

MICHAEL BEST

A FRIEDRICH LLP



**LEGAL ISSUES RELATED TO TECHNOLOGY
IN THE COLLEGE WORKPLACE**

José A. Olivieri, Esq.
Michael Best & Friedrich LLP
100 East Wisconsin Avenue
Suite 3300
Milwaukee, Wisconsin 53202
(414) 226-4067
jaolivieri@michaelbest.com

MICHAEL BEST

A FRIEDRICH LLP

WHY ALL THE FUSS?

- Rapid Technological Advances
 - Communications
 - Surveillance
 - Nanotechnology
 - Biometrics
- Relatively Slow Evolution of the Law
 - Legislative process can be slow
 - Education of policymakers, government officials, and the general public takes time

© Michael Best & Friedrich LLP 2009

2

MICHAEL BEST

A FRIEDRICH LLP

TECHNOLOGY CONTINUES TO EVOLVE

- Virtual meetings are replacing in-person meetings
- Devices are becoming smaller, faster, more powerful, and have greater storage capacity than ever before
- Wireless technologies allow for more mobility and permit greater connectivity
- Widespread use of surveillance cameras

© Michael Best & Friedrich LLP 2009

3

MICHAEL BEST

A CORPORATION

LEGAL IMPLICATIONS OF CHANGING TECHNOLOGY

- Existing laws are being applied to new and different circumstances and courts must often "adapt" existing laws to fit these circumstances
- As new laws are developed, they need to be reconciled with old laws that haven't changed
- Some legal issues will be difficult to anticipate in advance, especially when a technology is not well-understood

© Michael Best & Friedrich LLP 2009

4

MICHAEL BEST

A CORPORATION

EMPLOYEE MISCONDUCT

- Opportunities for misconduct
 - Internet
 - makes it easy to access to pornographic and other non-work-related material
 - can facilitate inappropriate communications
 - Removable memory devices (e.g., USB flash drives)
 - make it easy to steal data from computer systems
 - facilitate introduction of viruses or malware
 - Cell phones
 - can facilitate inappropriate communications
 - with cameras can be used for improper purposes
 - used for texting can lead to accidents if used while driving or operating machinery

© Michael Best & Friedrich LLP 2009

5

MICHAEL BEST

A CORPORATION

WILL TALK ABOUT

- Electronic use policies
- Blogs/Social networking
- Lawful products
- Privacy
- Genetic testing
- Email use

© Michael Best & Friedrich LLP 2009

6

MICHAEL BEST

DEVELOP ELECTRONIC USE POLICIES

- Older electronic use policies prohibited all personal use of computers or organization-provided technology
- Newer electronic use policies recognize that the latest technologies blur the distinction between "work" and "personal" (e.g., work-related electronic communications frequently continue after employees leave the workplace)
- Policies crafted to permit some personal use while attempting to prohibit obvious misuse such as harassing coworkers or accessing pornography

© Michael Best & Friedrich LLP 2009

7

MICHAEL BEST

OBJECTIVES OF ELECTRONIC USE POLICIES

- Notify employees that they have no expectation of privacy when using employer-provided technology and that the organization will monitor employee use of technology
- Encourage productive use of technology and discourage unproductive or harmful use of technology
- Provide examples of appropriate as well as inappropriate use of technology
- Remind employees that they must still obey the law and other organization policies when using technology
- Communicate the consequences of violating the policy

© Michael Best & Friedrich LLP 2009

8

MICHAEL BEST

DOWNSIDE OF ELECTRONIC USE POLICIES

- Risk of over-regulating employees
 - low employee morale
 - create red tape and inefficiency
- Employer knows what is being said and may, as a result, be accountable for it.

© Michael Best & Friedrich LLP 2009

9

MICHAEL BEST
ATTORNEY AT LAW

POLICIES REGARDING E-MAIL AND INTERNET USE

- How?
 - Develop a comprehensive technology policy
 - Address privacy expectations
 - Disseminate the policy
 - Discuss the policy – training important
 - Require employees to sign an acknowledgment
 - Monitor e-mail and Internet use

© Michael Best & Frisvold LLP 2009

10

MICHAEL BEST
ATTORNEY AT LAW

AN ELECTRONIC USE POLICY IS NOT ENOUGH

- Establish guidelines for proper online etiquette
 - assume what you write will end up on the front page of a newspaper
 - what you write can and will be used against you
 - watch not only what you say, but to whom you say it
 - nothing is ever really deleted
 - before you hit send or save, evaluate the risks and benefits of what you are writing
- Take quick action when problems are identified

