance grants, that can help you buy while the prices are low. Some employers run employee assistance programs, designed to keep workers in New York, that can help with a down pay-

ment on a home. Many labor unions also offer benefits for homebuyers. Buyers are also taking advantage of FHA mortgages, which allow borrowers to close with as little as a 3.5% down payment plus closing costs. This is great news for people with little savings looking to buy a home.

Each person or family has their own unique set of circumstances. There is no right loan for everybody. Some of the programs mentioned are only available to people with limited incomes, little or no existing debt, or those who are buying low-cost housing in areas designated to receive subsidies.

Anybody thinking of buying a home should examine their finances and projected budget, taking into account maintenance and upkeep of the home, as well as the likelihood of taxes and utility costs increasing. Run the numbers to find out the likely tax benefit to be gained from the itemized deductions for mortgage interest and real property taxes as well as any other available itemized deductions, as compared to the standard deduction. These should all make their way into the calculation of how much house you can buy while being able to set aside money for non-housing living expenses, repairs and emergencies. **M**

John Gordon, Esq. is an Associate in the Real Estate and Business Law Practice at Vishnick McGovern Milizio. If you have any questions about this article or would like a recommendation for a real estate professional, John can be reached at 516-437-4385, ext 143 or via e-mail at jgordon@ymmlegal.com.



John P. Gordon, Esq.

news Brief

H.R. 5107: The Employee Misclassification Prevention Act

A proposed bill that would make employee misclassification (i.e. classifying employees as independent contractors) a federal offense is rapidly making its way through Congress.

H.R. 5107 would amend the Fair Labor Standards Act of 1938 (FLSA) to, among other things, require employers to keep records of non-employees who perform labor or services for remuneration and to provide a special penalty for employees who misclassify employees as non-employees. Civil penalties would be imposed, up to \$1,100 per employee for first-time violators, and up to \$5,000 per employee for repeat or willful violators.

VMM's attorneys are available to assist employers in evaluating and reducing their risk under labor and anti-discrimination laws. **M**





news & Events

VMM Team Raises more than \$32,000 for the MS Society of Long Island



Top photo: The VMM Team; Bottom photo: Meghan Chainani and Bernard McGovern

Once again, Vishnick McGovern Milizio was a major supporter of the National Multiple Sclerosis Society Long Island Chapter (the Society).

On April 22nd the firm was a major sponsor of the Society's annual Spring luncheon.

On May 2, 2010, the firm put together a team of attorneys, employees, colleagues, friends and family to participate in the 2010 MS Walk to raise awareness about multiple sclerosis. This year our team boasted nearly 90 members. Together we raised more than \$32,000 that will help make a difference for those who face the unpredictable nature and devastating effects of multiple sclerosis.

Thank you to all our team members and supporters!

Congratulations!

On April 22 the annual Dinner for the State of Israel Bonds was held at Temple Beth Shalom in Roslyn, New York, honoring Rimon and **Sandra Reshef**. There were 125 attendees at the event, which raised more than \$600,000. The evening included a tribute to the Reshefs by Rabbi



Alan Lucas and a short speech by Rimon Reshef thanking the State of Israel Bonds for the honor and to all those attending for their generosity and show of support. **Sandra Reshef** is an Administrative Assistant and Receptionist at Vishnick McGovern Milizio LLP.

Baby News!

Congratulations to Mark and **Nancy DiMaggio** on the births of their first granddaughters... just weeks apart. Giuliana Nancy Rampulla was born on April 15, 2010 and Gia Pamela DiMaggio was born on May 26, 2010.



Celebrating 25 years!

May 2, 2010 marked the 25th year that **Terry DeStasio** and Partner **Joseph Trotti** have been working together. Commitment and long-term teamwork is part of what makes Vishnick McGovern Milizio not just a great place to work, but also a great place for clients.

Professional Updates

Partner **Christopher J.L. Deziel, Esq.** and Associate **Eun C. Jo, Esq.** published an article entitled “Pitfalls and Basic Issues Involving Estate Tax Apportionment,” in the March 2010 issue of the *Nassau Lawyer*. A copy of this article can be found on our website at www.VMMLEGAL.com.



Christopher J. L. Deziel, Esq.



Eun C. Jo, Esq.

In February, **Avrohom Gefen** served as the Dinner Chairman at the Yeshiva Beth Moshe annual dinner. In April, he was the Journal Chairman at the Congregation Kahal Chesed V’Emes annual dinner.

