



Employee Blogging: What Employers Don't Know Could Hurt Them

By Jessica Brown

Technology offers employers significant advantages, but it can be a double-edged sword. Technology has created issues that employers have never dealt with before — and bases for liability employers have never confronted before.

Some of these avenues to employer liability are becoming well known — for instance, employee e-mails and web surfing; employee access to or negligent protection of confidential information; even employee use of cell phones or Blackberries while driving.

But one such avenue is lesser known — employee blogging. According to an American Management Association 2005 survey of 536 employers, 84% of companies have established policies relating to personal e-mail use, and

81% have established policies relating to personal Internet use, but only 23% have policies on personal postings on corporate blogs.

This article discusses blogging and the potential for employer liability that employee blogging presents. It recommends that employers establish blogging policies so that such liability hopefully may be avoided.

WHAT IS BLOGGING?

Web logs, or “blogs” for short, are a type of frequently updated online journal, often featuring excerpts from news articles and links to other blogs. Usually employers have little interest in blogs, except to the extent employees use company time to communicate on blogs and thus are less productive at work.

An employee or group of employees can create a blog on any subject. This may cause an employer to take further note of its employees' blogging activity. Blogs provide an easy way for employees to post opinions and views about their company on the Internet for anyone to read. They can shape a company's reputation both internally and externally.

Comments are a defining feature of a blog. A blog without comments is not a blog, but a Web site. The conversation model of blogs

encourages lack of formality, however, which can prove problematic.

Some people post comments anonymously. Others do so openly, such as Kristie Helms. When she moved from Nashville to NYC several years ago, she experienced a bit of culture shock, and started documenting her workplace woes in an online journal. She recorded the nuances of cubicle life, how she was feeling, and her boss's idiosyncrasies. Sometimes she includes excerpts from his e-mail messages, *eg*, “My boss wrote, ‘Could you please handle this project,’ but what he really meant was, ‘I don't want to do this so I am passing it off to you.’” Ms. Helms has received e-mails from people all over the country responding to her blog, and Firebrand Books decided to publish her blogs in a book called, “Dish It Up, Baby!” The publisher says that the fact that the blogs are recorded in real time gives them reader appeal. They point to the success of the Dilbert cartoon and the movie *Office Space* as evidence that “[c]ubicle dwellers love to see one of their own get an edge on management.”

Companies like Blogspot and LiveJournal lead the way in allowing bloggers to begin publishing on the web within minutes. There were over 4 million blogs on the Internet

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in 2003. Certainly the "blogosphere" is even larger today.

WHAT ISSUES DOES BLOGGING RAISE?

Disparagement issues

If employers are unaware of their employee blog postings, they will be unable to take any corrective action. And if employees make inappropriate and defamatory statements about others in their blogs, employers could wind up being sued for libel or similar claims.

Disgruntled employees have been fired for their blog postings. A 33-year old employee was terminated from his Canadian law firm in 2003 for venting his frustrations about his law firm on a blog. A 27-year old woman was fired for referring to company executives on a blog as "Her Wretchedness" and "Vice President of Enabling His Fist Up Your Ass." One high-profile blog cost a popular columnist his job with ESPN's Web site after he used a blog to criticize executives at Disney, ESPN's parent company. And an employee of a U.S. senator allegedly lost her job after she posted details of her sex life on her personal blog, and they were re-published in a widely read Internet column.

At-will employees can, of course, be fired for complaining in public or making inappropriate statements, as long as the termination is not related to the employee's race, religion, union membership, disability, etc. Union organizers have a legal right to complain publicly, even about their corporate bosses, in furtherance of a legislative goal to address an imbalance of power. In addition, a number of states have passed statutes that protect employees' lawful off-duty activities. These statutes may forbid employers from requiring, as a condition of

employment, that any employee or prospective employee refrain from engaging in any lawful activity during non-working hours.

But statutes like these do not create new substantive rights for employees, and employees generally do not have the right to disparage their employers. Government employees enjoy some additional Free Speech protections under the First Amendment, but speech is not protected from private censorship. Thus, employers have wide latitude to fire employees for things they write or do online and most such terminations are lawful and will be upheld. For example, in yet another high-profile blogging case, a Delta Airlines flight attendant was suspended for posting somewhat provocative photographs online of herself in her Delta uniform.

Harassment issues

Employers also may face liability for sexual or other forms of harassment as a result of employee blogging.

