

in this issue:

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Employers don't just have to "hold them or fold them" when it comes to employee blogging. Employers should take proactive steps to protect their interests as well as warn their employees of company expectations regarding blogging.

DOOCES WILD: How Employers Can Survive the New Technological Poker Game of Employee Blogging

"dooced: to lose one's job because of one's website." — The Urban Dictionary (<http://www.urbandictionary.com/define.php?term=dooced>)

By Christopher E. Cobey and Philip L. Gordon

Welcome to the employers' latest cyber-challenge to management of their work forces — employee "blogging."

What is a blog?

A blog, short for Web log, is a journal or diary posted on the Internet, a component of the World Wide Web. Having a personal blog is akin to publishing your own newspaper continuously, and updating it regularly. Bloggers also may provide links to other blogs, or can reproduce part or all of other blogs on their own blog. Blogs have their own unique Web address, or location. An estimated ten million Americans currently maintain their own blog, with the number constantly increasing.

Unless the blog's creator restricts access to the blog, the blog may be accessed by anyone on the Internet — including the estimated 262 million individuals who speak English and use the Internet. Access to a blog can be restricted to those provided with a password, or those who provide "click verification" to any statements required to be answered before access to the blog is allowed. Visitors to a blog can enter their own comments ("post") on the blog for others to read and comment on.

Blogs can serve any purpose an individual can think of — political commentary, recruitment, venting, or — and this is where employers might start experiencing stomach distress — commenting on a person's work life and coworkers. Some businesses, however, including Sun Microsystems and IBM, have embraced blogging as a means of promoting employee creativity and constructive dialogue about the workplace.

Why should employers care about off-duty blogging by employees?

Like most off-duty, "off-campus" activities, blogging generally should not be a concern of

the employer. However, bloggers often fail to appreciate that their ability to communicate with millions of Internet users can jeopardize their employment if their self-expression conflicts with their employers' interests, for example, by publicly disclosing confidential information or undermining the employer's public image. Bloggers also may be encouraged to "cross the line" by their mistaken belief that the First Amendment protects their expressive activity. In fact, the First Amendment imposes no restriction on a private employer's ability to terminate an employee for their expressive conduct.

Examples of off-duty bloggers who have been "dooced" (fired because of the harmful content and public availability of their blog) abound:

- A flight attendant in her blog described herself as "Queen of the Sky," and included pictures of herself and her activities. The airline reviewed her blog photos showing her in her uniform in a plane, and showing more skin than usual. The airline fired her last year.
- After the employer of the "Diva of Disgruntled" terminated her employment, the ex-employee linked through her blog information her former employer considered to be confidential. (The employer was fined \$200,000 by a state agency for the blogger's online disclosures.)
- A U.S. Senate staff member's blog containing thinly-disguised descriptions of the sexual escapades of her coworkers led to her termination.

While private employers have substantial latitude when disciplining employees-bloggers who do cross the line, an employer should take care before "doocing" an employee-blogger. Some states, including California and Colorado, protect employees against adverse employment actions based on lawful off-duty conduct. These statutes, however, typically do permit an employer to discipline an employee whose off-duty

conduct, such as posting a picture of himself wearing nothing but a baseball cap with the company logo, conflicts with the interests of the employer. Because the scope and application of these statutes vary by state, counsel should be consulted before taking adverse action against an employee-blogger.

Other statutory protections for employees could come into play when an employer seeks to discipline an employee-blogger. In certain circumstances, a blog that is critical of an employer might constitute legally protected whistleblowing. Some of the National Labor Relations Act's (NLRA) provisions apply to employers who are not unionized or facing a union campaign. The NLRA, for example, prohibits all employers from restricting discussion among employees concerning the terms and conditions of their employment. Some state laws contain similar prohibitions. Thus, if an employee wished to blog about her terms and conditions of employment, and restricted access to her website to only current fellow employees, her comments arguably would be protected by the NLRA and similar state laws, and adverse action based on the blog's content might be unlawful.

Why should employers adopt a blogging policy?

