

# **Social Media and its Many Complications in the Workplace**

**Presented by:  
Luther Wright, Jr.**



**There are more than  
400 social media  
sites globally**

**Number of social network users in the United States**

**243.6m**

**Percentage of U.S. population who currently use any social media as of 2019**

**79%**


**Share of U.S. adults aged 18 to 29 years who use social networks as of 2018**

**88%**

**Projected number of Facebook users in the United States in 2023**

**223.2m**





That's pretty much  
“all of your employees”

# **What Are Employers Being Sued For?**

- **Discrimination; Harassment**
- **Retaliation**
- **Anti-union animus**
- **Disclosure of confidential information**
- **Invasion of privacy**
- **Defamation**
- **Violations of HIPAA, FMLA, FCRA**
- **Negligent hiring, retention or supervision**
- **First Amendment/Freedom of Speech**

# TODAY'S Agenda



- **Handling Negative comments and behavior by employees**
- **Protecting your confidential information**
- **Recruiting using Social Media**





**Negative Comments and Behavior by Employees  
on Social Media**





TACO BELL

ALL NEW  
CANTINA  
STEAK  
BURRITO

DRIVE  
THRU  
OPEN













**Amanda Francis RN**

Jan 13 at 12:15 PM 🌐

Sooooooooo sleepy here in the ICU. Will someone please code and give me something exciting to do? **#isthatbad?** — 😞 feeling bored at **UNM Sandoval Regional Medical Center.**



**UNM Sandoval  
Regional Medical...**





# **Employment Decisions Based on Social Media – Factors to Consider**

- **Was the post work-related or personal?**
- **Related to a social or political issue?**
- **Directed at other employees or other specific individuals?**
- **So egregious as to lose legal protections?**
- **Did it have an adverse impact upon the work place?**
- **Was it created and distributed during work time or off-duty?**
- **Made pursuant to work duties?**
- **Was it distributed with a personal device or the employer's equipment?**

# First Amendment Balancing Test

- **"Citizen Speech"** -- Speech that is
  - (1) off-duty
  - (2) unconnected to the workplace and
  - (3) related to issues of public concern
- **Citizen Speech** has the most protection
- Matters of public concerns can be anything related to a matter of political, social, or other community concern



# First Amendment Balancing Test

- **"Employee Speech"** -- Speech that is made as part of the employee's official duties is not protected
- **Employee speech** includes speech in furtherance of an employee's work responsibilities, even if that speech is not required by the job or made in response to a supervisor's request

# First Amendment Balancing Test

- If speech is **Citizen Speech** then use a balancing test:
  - Balance **employee's right to free speech** with **public employer's interests in ensuring public services are performed effectively and efficiently**



# First Amendment Balancing Test

- **Consider the employer's interests in**
  - **Avoiding disruptions in regular operations**
  - **Maintaining good working relationships among coworkers**
  - **Avoiding erosion of working relationships dependent on loyalty and confidentiality**
  - **Maintaining discipline and supervisory control**
  - **Avoiding obstructions in employees' abilities to perform their work duties**

# Remember TOOL vs. TRAP

- **Social Media is a **TOOL** for discipline and discharge:**
  - **Acquiring authentic and useful information**
  - **Protecting trade secret information**
  - **Avoiding liability for harassment**
- **But also a **TRAP** for discipline and discharge:**
  - **Acquiring information without “authorization”**
  - **Protected, concerted activity (NLRA)**
  - **Inaccurate, incomplete, irrelevant information**
  - **First Amendment Claims**



# Protecting Your Confidential Information



# Sobering Statistics

- **50%** of employees who left or lost their jobs kept confidential information
- **40%** of employees planned to use confidential information from previous employer in their new job
- **60%** of employees say a co-worker hired from a competing company has offered documents from that company for their use

# **TIPS TO AVOID POST-TERMINATION ISSUES**

- **Have a written policy establishing that the company owns the social media site (and any followers) and what happens to the account when employment relationship ends**
- **Policy should specify that the employee must return login and password information when employment relationship ends**