Numerous lawsuits involve allegations that an employer is liable for permitting a hostile work environment when employees use company e-mail to send sexual or otherwise offensive correspondence to co-workers. Employers may also wind up being liable for what their employees say on line. For example, in 2000, the New Jersey Supreme Court held that Continental Airlines could be held liable for comments pilots posted on a computer bulletin board that suggested a pattern of harassment. Pilot postings included pornography and chat posts popped up, such as "If the porn bothers you, don't look," and "Now don't start your feminazi

routine with me." *Blakely v. Continental Airlines*, 164 N.J. 38 (2000).

What if employees raise complaints about harassment or discrimination on a blog? The law is murky in this area and it is unclear whether an employee complaint in such a forum may trigger an employer's duty to investigate.

Privacy issues

Identity theft is the fastest-growing crime in the United States. More than 7 million people become victims of identify theft each year. And this is not something that only happens to individuals. Bank of America has admitted that it lost account information for 1.2 million credit card holders, and a data aggregator known as ChoicePoint acknowledged that identity thieves had stolen vital information of 145,000 people. After news of the ChoicePoint data leak broke, ChoicePoint's stock plummeted and several class action lawsuits resulted.

Employers need to realize the vulnerability in their computer systems. It just takes one employee to take advantage of the system and try to steal client or employee information. In addition, external hackers test server after server at various businesses to find one that has not been "locked" — thus, threats come from both inside and outside the company.

Trade secret issues

Finally, disgruntled employees sometimes intentionally disclose company trade secrets or confidential information on a blog for all to see. For instance, an employee might reveal an internal list of bugs for an important product, or reveal information about an unlaunched

product in an effort to seek fame.

Other disgruntled employees use the Internet to extract revenge in other ways. A woman who lost her job at the School of Visual Arts in NY was so mad, she posted two authentic looking job listings on a Web site saying that the school was seeking a Director of Human Resources, which it was not, and she registered the work e-mail address of the Director of Human Resources on a number of pornographic Web sites.

In addition, people often do not think as carefully as they should before their fingers start typing. Thus, employees may *unwittingly* disclose to the world confidential information or strategies as well.

HOW DO EMPLOYERS BECOME LIABLE?

There are two theories that may result in liability to an employer for an employee's unauthorized blogging. The first is *respondeat superior* liability, which means the employer can be held liable for actions that an employee takes if within the scope of his employment, even if unauthorized. An employee who handles credit card transactions, steals a customer's personal information, and uses it might get his employer into trouble on this theory.

The second theory is negligence — for instance, negligent hiring of an employee or negligent supervision of one. As a result, all employers are encouraged to make reasonable inquiries into an employee's background by calling references and past employers. But such checks may, of course, produce very little information and, thus, more extensive background checks may be required.

An employer may also be negligent in the way it guards, or fails to guard, confidential

information. If an identity theft victim, for example, can demonstrate that the company was careless in terms of who had access to the information and how dissemination of the information was controlled, the company may be held liable on a negligence theory.

BLOGGING POLICIES

Very few companies have blogging policies. But lawsuits holding companies liable for statements made by employees in company e-mails suggest the perils that blogs may present for companies as well. Some companies purposefully avoid blogging policies for this reason — they refuse to sanction blogs by getting involved in them, in hopes that they can defend a lawsuit on the basis that the employees were making these statements on their own time and not in the course and scope of their employment.

Other companies ban workplace blogging altogether. But there may be consequences to businesses of banning blogging. A “blogger's bill of rights” grew out of Silicon Valley, establishing a blacklist of companies that discourage or prohibit blogging.

Still other companies have found that blogs are a powerful tool that can actually be beneficial if used correctly. Microsoft, for example, has embraced blogging as a marketing tool. Internally, blogs can be useful as well, as a means to communicate and organize knowledge, collaborate with colleagues, and share information with clients and vendors. Some companies believe they can cut down on e-mails, faxes, and phone calls by using blogs instead. These companies often employ blog editors, who control the content of the postings.

Even if an employer does not sponsor a blog, if it permits

workplace blogging, it should have a policy governing employee blogging. At a minimum, company blogging policies should:

- Give employees notice that their Internet activities will be monitored;
- Instruct employees as to who has access to a blog, to make sure employees understand the ramifications of what they might write;
- Set proper limits on work time spent on Internet blogs;
- Prohibit publishing content that is secret, confidential proprietary, harassing, offensive, intimidating, defamatory, discriminatory, or pornographic;
- Warn employees that their blogging activities may result in discipline, up to and including termination;
- Require employees who blog to state explicitly that opinions expressed are their own, and not those of their employer; and
- Make clear that blogs are not the appropriate forum for raising complaints, such as complaints of harassment or discrimination.

CONCLUSION

Employees expressing themselves in online journals, or blogs, should be made aware that their speech is not necessarily protected and can result in liability for their employers and possibly termination for them. The best way to do this is through clear and comprehensible policies containing the various elements set forth above.



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