

## Social Media Solutions at Work

Bryan P. Cavanaugh  
The Cavanaugh Law Firm  
October 6, 2011

# + Presentation Goals



- Help determine how you should limit employees' social media use at work
- Ensure your policies and procedures on social media fit your business needs and comply with the National Labor Relations Act
- Understand the risks and benefits of using social media to screen job applicants

# + Presentation Agenda



- Defining Social Media
- Social Media and Your Workforce
- Concerted Activity
  - Recent Cases
- Screening Applicants via Social Media
  - Chart
- Conclusion / Things to Consider



# What is Social Media?



Noun: \ 'sō-shəl 'mē-dē-ə\

“The term ‘Social Media’ refers to the use of web-based and mobile technologies to turn communication into an interactive dialogue.”



# What is Social Media?



Noun: \ 'sō-shəl 'mē-dē-ə\

“A group of Internet-based applications that...allow the creation and exchange of user-generated content.”



# What is Social Media?



Noun: \ 'sō-shəl 'mē-dē-ə\

“Social Media are forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communications to share information, ideas, personal messages, and other content.”

# + Social Media and Your Workforce



- **Can you limit and control employees' use of social media?**
  - Yes, but should you?
  - Loss of productivity
  
- **Is blocking all social media the answer?**
  - What type of job does the employee have?
    - Accountant vs. salesperson
  - Does the employee's job require him or her to network with those inside or outside the organization?



# Social Media and Your Workforce



- **Can you regulate the content of what your employees are posting?**
  - Yes, with exceptions
  - What about First Amendment rights?
  
- **How can you regulate what employees say and how they interact online?**
  - Require postings to be consistent with the company's branding and message.



# + Social Media and Your Workforce

- **Can you discipline employees for criticizing the company on social media?**
  - Yes, carefully!
  - The National Labor Relations Act protects ***concerted activity***
    - Protection applies to employers without unions
  - Inappropriate or unwarranted discipline can result in workplace morale complications.

***Concerted Activity*** refers to communications between two or more employees concerning workplace conditions.

***Example:*** employees discussing wages and raises amongst themselves



# Recent Cases of Concerted Activity



## ■ **Dan Leone: Philadelphia Eagles (2009)**

- Gate worker was unhappy Eagles lost a player to free agency.
- Posted on his Facebook page: “Dan is [expletive] devastated about Dawkins signing with Denver ... Dam Eagles R Retarded!!”
- The Eagles fired him for this comment.
- This was not concerted activity.

## ■ **Robert Becker: Knauz BMW (2010)**

- High end car dealership held customer event; served hot dogs, chips, cookies, water.
- Car salesman posted photos and critical comments about event on his Facebook page.
- Salesman was fired.
- NLRB ruled postings about food constituted concerted activity.

# + Recent Cases of Concerted Activity



## ■ **JT's Porch Saloon & Eatery, Ltd. (2011)**

- Bartender complained on Facebook to his stepsister about his own compensation and about customers.
- NLRB ruled this was not concerted activity.

## ■ **Hispanics United of Buffalo (2011)**

- Employees of a non-profit complained about a co-worker on Facebook.
- Employer terminated them for harassment.
- NLRB called this a “textbook” example of illegal firing.

# + Social Media and Your Workforce

## Bottom Line

- You can and should regulate what employees say and how they interact online.
- Instead of blanket policy, give different classes of employees different access to social media.
- Avoid micromanaging – not illegal, but has harmful effect on productivity and morale.
- Concerted activity: you can regulate time and place, but not content.
  - The NLRB will analyze your policy and find a violation if it deems your policy too broad.

