



**PLUNKETT COONEY**  
ATTORNEYS & COUNSELORS AT LAW

## Don't Take the #Clickbait

Effective Social Media Use for Employers

Presented by  
**Rochelle L. Clarke**  
**Christina L. Corl**

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### Today's Presenters



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### Current Statistics: Employer Use of Social Media

- 12% of employers monitor the internet, including employee blogs.
- Up to 70% of employers use social networking sites to research job candidates.
- 39% of employers have looked up profiles of current employees on social networking sites.

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### Issues: Off-Duty Conduct & Social Networking Sites

- Injury leaves, sick leaves and workers' compensation claims
- Hiring/firing and disciplinary issues
- Sexual harassment and related issues



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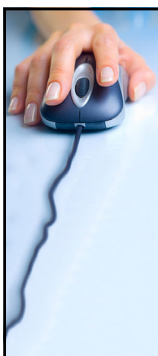
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### Leaves & Work-related Injuries

Courts are increasingly allowing access to even private portions of social networking sites to refute claims of workplace injuries.

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### Ledbetter v Wal-Mart (D. Colo.2009)

- Work-place injury
- Judge allowed subpoena to produce content of plaintiff's social networking site to refute claims that injured worker suffered physical and psychological injuries from accident.



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**Romano v Steelcase  
(Suffolk County, N.Y. 2010)**

- Plaintiff alleged that on-the-job injuries essentially left her housebound.
- Pictures on public portion of her Facebook page showed her outside of her home and happily enjoying life.
- Court ordered plaintiff to allow her employer access to private portions of her Facebook page to determine if any more information existed to refute her claims.



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**Bass v Miss Porter's School  
(D. Conn 2009)**

- Plaintiff, a student, claimed that school did not protect her from bullying by other students.
- Court ordered production of materials on her Facebook page as they supposedly contained evidence of her taunting and teasing students she accused of bullying.



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**EEOC v Simply Storage Mgmt  
(S.D. Indiana 2010)**

- Sex harassment claims by several female employees, alleging "ongoing emotional distress" resulting from harassment.
- Court ordered production of materials from plaintiffs' MySpace and Facebook pages limited to information relevant to their claims of emotional distress, depression and anxiety.
- Denied defendant's request for entire site contents.



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***Beye v Horizon BC/BS***  
**(D. New Jersey 2007)**

- Plaintiffs, insured under health insurance plan with defendant Blue Cross/Blue Shield, brought claims on behalf of their minor daughters to cover medical treatment for eating disorders.

*Continued*



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***Beye v Horizon BC/BS***  
**(D. New Jersey 2007)**

- Court ordered plaintiffs to turn over daughters' private "writings" on Facebook and emails to demonstrate disorders had emotional causes and, thus, were not covered under insurance policies at issue.



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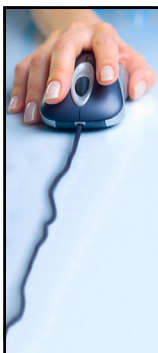
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**Hiring & Interviews**

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### Facebook Profile Pages Contain

- Educational and employment history
- Uploaded videos and photos
- Status updates
- Friends lists
- Email and real-time communications between users
- Contact and residence information



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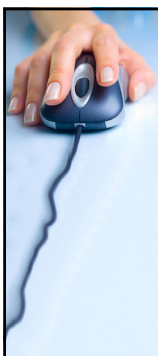
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**What information can employers get from visiting a Facebook profile that they could not legally ask in an interview?**

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### “Off limits” Information

- Marital status and information regarding children
- Religious information
- Political views
- Age and, potentially, medical information
- Union or political activity



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## Employers' Current Practices

- It is not, per se, illegal to access public information on the social media pages of job applicants or current employees.
- In fact, employers report rejecting job applicants when they find references to drug use, heavy drinking, sexually offensive materials, violent imagery, or anything else that reflects poorly on applicant.



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## Caution to Employers

- More than 20 states, including Michigan, have passed laws which forbid employers or potential employers from asking “employees or applicants to grant access to, allow observation of, or disclose information that allows access to personal internet accounts.”
- M.C.L. Section 37.721 et seq



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## Caution to Employers

- Employers may conduct an investigation when: receiving specific information about activity on employee's personal internet account, in order to ensure compliance with law, regulations, or workplace misconduct rules; or when receiving specific information about employee's unauthorized transfer of employer's proprietary information or financial data to personal account.



