

Opportunities and Challenges Presented by Social Media

Situation: Social media, such as Twitter, Facebook, MySpace, YouTube, blogs, text messaging, and instant messaging, are increasing in popularity at an astounding rate. It is estimated that 70 percent of Americans age 15 to 34 are actively involved in such social networking, and that every day one-half million people join MySpace or Facebook.

In-house Challenge: This explosion in the use of social media presents both opportunities and

challenges. The opportunities include the use of social networking as a means to advertise, connect with potential customers, and provide customer service. The challenges include the establishment of policies to govern employees' use of social media, and the extension and modification of document retention and related policies to include social media as electronic information subject to discovery in litigation.

Approach Adopted: Companies, governments, and law firms are responding to the challenge by adopting electronic communication policies that provide guidelines with regard to their employees' social networking and blogging. These policies start with a basic premise – that all existing company policies apply to electronic communications – and then set forth additional rules that apply specifically to electronic communications.

These rules typically instruct employees to: (a) be honest in all communications; (b) disclose your identity carefully so as not to

jeopardize your privacy; (c) if you identify yourself as an employee of a company, make it clear that the views set forth in the communication are your personal views and do not

necessarily represent the company's position; (d) respect copyright, fair use and financial disclosure laws; (e) maintain the confidentiality of the company's confidential and proprietary information; and (f) respect others, use good judgment, and do not use obscenities.

In addition to considering the elements of a policy governing employee use of social media, each company should determine whether to host their employees' social media communications. These decisions should be made with input from in-house counsel, as well as the company's business and IT managers. Hosting

communications in social media typically will carry an obligation to archive such communications, include them in document retention policies, and produce in litigation communications that are responsive to discovery requests. Even if a company chooses not to host social media communications, care should be taken to address whether the company will have some electronic information relating to the communications on its servers or computer hard drives (temporary internet files, for example) that could give rise to an obligation to maintain or search for that information in a litigation context.

When formulating a document retention policy that includes social media, it is critical that a company incorporate the correct legal requirements specific to its business (e.g., IRS, SOX, OSHA, etc.), require that the policy will be applied consistently (or automatically), and require monitoring and compliance to ensure that the policy is followed.



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