# TIPS TO AVOID POST-TERMINATION ISSUES

- **Define “Confidential Information”**
  - ***Proprietary information***
  - ***Financial information***
  - ***Strategic information***
  - ***Protected information about customers/others***
  - ***Health information***
  - ***\*Trade Secret Information\****
- **Policy should specify that the employee must return login and password information when employment relationship ends**

# **Identify Your Trade Secrets**

**Any information, including a formula, pattern, compilation, program, device, method, technique, or process that:**

**Derives independent economic value from not being generally known to, and readily ascertainable by, others who can obtain economic value from its disclosure or use, and**

**Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.**

# **Be Clear About Ownership and Access to Social Media**

- **This account belongs to the company.**
- **This account shall be linked only to your work email.**
- **Upon termination for any reason, you forfeit any access to this account.**
- **Passwords are confidential proprietary information.**
- **Give access to more than one person (but not too many).**

**O W N E R S H I P**



## ***REMEMBER the NLRB***

**The NLRB is more active in the social media arena than any other regulatory agency.**

- Broad social media policies can violate Section 7 rights under the NLRA where they would prohibit discussions of terms and conditions of employment, working conditions, criticism of the company or its supervisors, etc.**

# **Be Wary of Including “Overboard” Language**

- **Nothing that could be interpreted to discourage employees from exercising their right to discuss terms and conditions of employment:**
  - ✓ **Prohibiting discussion of wages, benefits, and other terms and conditions of employment**
  - ✓ **Prohibiting sharing “confidential” information without further clarification**
  - ✓ **Prohibiting employees from revealing “information regarding coworkers, company, clients, partners, or customers without their consent”**
  - ✓ **Prohibiting disparaging or defaming comments**
  - ✓ **Prohibiting use of trademarks or company logos**
  - ✓ **Vague restrictions about “inappropriate” conversations, such as prohibitions on “offensive conduct,” “rude or discourteous behavior,” and “disrespectful conduct”**
  - ✓ **Prohibiting discussion of matters under investigation by company’s HR**

# **Remember that You Can Prohibit:**

- **Maliciously false statements about the employer or its employees**
- **Threats of violence**
- **Unlawful discrimination**
- **Unlawful harassment**
- **Disclosing trade secrets**
- **Disclosing confidential personal information about customers/  
patients/students**

policy



# Recruiting and Hiring



Have you ever rejected a candidate because of what you saw about them on a social networking site?

