



Surviving and Thriving in the Social Media Rabbit Hole



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- How many of you read the newspaper today?
- How many of you have checked your Facebook, Twitter, or Instagram account today?



- What Can you Accomplish in 60 seconds?
- In 60 seconds, Google receives over 4,000,000 search queries, YouTube users upload 71 hours of new videos, Pinterest users Pin 3,472 photos, Facebook users share, 2,460,000 pieces of content, Twitter users share 277,000 tweet, Apple users download 48,000 apps.
(www.digitalinformationworld.com/2014/04/data-never-sleeps-on-internet-infographic.html)

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Stat of the Day

County	Population
China	1,401,586,609
India	1,251,695,616
United States	322,583,006

Guess how many people use Facebook worldwide?

1,440,000,000 (1.25B Mobile Users)

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CHAPTER 1:
The Well-Equipped Worker



- Examples of what we see in the workplace
 - ❖ Wireless web cams
 - ❖ Smart phones
 - ❖ Spy cameras
 - ❖ Blue tooth microphones
 - ❖ Gps jammers
 - ❖ Password cracking USBs
 - ❖ Etc.

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CHAPTER 2:
EMPLOYEES REALLY DO WASTE TIME



- Most workers today have PCs with internet access; and MANY have their own personal, portable devices with internet access.
- According to one study, a majority of workers regularly spend on-duty time on:
 - ❖ Internet shopping
 - ❖ Texting
 - ❖ Searching social media
 - ❖ Internet-based gambling
- In July 2012, Forbes magazine reported:
 - ❖ 64% visit non-work sites daily
 - ❖ 41% were using Facebook; 37% were on LinkedIn; 25% were on Amazon

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- A December 2012 PEW Research Center Study found:
 - ❖ 67% of online adults say they use Facebook
 - ❖ 15% Pinterest
 - ❖ 13% Instagram
 - ❖ 6% Tumblr
- The Center for Internet Addiction lists “checking e-mail” as the biggest on-duty time waster, often occurring during meetings and seminars.

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CHAPTER 3:
Employer Use



- **Hiring**
 - ❖ Impermissible to use fraudulent techniques to access information
 - ❖ Lawfully obtained, but unlawful use
- **Tips:**
 - ❖ Use an individual outside of the hiring process
 - ❖ Provide an opportunity to respond
 - ❖ Create a specific checklist for consistency.

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CHAPTER 3:
Employer Use



- **Investigations**
Employers conduct various types of investigations related to employee conduct (e.g. FMLA abuse, outside employment, political activity, sexual harassment, etc.).
- **Proper Use:**
 - ❖ *Jaszczyszyn v. Advantage Health Physician Network*
 - ❖ *Lineberry v. Richards*
- **Improper Use**
 - ❖ *Pietrylo v. Hillstone Restaurant Group*
 - ❖ *Van Abstyn v. Electronic Scriptorium Ltd.*

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CHAPTER 4:
Changes



- Cell phone discussions ANYWHERE, ANYTIME, ANY TOPIC
- Restroom stall has become the 21st century phone booth
- “My incoming cell phone call is more important than talking to you about our clients.....”
- Slow-motion “cell phone zombie” shuffle (hallways, doorways, grocery store aisles)
- Smartphone use while driving, and its negative impact on safety

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- “Here, take an hour of paid time and look at DOZENS of photos of my dog/baby/wedding, etc....”
- “My supervisor hates me, so I’ll secretly record every conversation that she has with me” and then post some out-of-context quotes - not wise...
- “This employer-owned cellphone has a camera; why not use it...”
- TIP: Review your policies and above all use common sense

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CHAPTER 5:
SOCIAL MEDIA...AND MORE



Name some social media websites, blogs, or other sharing platforms that are out there today.

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**CHAPTER 6:
THE PROBLEMS**



- Blogs and social media have become the weapons of “cyber bullies” (and this isn’t limited to kids/teens) and the lunatic fringe
- Employees will rant and post items unfavorable to their supervisors or coworkers
- Employees will frequently believe that their social media “profiles” and personal postings are confidential (often posting items that would make a sailor blush...)
- Blogs, texts, and social network postings often include items that are supposed to be confidential.
- Elected officials and governmental figures are often accused of illegal or immoral conduct (usually just before an election)

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Examples:

An Ohio juvenile court employee created an on-line diary in which she discussed cases that were pending before the judge, and speculated about what might happen to some of the juvenile offenders. (She was, of course, fired...)

- An Ohio deputy sheriff made numerous postings to a newspaper “blog” accusing the sheriff of adultery, accusing a coworker of conducting personal business on paid time, and accusing a female coworker of sleeping around. (He was fired and Arbitrator Fullmer upheld the termination.)
- In Fairfield County, a deputy sheriff was terminated for making inflammatory comments about coworkers and disparaging comments about the Sheriff’s Office, using the pseudonym “*Deputy Dog*.”

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Examples:

- Three girls were fired when they decided to make a Kentucky Fried Chicken restaurant sink their bath tub, and uploaded the video to the Internet.
- A San Diego police officer was terminated after it was discovered he was selling homemade, sexually explicit, videos and other police paraphernalia on an online website
- The Pittsburgh Pirates fired, and subsequently rehired, the “Pierogi” (a mascot that races around the field between innings), who resorted to Facebook to criticize the decision of the front office for extending the contracts of several managerial individuals.
- A Charlotte restaurant fired an employee for posting “Thanks for eating at Brixx, you cheap piece of [expletive] camper” on her Facebook page.