© Michael Best & Frisvold LLP 2009

11

MICHAEL BEST
ATTORNEY AT LAW

MONITORING EMPLOYEE ACTIVITIES

- Monitoring employee use of technology is easier said than done
- As a result, many employers only monitor for inappropriate internet browsing
- Effective monitoring requires cooperation and communication between IT and HR
- Ineffective monitoring can be worse than no monitoring
 - if monitoring reveals information that requires you to take action (e.g., evidence of a hostile environment) and you take no such action

© Michael Best & Frisvold LLP 2009

12

TECHNOLOGY TO WATCH

- Blogging
- Social Networking
- Twitter
- GPS
- Cell phones
- Camera phones

BLOGGING

- What is a Blog?
 - A blog, or weblogging, is a Web site which is continually updated as a personal diary, collaboration space, news outlet, collection of links, or memos to the world via the internet. Almost anything can be on a blog, including: text, pictures, audio, video, and more.

BLOGS

- 20,000 blogs created daily
- Approx. 20 million in existence in United States
- Approx. 35 million people read blogs daily
- External Blogs-written for reading by anyone
- Internal Blogs-company blogs for sharing ideas and managing information within the company

MICHAEL BEST

WHAT TYPE OF BLOGS ARE THERE?

- **Internal**
 - Allowing access to company employees only
- **External**
 - Available on the internet for the world to read
 - Examples:
 - Company-sponsored
 - Individual-sponsored
 - Gardening
 - Healthcare
 - Employment relations, etc

MICHAEL BEST

PROBLEMS WITH BLOGGING: WHY YOU SHOULD BE CONCERNED

- **In general**
 - Breach of confidentiality
 - Defamation
 - Harassing or offensive content
 - Inappropriate content
 - Invasion of privacy claims
 - Smear campaigns
 - Copyright law

MICHAEL BEST

ADDRESSING BLOGGING IN THE WORKPLACE

- **Recent Survey**
 - 46% No Policy
 - 34% Prohibits Accessing Sites
 - 19% Allows Reasonable Access
 - 1% What is Facebook?

ADDRESSING BLOGGING IN THE WORKPLACE

- Develop an effective workplace policy to address blogging
 - Require employees who create and maintain blogs to prominently display a disclaimer on their homepage
 - Establish employees' responsibility for the purposeful or inadvertent disclosure of any confidential information
 - Establish employer's right to freely view and monitor an employee's webpage
 - Prohibit employees from making statements about your organization, their coworkers, and your customers, competitors, agents, or partners that could be considered harassing, threatening, libelous, or defamatory in any way

ADDRESSING BLOGGING IN THE WORKPLACE

- Explain that anything posted on an employee's website is subject to all other organization policies
- Require permission to post or reproduce any organization logo, material, or trademarks
- State that employees are subject to discipline, including being fired, for violating your policy
- Include language related to professionalism, ethics, and conflicts of interest
- Remember the First Amendment

ADDRESSING BLOGGING IN THE WORKPLACE

- For company sponsored blogs
 - Establish what is appropriate content
 - Secure them through passwords or other means to prevent unauthorized viewing and protect confidentiality
- Blogging policy should be written
 - Develop, communicate, and enforce a policy

SOCIAL NETWORKING SITES - MY SPACE, FACEBOOK, ETC.

- 230,000 new registrations a day world wide
- Vast majority of Americans under 20 participate in one
- Sixty-three percent of employers that search social networking profiles online have rejected candidates based upon information found within those profiles

2008 SHRM SURVEY

2006

- 2% used SN sites frequently for recruiting purposes
- 7% used SN sites occasionally for recruiting purposes
- 79 % never used SN sites for recruiting purposes

2008

- 4% always use SN sites for recruiting purposes
- 9% frequently use SN sites for recruiting purposes
- 13% occasionally use SN sites for recruiting purposes
- 18% seldom use SN sites for recruiting purposes
- 55% never use SN sites for recruiting purposes

SHOULD YOU USE TO HIRE?

- "Background" check -- Disclosure? Discovery?
- Do you really want to know that?
 - Sexual orientation
 - Disabilities
 - Race
 - Associations (non-professional)
 - A picture tells 1000 words -- sometimes a 1000 words too many

MICHAEL BEST
ATTORNEY AT LAW

TWITTER

- Service to communicate and stay connected through the exchange of quick, frequent answers to one simple question:

What are you doing?

