

## SPECIAL REPORT

## EMPLOYEE BENEFITS

## &amp; HUMAN RESOURCES

## Dealing with social-media concerns in the workplace

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JOURNAL STAFF

SYRACUSE — Some Central New York employers are beginning to express concern over their employees' use of social-media websites, both on and off the job, and any legal liability that might result from such activity.

It was the topic of the latest seminar the labor-law attorneys at Mackenzie Hughes LLP of Syracuse conducted May 11 at Drumlins Country Club in DeWitt.

Two of the principal facilitators spoke with *The Central New York Business Journal*

on May 14.

Employers are asking for help in developing a social-media policy, says Jacqueline (Jackie) Jones, a labor-law attorney with Mackenzie Hughes.

"We do have some employers that now are having their marketing departments engage in virtual advertising using Twitter, using Facebook," says Jones.

The companies are seeking advice on



J. Jones



C. Jones

how their employees should conduct themselves while representing their employer through social media.

**Misuse and liability**

The Mackenzie Hughes seminar addressed how an employee's misuse of social media could be a liability for an employer. The misuse could include employees posting discriminatory statements, racial slurs, or sexual innuendo

directed at co-workers, management, customers, or vendors.

In addition, if a supervisor posts discriminatory statements or inappropriate pictures, they could be used as evidence against an employer.

Besides discrimination claims, claims of defamation are also possible if an employee or supervisor posts rumors, gossip, and offensive false statements that can create unrest in the workplace, according to Mackenzie Hughes.

A company might also be liable if an

See SEMINAR, page 13

## **SEMINAR:** *Also addressed the question about engaging in “legal off-duty activity” on a social-media website*

**Continued from page 9**

employee inadvertently reveals, or allows others to piece together, proprietary or confidential information on a blog or social-networking site. In some cases, the employee might be disgruntled and deliberately reveal the information, according to the law firm.

Mackenzie Hughes also cites newly revised guides from the U.S. Federal Trade Commission (FTC) addressing the use of “endorsements and testimonials in advertising,” which say employers may face liability when employees comment on their company’s services or products on social media without disclosing the employment relationship.

Employers may also face liability even if the company didn’t sponsor or authorize the comments.

“These FTC guidelines are concerned with transparency on these types of circumstances,” says Christian (Chris) Jones, a labor-law attorney and partner at Mackenzie Hughes.

### **Discipline and legal considerations**

Various scenarios that may prompt an employer to discipline an employee include illegal Internet activity (such as child pornography or certain types of gambling), use of Internet for non-work purposes, and the posting of discriminatory or inappropriate comments or pictures, according to Mackenzie Hughes.

However, employers need to consider certain legal restraints before disciplining an employee, the law firm added.

One such consideration is the National Labor Relations Act (NLRA), affords workers (even those not unionized) the right to engage in “concerted activity,” including the right to discuss the terms and conditions of employment with co-workers and outsiders.

An individual employee could post comments on Facebook that represent concerns of many employees, Chris Jones says.

“For instance, posting comments on Facebook complaining about not being paid for working through a lunch break or for being forced to work overtime without being paid proper compensation,” Chris Jones adds, noting those posted remarks could fall within the protected activity covered under the NLRA.

If a company disciplined an employee for such remarks, it could be a violation of the National Labor Relations Act, Chris Jones says.

In addition, federal and state whistleblower laws may protect employees who complain about company conditions affecting public health and safety, as well as employees who report potential securities-fraud violations.

The seminar also addressed the question about engaging in “legal off-duty activity” and posting pictures or information about it on a social-media website.

The New York State Labor Law protects legal, recreational activities, says Jackie Jones, which could include political activity, smoking, or drinking alcohol.

“The employer can’t discipline them for that unless their behavior is in direct conflict with the employer,” says Jackie Jones.

An example of such conflict would be an

alcohol counselor at a rehabilitation clinic indicating on a social-media website that he or she plans to get inebriated several days in a row, she added.

### **Instituting a policy**

Employers should have clear social-media use policies, including addressing use during work and non-work hours and outlining potential risks and expectations, the Mackenzie Hughes attorneys say. Specific policy components will depend on the type of workplace involved.

When implementing a social-media policy, employers should address proprietary and confidential-company information, discriminatory statements or sexual innuendo, defamatory statements, and a disclaimer.

“One of the first things you want to make clear in that policy is that there’s an expectation that employees conduct themselves professionally both on duty and while off duty while they’re at home updating their Facebook page,” says Jackie Jones.

Other provisions could include prohibiting the use of company pictures or company logos on social-media websites; noting that the company’s systems may not be used for illegal activity, and a notice that monitoring will occur; and a warning for supervisors about “friending” subordinates on Facebook or other online, social interaction.

That warning is recommended even though a company can’t prohibit a supervisor and co-workers from interacting on social media because the state statute on lawful recreational activities protects those activities, says Jackie Jones.

However, she notes that what many employers haven’t thought about is the potential for hurt feelings and liability when supervisors and subordinates connect or don’t connect on social media.

“If a supervisor supervises three subordinates and invites two of them to be a friend on Facebook and doesn’t invite the third person, the third person is going to think the supervisor doesn’t like them,” says Jackie Jones.

She notes the interaction could lead to discrimination lawsuits or even a sexual harassment lawsuit. The law firm recommends language in a policy that urges supervisors and employees to use discretion in their online interactions due to the problems that could occur.

Mackenzie Hughes also recommends amending any handbook to include an “acceptable use” policy, and all policies should be accompanied by monitoring and uniform enforcement. It also recommends training for employees on such policies.

### **Another upcoming seminar**

Another Syracuse law firm, Bond, Schoeneck & King, PLLC, will host a seminar on the topic of social-media liability. Entitled “Are You Tweeting Towards Liability? Legal Considerations For Social Media,” the event is scheduled for June 9 from 8 to 10:30 a.m. at the law firm’s offices at One Lincoln Center in Syracuse. For more information, visit [www.bsk.com](http://www.bsk.com) or call (800) 339-8897. □

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