Several employees terminated for blogging have protested that they had no idea that their blogging was contrary to company policy. Such complaints, which may be widely distributed over the Internet through the fired employee's blog or in the online press that reports on the "doocing," could create a negative perception that the employer treats its employees unfairly, and also could undermine employee morale. Policies that clearly draw the lines on the types of blogging that could result in discipline will help avoid such major misunderstandings.

Policies on blogging also help keep the employer out of trouble and protect its assets. Public disclosure of certain corporate information on a blog could violate federal securities laws. If the employee-blogger's comments were sufficiently negative, they could trigger a precipitous drop in the stock price of a publicly-traded company. Blogs can be used as a vehicle to disclose trade secrets.

Policies on blogging are particularly important for employers who embrace blogging. Without well-defined policies, the employer could be deemed vicariously liable for the contents of employee blogs. In addition, corporate encouragement of blogs significantly raises the likelihood that the contents of employee blogs will be discussed throughout the workforce,

opening the door to the negative repercussions of personal attacks, rumors, and prematurely disclosed corporate decisions.

What should a blogging policy say?

Like other employment policies, any blogging policy should take into account the individual employer's culture and meet the employer's objectives. The policy will have common elements regardless of whether the employer prohibits blogging during work hours and intends the policy to address only off-duty blogging or embraces blogging and encourages employees to blog while at work.

To begin with, the policy should explain the employer's approach to blogging during work hours. Regardless of the employer's approach, the policy should define what the employer considers "blogging" to be, and at least one of the distinguishing aspects of a blog — its typically universal availability. Some employees who have been disciplined or fired for blogging have complained that they did not understand that their blog would be accessible to so many people.

All blogging policies should specify the types of conduct, especially that peculiar to the public nature of blogging, which could result in discipline. Categories of conduct normally addressed in blogging policies include the following:

- **Disclaimer of Corporate Responsibility:** Bloggers should be instructed to state that the opinions expressed in the blog about work-related matters are their own and have not been reviewed or approved by the employer. In the same vein, bloggers should also be instructed to state that they assume full responsibility and liability for any work-related content contained in the blog. These statements are particularly important when the employer otherwise encourages blogging by its employees.

- **Confidential Company Information:** Bloggers are required to comply with the company's policies protecting its trade secrets and other confidential information and with provisions protecting trade secrets contained in any employment agreement.

- **Securities Regulations:** Bloggers should not disclose "insider information" and may be required by the employer not to address any company-related activity during certain black out periods required by securities laws and regulations.

- **Company Logo/Trademark:** The policy should explain when, if at all, the employee-blogger

may reproduce the company's identifying marks within the blog.

- **Copyrighted Material:** The policy should explain the potential civil and criminal penalties of posting in the blog copyrighted material without authorization.

- **Be Respectful:** The blog should not become a vehicle for personal attacks on the company, its products, its executives, supervisors, coworkers, competitors, or competitors' products.

To avoid having the blogging policy become encyclopedic while ensuring its completeness, the policy should cross-reference related policies, such as the company's policies on the proper use of electronic resources, prohibiting discrimination and harassment, and addressing confidential and insider information.

Companies that encourage blogging during work hours will need to include several additional elements in their policy. The employer should explain that blogging is a purely voluntary activity and it is the employee's responsibility to establish the blog and to maintain it at the employee's expense. The employer should set limits on the amount of time at work that may be dedicated to blogging. Employees should be required to identify themselves, not to permit retaliation by the employer but to increase the credibility of the content of their blog and to foster constructive dialogue among coworkers. The employer should identify a "point person" for responding to questions concerning the policy's application and identify those who are responsible for enforcing the policy.

Workplace policies addressing new areas of employee conduct, such as blogging, are useless unless effectively communicated to the workforce. Thus, employers should promulgate this policy, either as an addendum to existing policies, or as part of a revised electronic resources policy, by a method that will allow confirmation that all employees to whom the policy applies have read and understood it. The consequences for violators should be included in the policy itself and reiterated when the policy is distributed. Like all policies, the blogging policy should be enforced consistently at all levels of the organization.

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