MICHAEL BEST
ATTORNEY AT LAW

TWITTER

- A potential Cisco applicant tweeted this:
Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.
- Someone at Cisco saw the Tweet, and tweeted back:
Who is the hiring manager. I'm sure they would love to know that you will hate the work. We here at Cisco are versed in the web.

MICHAEL BEST
ATTORNEY AT LAW

USE OF GPS IN THE WORKPLACE

- Used to monitor employee's whereabouts during the workday
- Duty to bargain use of GPS to monitor whereabouts of employees

DISCIPLINING EMPLOYEES

• State Law (WI) – Lawful Use

- "Subject to ss. 111.33 to 111.36, no employer... may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of... use or nonuse of lawful products off the employer's premises during nonworking hours."
Wis. Stat. § 111.321.

UNION SOLICITATION AND DISTRIBUTION OF UNION MATERIALS

- Employee rights under Sec. 111.70(2) of MERA include the right to engage in lawful concerted activities for mutual aid and protection.
- Under Sec. 111.70(3) of MERA, employers are prohibited from engaging in interference, restraint, and coercion of employees in exercise of their rights.

UNION SOLICITATION AND DISTRIBUTION OF UNION MATERIALS

- E-Mail
 - Interference with concerted activities?
 - Policies must be neutral and be enforced in a consistent, non-discriminatory manner.

PRIVACY

- U.S. Constitution protects against governmental intrusion
 - a public employee may have a reasonable expectation of privacy in his/her office, desk, and file cabinets at the workplace *O'Conner v. Ortega*, 480 U.S. 709 (1987).
 - Employer can define the reasonable expectation.

PRIVACY

- Wis. Stats. § 995.50 (renumbered from 895.50)
 - codifies common law privacy doctrine
 - establishes cause of action for invasion of privacy
 - not limited to employment settings
 - remedies
 - equitable relief
 - compensatory damages
 - reasonable attorney fees

PRIVACY

- Employers may generally conduct silent video surveillance of employees in Wisconsin in public or in places where employees would not have a reasonable expectation of privacy.
 - hallways and other common areas versus bathrooms or locker rooms
 - may not record conversations without consent of one of the parties to the conversation
 - classrooms -- duty to bargain

MICHAEL BEST

PRIVACY

- Some information may not be used:
 - Wis. Stat. § 111.372 prohibits requesting, requiring, or using genetic testing to affect a term or condition of employment
 - Wis. Stat. § 111.37 prohibits the use of "honesty testing devices" such as "lie detectors" or polygraphs except in limited circumstances

MICHAEL BEST

GENETIC TESTING - GINA

- Genetic Information Anti-Discrimination Act of 2008 (GINA)
 - takes effect November 21, 2009
 - prohibits discrimination in employment based on a person's genetic information or the genetic information of a person's family members

MICHAEL BEST

GENETIC TESTING - GINA

- "Genetic Information" is information about
 - genetic tests that an individual has undergone
 - the genetic tests of an individual's family members
 - the manifestation of a disease or disorder in a family member
 - use of genetic services (e.g., counseling) or participation in clinical research involving such services.
 - For proposed EEOC regulations, would also include genetic information of a fetus or embryo.
 - final EEOC regulations were expected earlier this year, but have not been released yet
 - the EEOC is responsible for enforcing Title II of GINA

MICHAEL BEST

GENETIC TESTING - GINA

- Exception to general rule against collecting genetic information with respect to employees or their families only if all of the following apply
 - when employer is offering health or genetic services (e.g., wellness programs)
 - employee provides "prior, knowing, voluntary, and written authorization" specifying the types of information to be obtained, explaining how it will be used, and describing GINA's restrictions on the disclosure of genetic information
 - only the employee, family member, and health care provider (or genetic counselor) receive the genetic information collected
 - the employer does not receive any individually identifiable information collected (but may aggregate results)

MICHAEL BEST

TECHNOLOGY CHANGING COLLEGE CAMPUSES

- Students crave the latest, fastest, and best technology
- Rapid evolution in technology creates a constant challenge to keep up
- Internet access is a necessity at all institutions (wireless)
- Each technology creates new challenges and issues (e.g., cell phone use, digital cameras, online communications)