Decisions of Interest

Howze v. Corporate Debt Solutions I Inc., Index No. 25029/2009. Vishnick McGovern Milizio represented the plaintiff. The plaintiff sued the defendant based on the defendant’s non payment of money pursuant to the terms of promissory note. The Court granted plaintiff’s motion for summary judgment and concluded that the defendant failed to demonstrate the existence of evidence that it was not liable for payments on the promissory note. As such, the Court awarded the plaintiff a judgment for the accelerated amount due on the promissory note with interest. *Argued by Michael J. Stacchini, Esq.*

Histrov et. al. v. Antico, et. al., Index No. 27089/09. Vishnick McGovern Milizio represented the defendants. The plaintiffs and defendants are cousins. During her lifetime, the parties’ aunt transferred a house to the defendants. After their aunt died, the plaintiffs started a lawsuit arguing that the transfer was improper. The Court granted the defendants’ motion to dismiss the complaint. The Court found that the plaintiffs did not have legal capacity to commence the lawsuit because they did not have any interest in the property either at the time that their aunt transferred the property or at the time that they commenced the lawsuit. *Argued by Michael J. Stacchini, Esq.*

Seminars

The attorneys at Vishnick McGovern Milizio LLP offer a variety of educational seminars free of charge to business and community groups. Topics include:

Estate Planning

- How to Protect Your Assets & Interests
- The 3-Generation Juggle: Planning for Your Kids, Your Retirement and Your Aging Parents
- Charitable Planned Giving
- What You Need to Know About Estate Planning
- The Ins and Outs of Elder Care: Understanding Your Options

Business & Real Estate Law

- Legal “Must Dos” for Business Owners
- Buying a Home: Opportunities and Pitfalls
- Understanding Business Entities
- Business Succession Planning

Matrimonial & Family Law

- Protecting Your Assets Before, During and After a Divorce
- Adoptions

Litigation and Employment Law

- Social Networking: A Mine Field for Employers
- ADA Compliance
- How to Protect Yourself Against a Lawsuit

Special-Audience Seminars

- Empowering Seminars for Women (various topics)
- Estate Planning for Doctors & Medical Professionals
- Employment Law Seminars for HR Professionals & Business Owners
- Estate Planning & Jewish Law
- Life & Estate Planning for the LGBT Community

If you would like to schedule a presentation or learn more, contact Saskia Thomson at 516-437-4385, ext 127 or via e-mail at Sthomson@vmmlegal.com.



Seven “Must Dos” For Today’s Business Owners

By Avrohom Gefen, Esq.

ALTHOUGH THERE HAVE BEEN RECENT INDICATIONS that the recession is coming to an end, most businesses are still feeling the pinch of the severe economic downturn. Many business owners are understandably looking for cost-saving measures in an attempt to remain profitable or simply to stay afloat. Using a risk/reward or cost/benefit analysis, however, there are certain areas in which it is simply not worth cutting corners. Now is the right time for owners of large, medium and small businesses to realistically self-assess and resolve to undertake efforts that will both improve their bottom line and prevent potentially catastrophic losses.

Here, in no particular order, is a list of “must-dos” for business owners:

1) Incorporate. If you are not currently operating as a corporation, an LLC or another limited liability entity, you must take steps to do so immediately. You will not have any protection from personal liability if you continue to operate in your own name, a DBA or a partnership. For the same reason, even small business owners who are incorporated must carefully separate their personal and corporate existences or potentially be faced with liability for the corporation’s actions.

2) Properly classify your employees. The federal and state governments are cracking down on employers who misclassify employees as independent contractors seeking to lessen the burdens of payroll tax, Worker’s Compensation and Unemployment Insurance. The risk of misclassification is not worth the reward since an audit may result in substantial fines and penalties and the chance of an audit has increased greatly. Some employers also mistakenly think that certain employees are “management” and therefore exempt from minimum wage requirements. A great number of assistant and middle managers are non-exempt employees as defined by law and are entitled to 1 ½ times their normal hourly rate for every hour of work over forty each week.

Remember, even if an employee’s weekly compensation far exceeds the minimum wage for the hours worked, you still may be violating wage and hour laws. If you are unsure of your employees’ status, speak with a labor and employment attorney.

3) Do not pay employees in cash. Although many business owners are tempted to pay workers in cash, for obvious reasons, here too the risks are great. Wage and hour lawsuits by employees, including class actions, have become a cottage industry. By law, if an employer cannot produce records that show compliance with wage and hour laws, then the employees’ claims and estimations are presumed accurate. Aside from the legal obligations to withhold taxes and various other deductions, properly paying and reporting employee’s compensation will create a “paper trail” that may be used to prevent employee lawsuits. If you do pay your employees in cash, have your employees sign an acknowledgment of cash received.

4) Keep adequate employee records. Again, if you do not keep proper records, then the employee’s records and/or claims are deemed correct and may be used against you in court. The most basic records that must be retained are records of hours worked and compensation paid. In addition, all employers in New York State must give written notice to each newly-hired employee of the rate of pay, rate of overtime pay and the regular pay day and get written acknowledgment of receipt of the notice from each employee.

5) Post all required notices. Conspicuously post notices related to wage and hour law in your place of business. These posters, which should be in a language understood by your employees, may be obtained from the NYS Department of Labor. The minimum wage increased in 2009 so many employer’s posters are now outdated. Failure to post the appropriate notices will work to your detriment in any legal proceeding.

