

## A timely warning to employees about social media

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The National Law Journal  
September 08, 2011



Nilan Johnson Lewis' Sandra Jezierski

On Aug. 24, Steve Jobs resigned as chief executive officer of Apple Inc., surprising both Wall Street and fans of the tech giant. But one day later, a startup called OfficeLeaks.com issued a press release claiming that an anonymous Apple employee had reported the rumor of Jobs' departure on its Web site on Aug. 2.

OfficeLeaks, an online employee chat room that models itself on the traditional water cooler, was launched in April. The site promised it has taken steps to protect users' anonymity, but — like Facebook and Twitter — could become a tool for employers in legal disputes with their employees, said Sandra Jezierski, a shareholder at Minneapolis-based Nilan Johnson Lewis who represents employers in litigation.

Jezierski spoke to *The National Law Journal* about OfficeLeaks and warned employees to be aware of the risks they face when posting to social media sites. The article has been edited for length and clarity.

**National Law Journal:** Why did this OfficeLeaks press release catch your attention?

**Sandra Jezierski:** The fact that employees were discussing Steve Job's resignation — I believe two weeks before he actually resigned. It caught my eye because I'm involved in social media in litigation. And this just demonstrates the potential damage that a site like OfficeLeaks could cause. When you look at it from a shareholder perspective or publicity perspective, it could be quite damaging if confidential information is getting out before a

company released that information or a decision has been made. There are some liability issues if the employee leaking that information did not have the authority to release it.

**NLJ:** What is OfficeLeaks?

**S.J.:** What the company claims is that it's sort of a Facebook but geared toward employee-to-employee communications. When I look at OfficeLeaks, they have a list of Fortune 500 companies set up on the Web site and as an employee you can log in and go on the site with your corporate e-mail and they'll confirm your membership by sending an e-mail back. Then you're on the site with other employees of your company. And supposedly only individuals registered to corporate e-mail can access that particular site.

**NLJ:** Who would use their corporate e-mail to access a social media site?

**S.J.:** The site boasts it's able to keep the posts anonymous. However, employees don't have a right to privacy on their corporate e-mail. A company could do a search on its e-mail for OfficeLeaks and find the confirming e-mail and know which of its employees are using this site. Supposedly, what this company does is once it sends a confirmatory e-mail to an employee they destroy the e-mail so you can never, as an employer, ask OfficeLeaks for a list of employees on this site. However, as an employer, you can go onto your corporate e-mail and do a search and find the confirmatory e-mail and find out the identities of the posters. For the posts themselves, they make up their own names and it's anonymous. But the employer would still have the ability to determine who was using their corporate e-mail to set up this account.

**NLJ:** How popular is this site?

**S.J.:** It doesn't seem like it's taking off, which is a good thing. The last numbers I saw a month ago, approximately 500 people were using the site. I'm hoping the reason it's not popular is because employees are savvy about using their corporate e-mail and corporate computers to air their grievances.

**NLJ:** How could this information on this Web site be used legally in litigation between employers and employees?

**S.J.:** This applies to all social media sites: The courts are starting to come down with the decision that information posted on these sites is discoverable in litigation. Courts are requiring plaintiffs, the employees, to turn over their posts and sometimes passwords to social media sites. And it's been reshaping discovery. What was once a he-said, she-said situation is now etched in stone. And now it's a wider audience than two people having a conversation.

The social media sites resist the subpoenas. But the courts are compelling the plaintiffs themselves to turn over the information. I've seen a recent case where the judge did his own social media research on a party in front of him. It's out there. It's out there for anybody to see. And this is evidence that doesn't go away.

For example, the case where the judge actually did his own research was actually someone who was applying for Social Security income and claimed disability due to

asthma. The judge found a picture of this plaintiff smoking a cigarette.

**NLJ:** Obviously, you can't stop employees from using social media. What advice would you give to those with jobs right now on how they use these Internet resources?

**S.J.:** What I would recommend to employees is to remember that their handbook and the policies apply to their social media activity, as well. For example, anti-harassment policies apply even if they're posting online. The nondisclosure of trade secrets and confidential information includes posting on social media sites and remind employees they don't have a right to privacy, and that includes corporate laptops and e-mail addresses. I would remind them that all the information they post on a social media site, regardless of when they posted or from where they posted, could be discoverable in litigation. That's true even if the social media site claims they won't disclose the identities of their users.

Asked for a response to Jezierski's arguments, Ryan Masanz, founder and chief executive officer of OfficeLeaks.com in St. Paul, Minn., said the requirement to use a corporate e-mail to register on the site was dropped in June after some users raised concerns about whether their employer might be tracking them. About 35% of users still verify where they work, he said.

He said judges have been reticent to force employees to turn over posts or conversations they have had on social media sites while not on company time.

"I have lawyers, and my lawyers have lawyers, and their comment to me is there usually has to be some sort of cause or evidence or something that will force the hand of a judge or someone to actually invade someone's privacy to go in and look at their computer," he said. It's a bit far-reaching to say what you can do at home and in your private life. Our forum is made to be used by employees of the company, even if they're on their own time, not business hours."

Still, he acknowledged that the company takes down posts that could reveal identities or could violate laws — removing last names or comments regarding trade secrets or copyrights, for example. "Generally, we've asked people to be civil," he said.

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