MICHAEL BEST

LEGAL IMPLICATIONS

- The legal implications discussed in the workplace context also apply generally to the college or university setting, which is a workplace for faculty, staff, and even some students
- Colleges and universities face additional issues when developing policies relating to technology, including how the policies will apply to students and deal with situations that may be unique to college and university campuses
- Public colleges and universities have additional considerations given their status as part of the government

MICHAEL BEST

CONSIDERATIONS FOR COLLEGE SETTINGS

- Cell phones, camera phones, and other personal technology
 - can aid in cheating and can be prohibited in testing rooms
 - for public institutions, "reasonable suspicion" is usually required for a more intrusive search of a cell phone's contents
 - confiscation of personal technology can lead to claims of conversion and, for public institutions, alleged due process violations

MICHAEL BEST

ADDITIONAL CONSIDERATIONS FOR PUBLIC COLLEGE SETTINGS

- Open Meetings Law
 - A meeting occurs whenever:
 - (1) Members convene for purpose of conducting governmental business and
 - (2) There are sufficient number of members present to determine body's course of action

MICHAEL BEST

ADDITIONAL CONSIDERATIONS FOR PUBLIC COLLEGE SETTINGS

- QUESTION: Can e-mails or instant messaging constitute a meeting?
 - No case law on this but:
 - A.G. office strongly urges public entities to avoid using electronic mail to communicate on matters of public business because it creates a "substantial risk of violating the O.M. law." Informal Letter from Wis. Atty. Gen. to Krischan (10/3/2000)

MICHAEL BEST
ATTORNEY AT LAW

**ADDITIONAL CONSIDERATIONS
FOR PUBLIC COLLEGE SETTINGS**

Internal letter from Wis. Atty. Gen. to Benson (3/12/2004)

- A determination of whether e-mail implicates open meetings depends on whether the e-mail exchange more resembles "correspondence" or "conversation"
- The A.G. also noted that a violation could occur:
 - "if elected officials are instant messaging or contacting each other via e-mail within a close timeframe if enough of them are involved in the messaging to determine the body's course of action, and (2) there is a purpose to engage in official business.
 - walking quorum

MICHAEL BEST
ATTORNEY AT LAW

**ADDITIONAL CONSIDERATIONS
FOR PUBLIC COLLEGE SETTINGS**

- Open Records
 - Definition of a record broad enough to encompass e-mails
 - A "record" is:
 - "[A]ny material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. Wis. Stat. § 19.32(2)

MICHAEL BEST
ATTORNEY AT LAW

**ADDITIONAL CONSIDERATIONS
FOR PUBLIC COLLEGE SETTINGS**

- Open Records cont.
 - A "record" is not:
 - a "record" does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; [or] materials which are purely the personal property of the custodian and have no relation to his or her office.... Wis. Stat. § 19.32(2) (emphasis added)

MICHAEL BEST

**ADDITIONAL CONSIDERATIONS
FOR PUBLIC COLLEGE SETTINGS**

- Open Records cont
- What about personal e-mails sent from institution's system?
- Schill v. Wisconsin Rapids School Dist., 2009 WL 1154920 Wis. App. 2009
 - School has a policy on ownership of computer system and no expectation of privacy but allows for "occasional personal use."
 - Request is made for e-mails for five school employees "from the computers they use during their school work day," over a six-week period.
 - **QUESTION:** Should the requestor get all the e-mails, even those that are purely personal, i.e. communications with friends or family? What if the discussions involved some college business?

MICHAEL BEST

**ADDITIONAL CONSIDERATIONS
FOR PUBLIC COLLEGE SETTINGS**

- Open Records Cont.
- Schill cont.
 - Main issue before the court is whether the some of the e-mails qualify for "purely personal exemption"
 - If the exemption does not apply, still have to use balancing test.
 - Public's interest in disclosing the information, i.e. to see how a public employee is spending their time at work
 - vs.
 - Public's interest in the privacy rights of public employees.
- Court of Appeals asked the Wisconsin Supreme Court to decide this issue and it is now pending before the Court.

MICHAEL BEST

WHAT SHOULD WE DO?

- Don't forget existing rules
- Keep up with technology even if you don't use it
- Anticipate how existing rules may apply to new situations brought about by changes in technology
- Keep up with new laws
- Review existing policies
- Develop new policies based on new technology and new laws
- Communicate and enforce all policies consistently
- Don't be afraid to seek out information and/or advice

MICHAEL BEST

QUESTIONS

© Michael Best & Frost LLP 2009

49

4/20/09