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Examples:

- An employee resigns after “sexting” photos were found on an employer-owned mobile phone during an unrelated work investigation.
- An individual was disciplined for being off on FMLA for knee surgery. A posting on her Facebook page revealed her dancing on a table.
- A nurse is terminated for violating HIPAA when alluding to a patient on a “status update.”
- At U.S. Airways, a worker posted a surreptitiously taken photo of a female coworker’s backside (while bending over) on his “Facebook” page, leading to a charge of sexual harassment.
- In Dublin, Ohio, two subway employees were fired for uploading photos to Instagram of them tampering with food.

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**CHAPTER 7:
DEFINING THE PROBLEM**



- 1) Employees making disparaging comments about their employer, or discriminatory or defamatory comments about coworkers.
- 2) Employees posting information that reflects badly on them, or the agency.
- 3) Employees posting, or emailing confidential information.
- 4) Misuse of employer equipment.
- 5) Employees being cross-examined for bias about matters that they included in online profiles, or about comments posted on line. (consider what happened to Mark Fuhrman in the O.J. Simpson trial...)
- 6) Employers using material from an applicant’s social media site as a basis for hiring or not hiring.

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**CHAPTER 8:
BARRIERS TO FIXING THE PROBLEMS**



Governmental employment is different. At the outset, public employees often have either civil service protection or collective bargaining agreements. Beyond that, however, governmental employers must honor an employee’s constitutional and statutory rights.

Sources of Rights

- 1) First Amendment
- 2) Fourth Amendment
- 3) Federal and State Wiretap Laws/
Stored Communication Act

These provisions shape “what process is due,” (or not due), under various laws and the 14th Amendment.

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Fourth Amendment: Accessing Employee's Phones and Computers

- Policies must reinforce the notion that the workplace, and all of its equipment, are the property of the employer, who can make rules about use and inspection.
- *O'Connor v. Ortega*, 480 U.S. 709 (1987) – public employees can have a “reasonable expectation of privacy” unless the employer cuts it off.
- Two Part Analysis under the 4th Amendment:
 - 1) Employee must have a *subjective* expectation of privacy
 - 2) Expectation must be *objectively* reasonable under the circumstances
- *City of Ontario, California v. Quon*, (Slip Opinion No. 08-1332.) Argued April 19, 2010 – decided June 17, 2010.

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Federal and State Wiretap Laws

- Employers sometimes want to “get the goods” on a bad worker. On the other hand, some employees (and a few unions) sometimes want some “intelligence” information to use against the employer.
- It is not uncommon for unethical people to leave a voice recorder “on” in an empty room to “catch” its next user. Indeed, some of the devices listed above allow microphones, cameras, and recorders on cell phones to be turned on from a safe distance away...
- One federal law to watch is **18 USC 2511** (wiretaps — intentional interception of any wire, oral, or electronic communication).
- Another is the “Stored Communication Act,” (USC) **18 USC 2701**. The latter forbids the intentional and unauthorized accessing of stored communication, and has broader exceptions than the Wiretap Act because it excludes those with “authorized access.”
- See *Pietrydo v. Hillstone Restaurant Group*, Docket No. 2:06-CV-05754 (D.N.J. 2008)

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First Amendment: Can We Punish Them for What They Said?

- Courts look to a four-part test to determine if an individual's right to free speech has been violated by the government, in cases where some adverse employment action results from the speech in question. The test is as follows:
 - 1) Whether the speech touched on a matter of “public concern.”
 - 2) If so, whether the employee's interests in the speech outweigh the employer's interest in promoting efficient operations.
 - 3) Whether the speech played a substantial role in leading to the adverse employment action.
 - 4) Whether the government can show, by a preponderance of the evidence, that it would have taken the same employment action absent the protected speech.

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Matters of Public Concern

- *Connick v. Myers*, 461 U.S. 138

Meyers prepared a questionnaire that was distributed throughout the office concerning the office transfer policy, office morale, the need for a grievance committee, confidence in supervisors, and pressure to work campaigns. Meyers was terminated for refusal to accept transfer and for being insubordinate by distributing questionnaire. Meyers alleged wrongful termination because she exercised her 1st amendment rights.

What did the Court hold?

The Court held that because the questionnaire only touched on one question which was of public concern that the questionnaire (considered a work-related gripe) was not protected free speech. Furthermore, the Supreme Court stated that the "public concern" analysis shall focus on the content, form, and context of the speech, with emphasis being placed on the content.

- *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

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Balancing of Interests:

If the Court does find that the speech is a matter of public concern, the balancing test is applied.

- *Pickering v. Board of Education*, 391 U.S. 563 (1968)

Pickering is the landmark case that established the balancing test that courts look to when analyzing whether the government has infringed upon one's right to free speech. The Court stated that one should give deference in the analysis to whether the speech impairs working relationships for which loyalty and confidentiality are important or whether it impedes the performance of duties or impairs discipline or harmony among coworkers. The Court further stressed that an employer does not have to wait to see if actual harm from the speech has taken place before taking action, but may act upon reasonable predictions of disruption.

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Questions?



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