69%

Yes

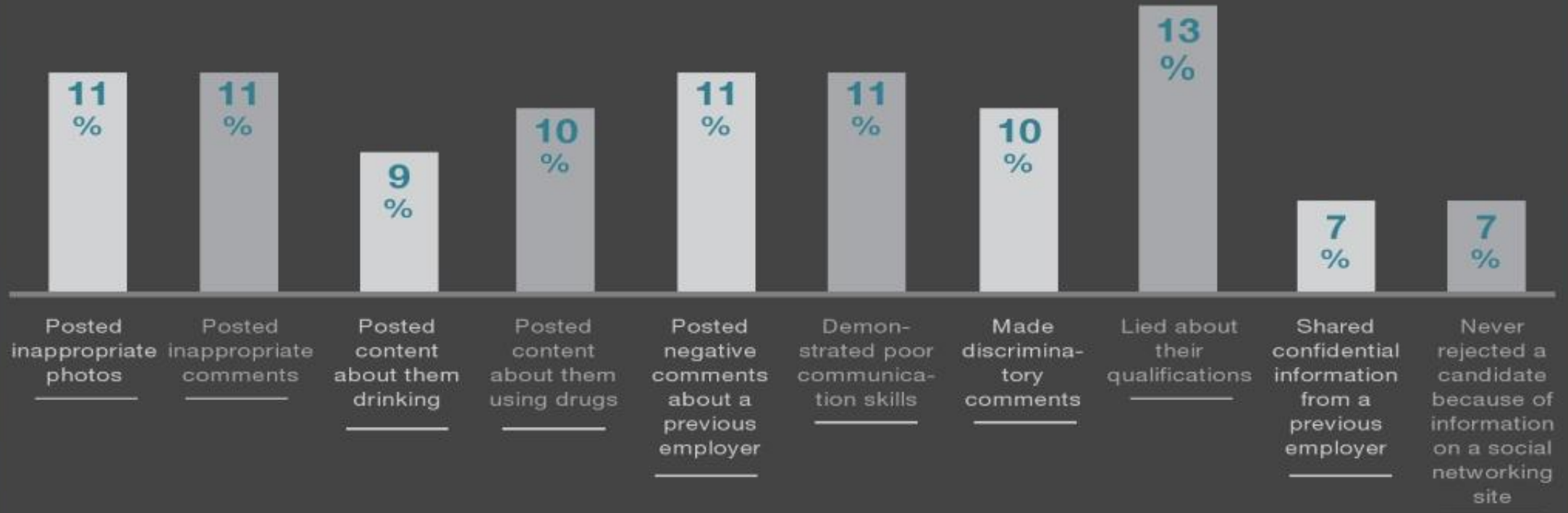
26%

No

5%

I don't use those sites to screen prospective employees

Why have you rejected those candidates?



# **Invasion of Privacy Issues**

- **Applicants believe employers should not be looking at their social networking profiles**
- **Does the applicant have a “reasonable expectation of privacy in the information viewed”?**
- **Likely determining factor**
  - **Is the applicant’s profile accessible to the public at large or only through friends?**
  - **If public, unlikely a court will find any expectation of privacy**



# **Too Much Information!!**

- **Race**
- **Gender**
- **Political Views**
- **Controversial Opinions**
- **Religion**
- **Children**
- **National Origin**
- **Sexual Orientation/  
Gender Identity**
- **Age**
- **Drug/Alcohol Use**
- **Arrest/Criminal History**
- **Marital/Family Status**
- **Tobacco Use**
- **Other “Lawful Out Of Work  
Activities”**

- **Prior Lawsuits/Charges**
- **Bigotry**
- **Workers’ Comp Claims**
- **Records Of Disabilities**
- **Health/Psychiatric Issues**
- **Whistleblowing**
- **Periods Of Unemployment**
- **Disclosure Of Prior Employer’s  
Secrets**
- **Employer Bashing**
- **Gossip**
- **Sexual Content**
- **Harassment Of  
Co-Workers**
- **Defamation Of Employer’s  
Clients Or Third Parties**



# **Social Media & Hiring: Legal Risks**

- **Access to profile provides protected class info that you may not want imputed to your employment decision**
- **Once viewed, it is a bell that can't be “un-rung”**
- **Could lead to disparate impact claims**
  - **Certain “profiles” favored over others**
  - **Certain groups less likely to have profiles**

# **Discrimination avoidance tips:**

- ***Insulate decision maker from reviewing the profiles by having another individual look at the sites***
  - **Whether or not the applicant has posted inappropriate photos**
  - **Whether or not the applicant has ties to a competitor**
  - **Whether or not the applicant is opposed to your business**
  - **Does profile contradict resume/application?**



# **Discrimination avoidance tips:**

- **Do not use social media as exclusive recruiting tool**
- **Track potential trends in social media recruitment outcomes (i.e. exclusion of certain groups)**
- **Verify information**



# SOME KEY TAKEAWAYS



# SOME KEY TAKEAWAYS

- **When social media issues hit home, think about these things:**
  - ***The comment's content***
  - ***Source(s) of information***
  - ***Which policies may be implicated***
  - ***Potential effects on employee morale***
  - ***Potential public relations implications***
  - ***Potential liability***
    - ***For the post itself***
    - ***For the disciplinary action***



# SOME KEY TAKEAWAYS



- **Signed acknowledgement of Policies**
- **Training on identification, classification, labeling, and handling of confidential materials**
- **Periodically review obligations with employees**

# SOME KEY TAKEAWAYS

- **Conduct exit interviews**
- **Review information employee had access to and ensure property is returned**
- **Have employee acknowledge obligations**
- **Check for storage of information on personal computers, recent access/printing history**
- **If employee had administrative privileges to social media accounts, change passwords**

# Question and Answer





# **Social Media and its Many Complications in the Workplace**

**Thank You!!**