

# Regulating Blogs, Social Networking Sites, and “Tweeting” in the Workplace

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A few years ago, regulating “blogs” in the workplace was an employer’s chief concern in the way of employee Internet activity. Today, not only are employers faced with employee blogs, but also postings on social networking sites like MySpace, Facebook, and LinkedIn, or on online pages called wikis. Indeed, blogs have even spawned strange-named offspring with the popularization of micro-blogs like “Twitter” or “Yammer.”

**T**HIS TERMINOLOGY MAY SEEM FOREIGN TO YOU, BUT TO YOUR EMPLOYEES it is commonplace. More and more employees engage in some sort of Internet activity either at work or on their own time, making it even more important to ensure your workplace policies address Internet activity.

## Helpful Definitions

A blog (or weblog) is a type of Web site that is maintained by an individual who makes regular entries commenting on a particular topic or issue, describes certain events, or posts material such as graphics or video. Entries are commonly displayed in reverse-chronological order.

Social networking sites such as MySpace, Facebook, and LinkedIn are Web-based communities of people who share interests and/or activities, or who are interested in exploring the interests and activities of others. These sites allow users the opportunity to e-mail, instant message, and post videos and pictures in a public venue, or to a defined group of people.

A wiki is a collection of Web pages designed to enable anyone with access to contribute or modify content. Wikis are often used to create collaborative Web sites or to power community Web sites. The most well-known wiki is Wikipedia, the online collaborative encyclopedia.

Twitter is a free micro-blogging or micro-sharing site that allows registered users to send and read text-based updates (“tweets”) of up to 140 characters in length. Users can “follow” each other’s updates as well as see what others are reading and chatting about by clicking on links embedded in their update.

Yammer is similar to Twitter, but geared toward businesses rather than individual users. Only individuals with the same corporate e-mail address may join a given network.

## Legal Considerations

These technological advances in communications and seemingly unlimited Web access have created unique problems for employers in their attempts to regulate employee conduct. While it is theoretically possible to outlaw personal Internet use in the workplace completely, the negative implications of such a ban (such as increased costs to monitor employee compliance with a total ban; detrimental effect on business for failing to keep up with “Internet society”) outweigh the utility of it. Rather, employers are better advised to formulate policies that merely restrict Internet use, rather than prevent it.

As a matter of sound business practice, an employer may develop policies

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that regulate its employees' Internet activities while in the workplace. However, the ability to regulate Internet activity outside the workplace, while possible, is less clear cut. While employers would have a difficult time preventing employees from blogging or tweeting about their private lives during their private time, they can regulate postings created outside of work if those postings relate to the company or work environment. By ensuring that each employee signs certain non-disclosure, privacy agreements, the employer will be able to discipline employees for, and hopefully therefore prevent them from, revealing confidential proprietary information in their Internet postings, even when done outside of the workplace.

In addition to the dissemination of confidential information, negative and derogatory comments by employees about their company can have serious effects on company business when posted on the Internet. It is therefore important to regulate such comments. While one naturally might think that an employee's freedom of speech is implicated by such regulation, private employees are not, in fact, protected from regulation from their employer by the First Amendment. Nevertheless, any efforts by the employer to constrain speech should be done with caution.

An employer may have an avenue of regulation under basic principles of agency law. Specifically, unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of that principal in all matters connected with his agency. This general rule forbids acting in competition with the principal, as well as taking unfair advantage of agent's position in his use of information acquired by him because of his position as agent. Because of these fiduciary duties, any employee who makes disparaging comments about the company on the Internet will have violated, for example, the duty of loyalty. It is therefore permitted, and even necessary, for an employer to develop a policy regulating Internet postings so that such disparagement does not occur.

