

Considerations regarding the effect of
Social Media on the Workplace

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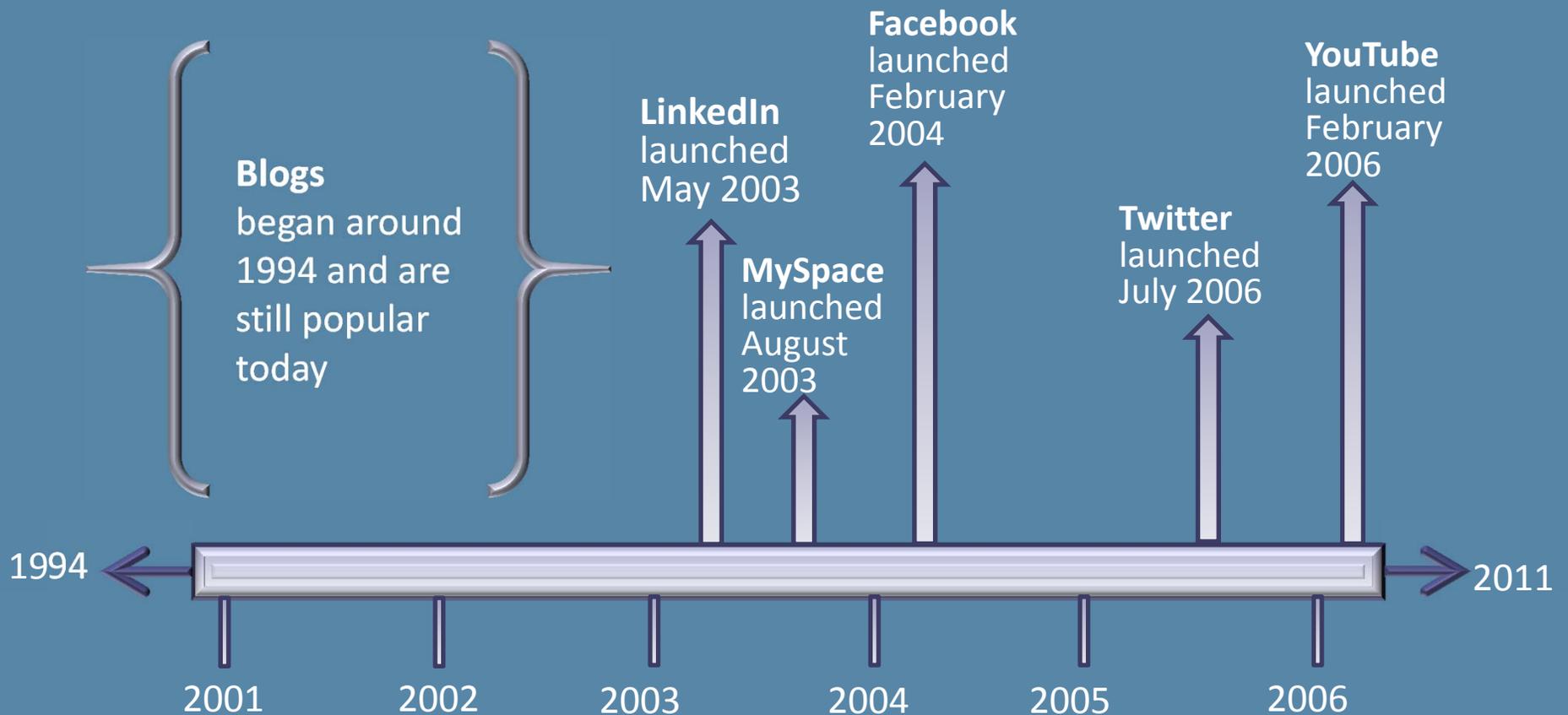
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Overview

- The term “Social Media” is too broad and fluid to specifically define.
- In general, it is comprised of numerous on-line platforms utilized to communicate and share information.
- Common examples would be: Facebook, YouTube, Blogs, and Twitter.

Overview

The Social Media Phenomenon



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Overview

The Social Media Phenomenon

- Facebook, MySpace, LinkedIn, YouTube, Twitter, Blogs
 - MySpace peaked in 2008 and is in its decline, now ranked 106th among worldwide sites visited. *See Alexa, the Web Information Company* (as of Oct. 3, 2011).
 - However, Facebook, YouTube, Twitter, and LinkedIn are among the top sites visited worldwide.
 - Facebook ranked #2 after Google
 - YouTube ranked #3
 - Twitter ranked #9
 - LinkedIn ranked #12
- Needless to say, social media is now a part of our every day lives.