6) Don’t interfere with your employees’ tips. Management and ownership should avoid becoming involved in the collection or distribution of tips. If you take advantage of the minimum wage “tip credit” be sure that this is explained to each employee. If you have not yet explained the tip credit to your employees, do so now, in writing. Each new hire should also receive a written explanation of the tip credit. You can impose a service charge in lieu of tipping, but if any part of the service charge is kept by the management or owners, this must be clearly explained in writing to the customers. If ownership or management keeps any part of the service charge, you may not take advantage of the “tip credit.”

7) Perform an insurance checkup. This includes your general liability, Worker’s Compensation, errors and omissions and directors and officers policies. Business owners and partners should also consider life insurance and long-term and short-term disability insurance, as well as “key man” policies. Any time you or your business is named an “additional insured,” ask for a copy of the actual policy. A certificate of insurance does not guarantee coverage and is worthless if you are not properly named in the policy or if it is the wrong type of policy. If you do not understand the policy, have an attorney review it. Finally, you must notify your insurance carrier at the first possibility of any claim or your insurer may disclaim coverage for late notice.

This list is not meant to be exhaustive but is intended to make business owners aware of some of the protections that are needed to protect their investment and personal assets. Our attorneys possess the knowledge and skills necessary to address the needs of today’s business owner. Having a knowledgeable attorney perform a “legal audit” of your business is an investment that will certainly pay off in the long term. **M**

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Avrohom Gefen, Esq.

“Many business owners are understandably looking for cost-saving measures... however, there are certain areas in which it is simply not worth cutting corners”

New York Senate Passes Healthy Workplace Bill

By Andrew A. Kimler, Esq.

ON MAY 12, 2010, the New York State Senate passed the “Healthy Workplace” bill. If enacted, this legislation would amend the New York Labor Law and create a private cause of action for all employees who are subjected to an “abusive work environment.” An “abusive work environment” is defined as a “workplace in which an employee is subjected to abusive conduct that is so severe that it causes physical or psychological harm.” “Abusive conduct” is defined as “conduct, with malice, taken against an employee by an employer or another employee that a reasonable person would find to be hostile, offensive and unrelated to the employer’s legitimate business interest.”



The proposed law would allow a court to consider the severity, nature and frequency of the conduct. It further provides that a single act shall not be considered abusive conduct unless the court “finds such act to be especially severe or egregious.” The law goes on to provide for various remedies that may include compensation for emotional distress, punitive damages and attorney’s fees. The legislation also includes two defenses for employers. One affirmative defense provides that the employer “exercised reasonable care to prevent and promptly correct the abusive conduct” which is the basis of an abusive work environment claim and the employee “unreasonably failed to take advantage of the appropriate preventative or corrective opportunities provided” by the employer. This affirmative defense, however, is not available when the abusive conduct results in a “negative employment decision” with regard to the employee. A “negative employment decision” is defined to mean a “termination, constructive discharge, demotion, unfavorable reassignment, refusal to promote or disciplinary action.” A second defense is available if the employer’s negative employment decision is consistent with the employer’s legitimate business interest, such as termination or demotion based on the employee’s poor performance. An action to enforce this law must be commenced within one year of the last abusive conduct.

Of particular significance is the fact that this proposed legislation will provide employees with a basis for suing their employers even in the absence of unlawful discrimination. Indeed, the proposed statute provides that the remedies are in addition to “any other state law” and thus there exists the possibility that this law could also be applicable to situations involving workplace discrimination. More fundamentally, however, is the fact that if this legislation becomes law, it will dramatically change the employment landscape in New York State since it creates a basis for lawsuits which previously did not exist. **M**

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Thus, it might be asserted that members of a protected class are less likely to be present on such sites and accordingly, the employer’s recruitment process may have a disparate impact on a particular group of individuals.

Recommended Employment Policies

To protect itself from potential liability, an employer should consider adopting a variety of measures. For example, employees should be informed that they have no reasonable expectation of privacy on the company’s computers and e-mail systems and that they are subject to monitoring. Moreover, employers should emphasize that employees who engage in social networking must do so in a respectful and professional manner and avoid from engaging in any offensive postings. It should be pointed out that online activities that violate the employer’s harassment and discrimination policies will not be tolerated. An employer should also note that employees should refrain from revealing confidential information, trade secrets and related information. In addition, social networking policies should specifically point out that employees should refrain from disparaging the employer, its employees and clients. Moreover, an employer should not exclusively rely on social networking sites as a means to seek prospective applicants and perhaps a company should utilize other recruitment methods such as employment agencies and newspaper postings.

Any corporate policies that are developed by employers should be disseminated to all employees and the employees should acknowledge in writing their receipt of these policies. By drafting specific policies, an employer can help minimize if not all together avoid, claims arising out of an employer’s use of social networking. **M**

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