One potential pitfall to regulating employee postings relates to every employee's right to engage in protected concerted activities under Section 7 of the National Labor Relations Act (NLRA). For example, an employee who expresses work-related dissension to a co-worker engages in protected concerted activity. An employer therefore must not punish that employee for such behavior, or the employer risks committing an unfair labor practice. As such, if the employee's blog, tweet, or posting is only aimed at co-workers, the employer may not be able to regulate it. Nevertheless, one federal court of appeals has determined that employees who prepared a mocking and sarcastic letter critical of their employer did not engage in "concerted activity" protected by NLRA, for the letter was only intended as satirical comment on the way management chose to thank employees and was in no way for "mutual aid or protection" within contemplation of Section 7. While one would have to assess whether a message was satirical rather than for "mutual aid

or protection" on a case-by-case basis, employers may have greater latitude to regulate Internet postings without the risk of violating an employee's Section 7 rights under the reasoning of this case. Moreover, modern search engines enable individuals to find virtually anything anyone says in an Internet posting. Work-related postings aimed at third parties thus become less about engaging in protected rights and more about engaging in personal activity.

### Other Considerations

Most employers would agree that employees who visit social networking sites, or those who tweet or blog during working time, engage in non-work related activity that can hurt productivity. Such behavior also potentially compromises the security of a company's computer networks. Specifically, malware, or malicious software, is designed to take control of a computer and cause it damage. Malware can help hackers steal identities and private data. Many computer hackers distribute malware through Web sites used for social networking, or on non-secure blogging sites.

Moreover, many employers encourage the use of, and even provide to their employees, Smartphones. While the use of such Smartphones generally increases employee accessibility,

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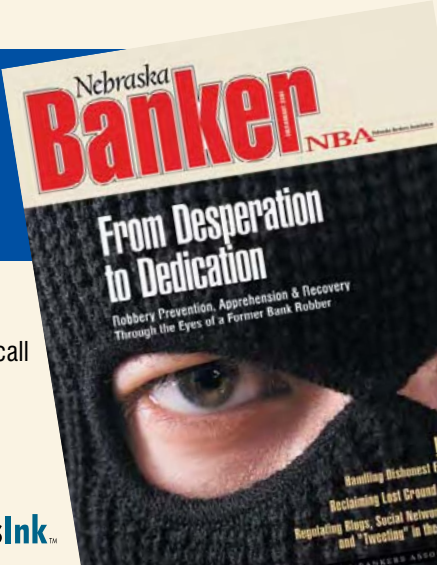
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productivity, and creativity, they also create problems for employers, such as whether an employee should be compensated for checking their e-mail after hours. Employers should therefore make very clear its expectations with regard to out-of-work activity.

**Internet Posting Policies**

In light of these risks, it is even more important for employers to adopt (and update) policies related to Internet postings and usage in and about the workplace. Even policies created a few years ago are likely outdated in today’s changing technological landscape.

Internet posting policies should include clear statements that the employee is not to disclose any proprietary or confidential information of the company or information that has been disclosed to the company by someone else. This could be incorporated into the company’s standard confidentiality statement or maintained separately for further emphasis.

Additionally, if the employer chooses to allow employees to post or comment about the company’s business, a policy provision should clearly outline the limitations on such postings. For instance, the employee must clearly identify himself as a company employee and include a disclaimer that the views are the employee’s own and not those of the company.

The Internet posting should reflect the individual’s point of view, and not necessarily the point of the company, and neither claim nor imply that the employee is speaking on the employer’s behalf. A policy should also warn the employee that the employee, not the company, is legally responsible for his/her postings, and therefore he/she may be liable if the posts are found to be defamatory, harassing, or in violation of any other applicable law.

Policies also should include provisions that address Internet security issues, particularly with regard to downloading from or posting material to unsecured Web sites. An IT professional can help formulate these standards as well as shore up your overall network security.

Finally, employers should clearly define what is considered “compensable time.” Specifically, an employer’s policies should expressly prohibit personal Internet activity (posting, blogging, or tweeting) during work hours or while at work. Likewise, if employers choose to allow the use of Smartphones, they should clearly define what is considered “work time” and inform employees that checking e-mail outside of that time is purely voluntary and not for the benefit of the employer (and therefore not compensable). ▶

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