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Milwaukee Biz Blog

Court cases are shaping social media law

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A social media account through any number of services is a virtual necessity to successfully advertising a company online today. Twitter followers, LinkedIn connections and Facebook friends are the commodities that sales and advertising executives crave to get the business message widely dispersed or to maintain valuable relationships.

Moreover, staff seeking a competitive edge to sell services or products may turn to these services on their own volition to generate an online buzz. Employees who build these accounts are beginning to create contentious legal issues when they depart and attempt to maintain control over profiles.

Recent district court opinions across the country issued at the end of 2011 are shaping the discussion over how your company can protect these online assets when employees leave employment. In each case, claims over rights and interests in social media accounts survived key dispositive motions because courts joined the growing number that recognizes just how valuable these cost-effective sources of advertising can be to a business.

In an opinion issued in late December 2011 by the Eastern District of Pennsylvania, a judge refused to dismiss a company's counterclaims against a former employee who attempted to take her LinkedIn account after she was terminated.

Key to the case of *Eagle v. Edcomm, Inc. et al.* was the fact that the employer made substantial investments in the account by requiring employees to establish a profile and providing resources to build and maintain it. In the face of these facts, the court allowed the employer's claims for misappropriation and unfair competition to proceed. Close to home in the Northern District of Illinois in early December 2011, a judge allowed a former employee's claims for false association and violations of the Stored Communications Act to proceed in *Maremont v. Susan Fredman Design Group, Ltd.* The Stored Communications Act prohibits unauthorized, intentional access to communications that are held in electronic storage. This litigation followed company staff use of the former employee's personal Facebook and Twitter accounts to continue advertising the company's products while she was out for an extended period of time due to medical reasons.

Making the biggest splash on this topic was the case of *PhoneDog v. Kravitz* from the Northern District of California in November 2011. There, an employee who developed the Twitter handle @PhoneDog_Noah as part of his employment at PhoneDog attempted to change the profile to @noahkravitz and keep the account's approximately 17,000 followers after ending his employment. In the early stages of litigation, the court allowed the employer's claims to proceed based on the allegation that the company suffered damages of \$2.50 per follower per month for the eight months Kravitz wrongfully controlled the account.

These cases should put companies with an online presence on notice that efforts to protect their interests in social media accounts must start now. For some, the business interest lies in retaining connections, friends, and followers to continue spreading the company message. For others, there may be significant value in ensuring that the competition does not gain access to contacts associated with an account. No matter your primary concern, the recent opinions from these cases reveal a few simple steps companies should take to make sure their interests are protected.

An employer should begin by evaluating whether it wants to retain the rights to social media accounts started on the company's dime. A tightly managed policy that provides your business with the greatest defense to retain rights may secure that social media account but may also inhibit use of that account by employees.

Your company's culture may influence what further steps you want to take to secure interests. If it is your priority to retain rights to an account after an employee leaves, that policy should be clearly articulated to employees when they begin and in the employee handbook. Employees should receive notice that the account is part of their employment and the company will retain it when the relationship ends.

Another step to take to protect your company's social media accounts is to require employees to use company resources to develop and maintain the account. This concept may include decentralizing access to the account by allowing multiple staff to build and maintain profile content. Additionally, requiring an employee to use a professional photographer paid for by the company in a profile picture can demonstrate the employer's investment to develop the

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Finally, where a policy is in place and an employee leaves employment, the policy must be enforced. Current staff should be able to update passwords and change content to accurately reflect correct information. Implementing practices like these and continuing to monitor the developments in the cases described above can help to ensure that the valuable account your company invests in, stays with its rightful owner.

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