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Balancing Act

- Pros:

- Efficient way of communication
 - Free advertisement
 - Alert clients immediately on events, sales, etc.
- Avenue for networking
 - Staying current on existing clients
 - “Meeting” new potential clients
- Source of research
 - Learning about companies and individuals

- Cons:

- Using social media during work hours for non-work-related purposes
- Potential for creating liability exposure
 - Harassment
 - Publishing information that is harmful to your company and which is discoverable in a lawsuit
- Inappropriate/distasteful posts may reflect poorly on your company

Addressing Social Media's Impact on the Workplace

- The phenomenon cannot be ignored.
- Preparing and implementing a policy is a logical first step.
- You must consider and address the requirements of federal law when preparing your policy.

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Federal Limitations on Social Media Policies

- The National Labor Relations Board is very interested in how employers are wording and applying their Social Media Policies.
- The NLRB is focused on whether the limitations employers are placing on employees' social media activities infringe on an employees' rights under the National Labor Relations Act.
- Specifically, they have been focused on employees' rights under Section 7 to engage in “concerted activities for purposes of collective bargaining or other mutual aid or protection”

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Recent Guidance From The NLRB General Counsel

- In the past year, the NLRB has become involved in numerous cases involving alleged unfair labor practices stemming from social media policies and social media activities.
- This has led to a confusing collection of legal opinions from the NLRB on social media.
- In August, the NLRB General Counsel issued a report detailing these opinions and providing further guidance.

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Federal Limitations on Social Media Policies

- Activity is concerted when an employee acts “with or on the authority of other employees, and not solely by and on behalf of himself.”
- An employer that fails to recognize these rights may be subject to a charge that it engaged in unfair labor practices.

NLRB Guidance: Protected Activity

- Examples of Protected Concerted Activity
 - Employee's Facebook post and comments by other employees about job performance and staffing were protected concerted activity
 - Employer acted unlawfully by discharging employee for posting negative remarks about her supervisor on her personal Facebook page
 - Employee's Facebook postings of photos and commentary criticizing his employer's sales event and how it would negatively affect his sales commissions were part of protected concerted conduct
 - Employee's Facebook postings with former employee about tax withholding practices were protected concerted activity

NLRB Guidance: Protected Activity

- Examples of Unprotected Activity
 - Employee's offensive tweets were not protected concerted activity
 - Bartender's Facebook message about employer's tipping policy in response to a question from non-employee was not protected concerted activity
 - Employee's Facebook posting on her senator's "wall" was not protected concerted activity
 - Employee's Facebook comments about employer's mentally disabled clients was not concerted activity
 - Employee's profane Facebook postings about manager were individual gripes, not concerted activity

NLRB Guidance: Social Media Policies

- A policy is unlawful if it:
 - Expressly restricts Section 7 activities;
 - Would reasonably be construed to prohibit Section 7 activities;
 - Was promulgated in response to union activity; or
 - Has been applied to restrict the exercise of Section 7 rights.

NLRB Guidance: Social Media Policies

- Examples of Social Media Policies: Overly Broad
 - Provision prohibiting employees from using any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity
 - Overly broad because it provided no guidance or definition as to what the employer considered to be private or confidential
 - Reasonably could be interpreted as prohibiting employee discussions of wages and other terms and conditions of employment

NLRB Guidance: Social Media Policies

- Examples of Social Media Policies: Overly Broad
 - Provision prohibiting employees on their own time from using social networking to discuss company business on their personal accounts, posting anything they would not want their manager to see, from disclosing inappropriate or sensitive info about their employer, and posting inappropriate photos or comments involving the company or its employees
 - It also provided that one inappropriate picture or comment taken out of context could fall into the wrong hands and cost an employee his or her job
 - Overly broad because the prohibitions reasonably could be construed to prohibit Section 7 activity
 - No definition or guidance regarding the broad terms
 - The ban on identifying their employer on their personal profiles, among other places, was unlawful and particularly harmful because the profile assists in locating and communicating with coworkers

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NLRB Guidance: Social Media Policies

- Examples of Social Media Policies: Lawful
 - Employer's policy that barred employees from pressuring coworkers to use social media was lawful
 - The rule was sufficiently specific in its prohibition and clearly applied only to harassing conduct

The Take Away: Social Media Policies

- If you do not have a Social Media Policy, strongly consider implementing one.
- If you have a Social Media Policy, review it to make sure there are no provisions that potentially violate NLRA Section 7 rights.
 - Narrowly tailored provisions
 - Specifically defined terms
 - Consider including a NLRA disclaimer
- Train your team members who will have responsibility for monitoring and/or implementing your policy.
- Keep up to date on NLRB rulings.

The Take Away: Policy Enforcement

- Closely review and consider the content of Facebook postings, tweets, etc. before taking any adverse action.
- Be wary of taking action where the content relates to the terms and conditions of employment or seeks to involve other employees in discussions involving employment.
- Seek legal counsel when you are unsure whether you have the legal right to take action.

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