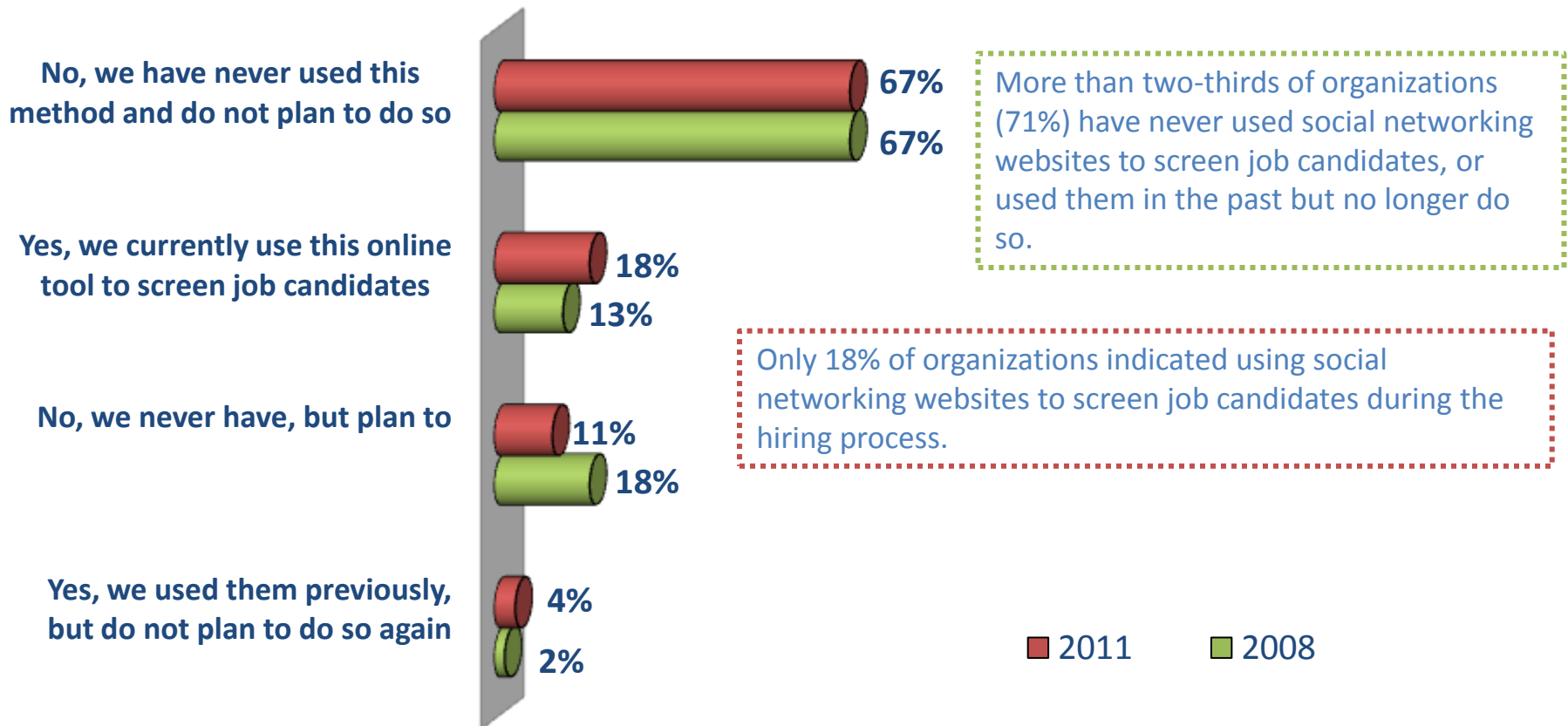
# + Screening Applicants Via Social Media

- **Is it legal to use social media sites to screen applicants?**
  - Yes, but do you really want to?
    - Are you hiring for a position where character and background really matter?
- **What's the harm in screening applicants?**
  - Will you find out relevant or damaging information?
    - You may discover protected information that can be used against you if candidate is not hired: gender, race, age, religion, political views, marital status.
- **Do you need authorization from the applicant to do this?**
  - It depends whether you are doing it yourself or using an outside agency.



# Screening Applicants: Chart

Has your organization used social networking sites to screen candidates, or does it plan to do so?



*Note: Respondents who answered "I don't know" were excluded from this analysis*



# Screening Applicants via Social Media

## Bottom Line



- Some experts strongly advise against it.
- Risk / benefit analysis – is the information you uncover worth the risk of being sued?
- My suggestion: Unless you have specific reason for investigating the applicant's background, stay away from social media checks.

# + Conclusion / Things to Consider

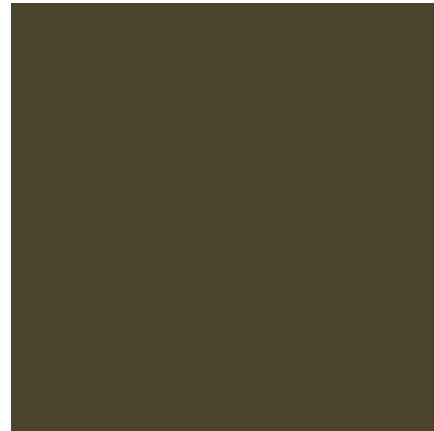
- Enact and distribute policies and procedures on social media use; train employees on those policies and procedures and the reasons for them.
- Ensure your policies on negative comments and social media use are narrowly tailored so the NLRB would not find they have a “chilling effect” on concerted activity.
- Ensure individual H.R. directors and hiring managers are complying with the organization’s policies on screening applicants and background checks.





## Contact Information

Bryan P. Cavanaugh  
The Cavanaugh Law Firm, L.L.C.  
512 Sunnyside Avenue  
St. Louis, MO 63119  
(314) 308-2451  
[bcavanaugh@cavanaugh-law.net](mailto:bcavanaugh@cavanaugh-law.net)  
[www.cavanaugh-law.net](http://www.cavanaugh-law.net)



Social Media Solutions  
at Work

Thank you for attending!