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### Caution to Employers

- Anti-discrimination laws still apply, so if employer or applicant can demonstrate that employer used information from a social media site and acted on that information in a discriminatory way, employer can be legally responsible.
- Third party background checks which include social media site checks must follow the requirements of Fair Credit Reporting Act.



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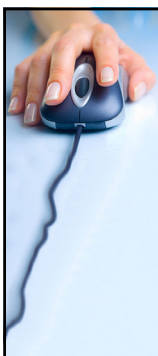
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### Terminations & Discipline

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### Sumien v CareFlite

- Court of Appeals of Texas 2012
- Plaintiff worked as an emergency medical technician for an ambulance service.
- Plaintiff made comments about patients on Facebook.

*Continued*



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### ***Sumien v CareFlite***

- Third party made employer aware of comments and plaintiff subsequently terminated.
- Plaintiff sued, asserting several claims including a claim for unlawful termination.
- Trial court dismissed claim.



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### ***Rodriquez v Walmart Stores Inc***

- Fifth Circuit 2013
- Plaintiff, a Walmart employee, was already on disciplinary status for violating the store's purchase policy when she commented on a co-worker's Facebook page, accusing the co-worker of lying about reason for absence from work.

*Continued*



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### ***Rodriquez v Walmart Stores Inc***

- Co-worker reported incident to human resources.
- Plaintiff subsequently terminated for violating store's social media policy.
- Court determined termination was based on a legitimate and nondiscriminatory reason.



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***In Matter of the Tenure Hearing of Jennifer O'Brien, N.J. Super. 2013***

- Tenured first grade teacher removed by school board and subjected to tenure charges after posting derogatory comments on Facebook about students.
- Administrative law judge upheld removal, holding that the comments were not protected under the 1<sup>st</sup> Amendment.

*Continued*



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***In Matter of the Tenure Hearing of Jennifer O'Brien, N.J. Super. 2013***

- District's need to operate its school efficiently outweighed plaintiff's rights to express herself
- Plaintiff's conduct engaged in "conduct unbecoming" and "failed to maintain safe, caring, nurturing educational environment."
- Decision upheld by appellate court



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***Carter v Transport Workers Union of America Local 556, N. D. Texas 2019***

- Flight attendant made posts on Facebook and sent private messages—including a video of an aborted fetus—to union president after union participated in Women's March on Washington DC, which was sponsored in part by Planned Parenthood.
- Terminated after investigation for violating company social media and anti-bullying policy.

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**Carter v Transport Workers Union of America Local 556, N. D. Texas 2019**

- Plaintiff filed grievance and proceeded to arbitration.
- Arbitrator found in favor of airline company; plaintiff filed suit in district court.
- Court held that plaintiff stated a plausible claim for religious discrimination.



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**Moreau v St Landry Parish Fire District No 3, W.D. Louisiana 2019**

- Fire captain commented on friend's Facebook post regarding an incident involving a teacher at a school board meeting and then engaged in series of private messages regarding incident.
- Employer initiated investigation into "disparaging remarks" made on Facebook in violation of social media policy and ultimately terminated employment.

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**Moreau v St Landry Parish Fire District No 3, W.D. Louisiana 2019**

- Court dismissed 1<sup>st</sup> Amendment retaliation claim.
- Speech was not made on public page and did little to "inform the populace of more than the fact of an employee's employment grievance."



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**Cummins v Unemployment Comp. Bd.  
Of Review, Pa. Commw. Ct. 2019**

- Plaintiff got into heated argument with her boss and subsequently posted on Facebook that she “would [have] sliced his throat open if it didn’t happen at work.”
- Termination upheld.
- No requirement that employee’s misconduct must occur on employer’s premises.
- Statement was a threat and expressed intent to cause physical harm.



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**O’Daniel v Industrial Service  
Solutions, Fifth Circuit 2019**

- Manager of human resources department made incendiary post on Facebook, referring to a man wearing a dress as “that” and commenting on his ability to use the women’s restroom or dressing room.

