

## Social networking sites become objects of embarrassment for some companies

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At the Bargain Zone, a freight surplus store in Lee's Summit, Mo., office manager Jeff LeMasters was clear about cell phone and Internet rules for employees:

No personal calls, no texting, while on the store floor. And employees had to sign a contract that said they'd be terminated for personal use of the Internet while working.

But LeMasters wasn't clear about what to do when "someone called and told us we needed to take a look" at what an employee wrote on Facebook.

The employee "was basically trashing us online," LeMasters found. The comments included profanity and derogatory things about the work and the owners.

"We had no way to know if that could have a negative impact on our business, but we knew we didn't want it out there," LeMasters said.

The world of Facebook, [MySpace](#) and [YouTube](#) postings is giving employers headaches. Often, employers like LeMasters are exploring on a case-by-case basis what rights they have to police employees' blogs and social networking pages.

LeMasters and business partner Randy Benton quickly learned they had no constitutional right to fight the worker's postings, but they did have a

clear course because some of the Internet use had occurred at the store.

"We didn't fire the employee because of what was said," LeMaster said. "We fired the employee because the time spent online was in violation of the signed work contract."

Usually, though, there isn't such a bright line to guide employers.

"There's always a tension between employee privacy rights and the rights of the employer to protect the company image and, sometimes, co-workers," said Joseph Clees, a lawyer with the Ogletree Deakins Nash Smoak & Stewart law firm.

Several weeks ago, there was no question that Domino's Pizza would fire two employees at one of the chain's North Carolina units. The pair posted videos online of themselves stuffing cheese up their noses, sneezing on the pizza and passing gas on the salami.

Similarly, Burger King fired employees in Ohio who were involved in creating and posting a video of a worker bathing in a suds-filled stainless steel restaurant sink while co-workers watched.

In Chandler, Ariz., an appellate court recently upheld the firing of a police officer on the grounds that his personal online video sex business could be considered detrimental to the "mission and function" of the employer.

One of the earliest cases to bring national attention to this issue was filed in 2005, when a Delta Air Lines employee sued after she was fired. She alleged discrimination after she'd posted racy pictures of herself on her "Diary of a Flight Attendant" blog. (The case, mired in the Delta bankruptcy, has not yet been resolved.)

In an "Ethics & Workplace" survey released in May by Deloitte, 60 percent of the business executives surveyed said they believed they had a right to know how employees portray themselves and their organizations in online social networks.

But the same survey found that employees tend to disagree. Fifty-three percent of employees said their social networking sites are not their employers' concern.

"Generally, the courts are giving employers a wide berth for taking action based on (damage to) corporate image, but 'image' can't be a subterfuge for taking action based on looks or a handicap or race or any other protected category," Clees said.

Bill Martucci, an employment law attorney at Shook Hardy & Bacon, said the "state of relevant law truly at this point is unsettled. ... It's looking at a balancing of interests and is generally slow to catch up to technology."

In recent years, there is a growing body of case law that says employers have the right to take adverse action against workers based on off-the-job conduct. But there's a fine line between trampling on an employee's free speech rights and protecting a company's reputation.

In an "employment at will" situation \_ in which employees work without collective bargaining contracts \_ employers can hire and fire for any reason, providing the action isn't a pretext for discrimination based on legally protected categories, such as race, religion, sex or age.

As in the Bargain Zone case, most employers aren't grappling with the social networking issue until a perceived abuse hits them personally.

The Deloitte survey found that only 17 percent of executives said they

have a program dedicated to monitor or "mitigate risks" associated with social networks, and only 24 percent have formal guidelines for employees' use of social networks.

When crafting such policies, employers are learning that their prohibitions can't overreach. For example, the National Labor Relations Board has long held that employers cannot ban employees from lodging complaints or discussing terms of employment, such as their pay.

But employers are able to take action if the employee's words are deemed to be malicious, deliberately false, reckless, or disloyal to the organization.

There's another fine line: Employers are considered to have an "affirmative duty" to protect co-workers and customers if they discover dangerous postings.

Law seminars around the country are teeming with presentations to teach lawyers and employers how to use social networking tools to check up on applicants and employees.

A person's MySpace or Facebook page can give better insight into their habits or beliefs than questioning them in a job interview or a courtroom.

Understandably, that investigative ability makes many people squirm. Some users are limiting the viewers who have access to their posts.

Facebook, for example, allows users to set up "Friend Lists" and adjust their profile privacy settings to give access only to approved viewers.

Martucci said he's watching a developing case in New Jersey, where a restaurant manager allegedly ordered an employee to go online to give

him access to another employee's social networking site to see the allegedly critical things being said about the restaurant.

Martucci's legal colleague, Jennifer Oldvader, said the law is only beginning to learn how intertwined [social networking](#), blogging and texting practices are with the youngest generation of workers.

"It's going to take the law a very long time to catch up to where young people are with their lives," she said.

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