



# Workplace 2.0: The Modern Electronic Workplace and Issues Faced by Employers

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Today's workplace depends on email, proprietary Web pages, the BlackBerry, and online-savvy employees – all the great benefits of Web 2.0, which makes it easy for anyone to get online and work cooperatively.

But Web 2.0 also brought new pitfalls, and today's employers – and the courts – are figuring out crucial ground rules for the modern office. For example, can employers use job candidates' Facebook profiles in hiring decisions? When does an employee's personal blog become a liability for her employer? What happens when an hourly employee's BlackBerry creates a 24/7 workplace?

Howard Schragin of Epstein Becker & Green, P.C., explained the latest trends in workplace policy, legislation, and more at the HR Roundtable in May, "Workplace 2.0: The Modern Electronic Workplace and the Issues Faced by Employers." **Click here for your personal invitation to the next HR Roundtable.**

Schragin addressed these topics:

- Social Networking and Work: The benefits and dangers of checking a job candidate's or employee's Facebook page
- Blogging: The reasons employers should be aware of employees' online activity
- The 24/7 Workplace: How to manage BlackBerry and Internet use before it turns into thousands of overtime dollars
- High-Tech Accidents: Employee plus company cell phone plus auto accident: Who's liable?

## **Social Networking and Work**

It's easy to Google a potential job candidate or a current employee, either out of curiosity or to screen someone before bringing them into the company. And by using a social networking site, like Facebook, an employer can get a detailed view into the personal lives of candidates and employees.

But should they? Think twice, Schragin said.

The kind of information a person posts on a site like Facebook is often exactly the information employers are barred by law from considering in hiring and firing decisions, such as:

- sexual orientation
- marital status
- whether a candidate is pregnant or plans to be
- New York state specifically bars employers from weighing a candidate's "legal recreational activities" in hiring decisions.

Once an employer has viewed a personal profile on a social network, it's hard to prove that the information *didn't* have an impact in a hiring or firing decision, Schragin said.

Some employers argue that social networking sites can turn up evidence of extreme beliefs or behavior, like racist beliefs or membership in an anti-minority group, real dangers in the workplace. Or an employer might simply find evidence of poor judgment, like pictures that suggest a candidate parties hard every night.

But these small benefits don't necessarily outweigh the legal danger of knowing too much personal information, and what looks like evidence of a hard partier might simply be a person's exaggerated online identity, Schragin said. Instead of trolling social networking sites, exposing yourself to protected information, trust your regular practices and decision-making policies, he argued.

"If a real bad seed is coming to interview with you, chances are you're going to figure it out without having to check their MySpace page," he said.

If an employer does use information from a social networking site to make a hiring or firing decision, it's crucial to document exactly how that information would impact the company, Schragin added. Be sure that everyone making the decisions, including third parties, is aware of anti-discrimination laws and aware of company policy on using social networking sites in hiring and firing.

Some companies include social networking sites in a background check, *after* a conditional offer is on the table, which is less risky, Schragin said. You can ask the candidate to explain potentially damaging information you find, for example. And if you uncover a really bad seed, you might decide it's worth risking a lawsuit rather than bringing that person inside your company.

### **Blogging and Other Online Activity**

You absolutely do want to know about your employees' online activity at work, and outside of work if it relates to the company, Schragin said – in part because you could get sued for it.

He cited a recent case in which an employer found out an employee was viewing child pornography at work. The employer was reprimanded, but he kept doing it, including looking at pornographic images of a child in his family. When the mother of the child sued the company, the court found the employer liable.

"It's always recommended to monitor [employee's online behavior at work]," Schragin said, but in today's workplace, "it's almost required."

Employees' online activity can be damaging to an employer, even inadvertently:

- Blogs that reveal trade secrets or financial information can make it harder to argue for privacy rights or trademark protection in the future.
- An ambivalent or negative comment about an upcoming product can endanger a merger or acquisition.
- An employee who uses a blog to make personal attacks or discriminatory statements against another employee can open the employer to legal risk.

It's important to note that the First Amendment does not protect this kind of online activity; employers have a right and an obligation to know about it and to take action. In fact, bloggers have a word for getting fired for their online habits: "dooced," because the writer of the popular blog "Dooce" was fired for writing disparagingly about her workplace.

It's possible that in some cases, employees might have a right to privacy online. For example, employees of a Houston restaurant created a password-protected, invite-only online forum where they could vent about work. They took every precaution to keep outsiders from seeing it, but when one employee mentioned it to a manager, the two employees who set it up were fired. The courts will decide this summer whether the employees had a right to privacy and were wrongfully terminated.

### **The BlackBerry and the 24/7 Workplace**

When an assistant on *Oprah* claimed \$32,000 of overtime in less than three months, the culprit was her BlackBerry. This hourly employee had been working around the clock, sending emails and making phone calls, and that had added up to an astounding amount of overtime. The company paid it.

"Things like that are going to be happening more and more," Schragin said. "If this is one employee, imagine if you have a thousand of them."

Thanks to the existence of the cell phone and easily available high-speed Internet, the 9-to-5 job can turn into a 24/7 endeavor, even for hourly employees. One of the biggest risks for employers is in misclassifying those employees, Schragin said. If an employer doesn't track afterhours work like BlackBerry calls and emails, it's treating hourly employees like exempt workers, which can result in expensive overtime lawsuits.

Generally, employers can do the following without risking overtime problems:

- Allow or require an hourly employee to check in by phone or email once or twice during her off hours, if she has easy access to phone and email
- Allow or require an exempt employee to check in occasionally during off hours the same way

An employer may have to pay employees if:

- An hourly employee checks in frequently or works via phone or email during her off hours, especially to the extent that her time is no longer really free
- An exempt employee checks in frequently or works via phone or email during unpaid leave

It's important to note that even if the employee does the work *without* first notifying the employer, the employer can be held responsible for those hours. To avoid overtime issues and huge payments to employees like the *Oprah* assistant, clearly define your policies about when to use tools like BlackBerrys, and track your employees' use of them, Schragin said.

## **High-Tech Accidents**

In the past, employers had to worry about slip-and-fall accidents on their grounds. Today, the employee takes the office with them, and courts may find employers liable for accidents incurred while an employee is driving and texting on company cell phone, for example.

Case law is still being developed in this area, but employers can protect themselves ahead of time by setting smart policies and practices, and enforcing them, Schragin said.

- Set a clear policy against talking or texting while driving.
- Even if a headset is available, make it clear the employee needs to prioritize driving, or walking across a busy street.
- Require an employee to sign the policy when he or she is issued a phone or agrees to reimbursement for a phone.

If you call a potential client or job applicant and they're driving, can you be held liable for an accident? "I haven't seen it go that far yet," Schragin said.

"Is it fail-safe? No. Are they going to try to look for whoever has the deep pockets? Sure," Schragin said. "These are just things you can do to try to insulate the company if a lawsuit comes down the road."

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