*Continued*



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**O’Daniel v Industrial Service  
Solutions, Fifth Circuit 2019**

- Company owners, one of whom was a member of the LGBT community, learned of the post, took personal offense to it and terminated employment.
- Termination upheld by the court.
- Employer can dismiss an employee at any time for any reason aside from federal and state exceptions.



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### Social Networking Site Information Used to Justify Termination

- Terminations justified for criticism of management (Virgin Atlantic).
- Marion Co. Florida Sheriff Deputy fired for offensive comments posted on MySpace, next to picture of him in uniform.
- Employee terminated from Boston's Anglo Irish Bank when he took a day off for a "family emergency" then posted pictures of himself at a party on the same day.



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### *Pietryol v Hillstone Rest. Grp.* (D. New Jersey 2009)

- Employees set up password-protected MySpace page to criticize management.
- One employee gave password to manager, who then accessed site.
- Several employees were fired for comments.
- Jury verdict in favor of employees, because jury felt employee who gave password was "coerced."



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### *Thaeter v Palm Beach Co. Sheriff* (11<sup>th</sup> Circuit 2006)

- Three sheriff's deputies and their wives engaged in group sex and made a video which they sold on the internet.
- Deputies were terminated for conduct unbecoming, and termination was upheld by the 11<sup>th</sup> Circuit Court of Appeals.



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**City of San Diego v Roe  
(U.S. Supreme Ct. 2004)**

- San Diego police officer caught selling videos of himself masturbating in uniform on eBay.
- Termination for conduct unbecoming ultimately upheld by U.S. Supreme Court, finding that 1st Amendment did not protect such conduct.



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**John Doe v Department of Justice  
(Federal Circuit 2009)**

- FBI Agent was caught videotaping sexual encounters with women without their consent and was fired.
- Agent argued his off-duty conduct had no nexus with his job performance.
- MSPB and court agreed, stating his actions violated an internal regulation and negatively impacted the agency.



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**Social Network Postings  
& Breach of Security**

- In 2010, an Israeli soldier posted as a status update on his Facebook page the date and location of a raid being planned.
- Raid was cancelled, and soldier was court-martialed.



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### Hostile Work Environment Claims

- New frontier: employees claiming that co-workers social media posts outside of office create a hostile work environment.
- Cases so far have held that a single post or even a couple of posts are not pervasive enough to create a hostile environment.
- Implies such a claim is possible under right circumstances.



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### La Porta v Alacra, Inc, Supreme Court, N.Y. County 2016

- Plaintiff, a female manager, claimed male employee with history of sexually harassing female coworkers sent unsolicited, offensive message on Facebook.
- Plaintiff sued, alleging a hostile work environment under New York City Human Rights Law.
- Court held allegations stated viable claim for sexual harassment, creating hostile work environment.



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### Summa v Hofstra University E.D.N.Y. 2011

- Plaintiff student manager of Hofstra football team, her boyfriend a player on the team.
- Teammates made series of posts on Facebook about plaintiff and her boyfriend.
- Plaintiff sued, alleging a hostile work environment.

*Continued*



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### **Summa v Hofstra University**

- Case dismissed because court found that “totality of circumstances” indicated that Facebook posts only tangentially related to plaintiff’s employment. Main concern of posts was her “personal” life.



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### **Amira-Jabbar v Travel Svcs, Inc District Puerto Rico, 2010**

- Female employee claimed she was retaliated against and subject to hostile work environment.
- At issue was co-worker’s posting of her picture at company golf outing on co-worker’s Facebook page with derogatory comment.

*Continued*



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### **Amira-Jabbar v Travel Svcs, Inc District Puerto Rico, 2010**

- Court found that a single, isolated incident or comment on co-worker’s page was not pervasive enough to create a hostile work environment.



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## Questions?



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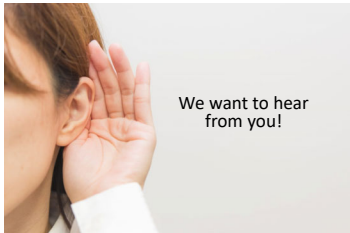
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Date: June 11, 2020  
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Cost: Complimentary

Social media information is a modern day equivalent of forbidden fruit for employers.




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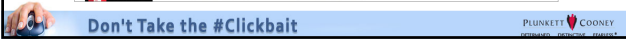
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## Have a Good Day!

*Thank You*




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