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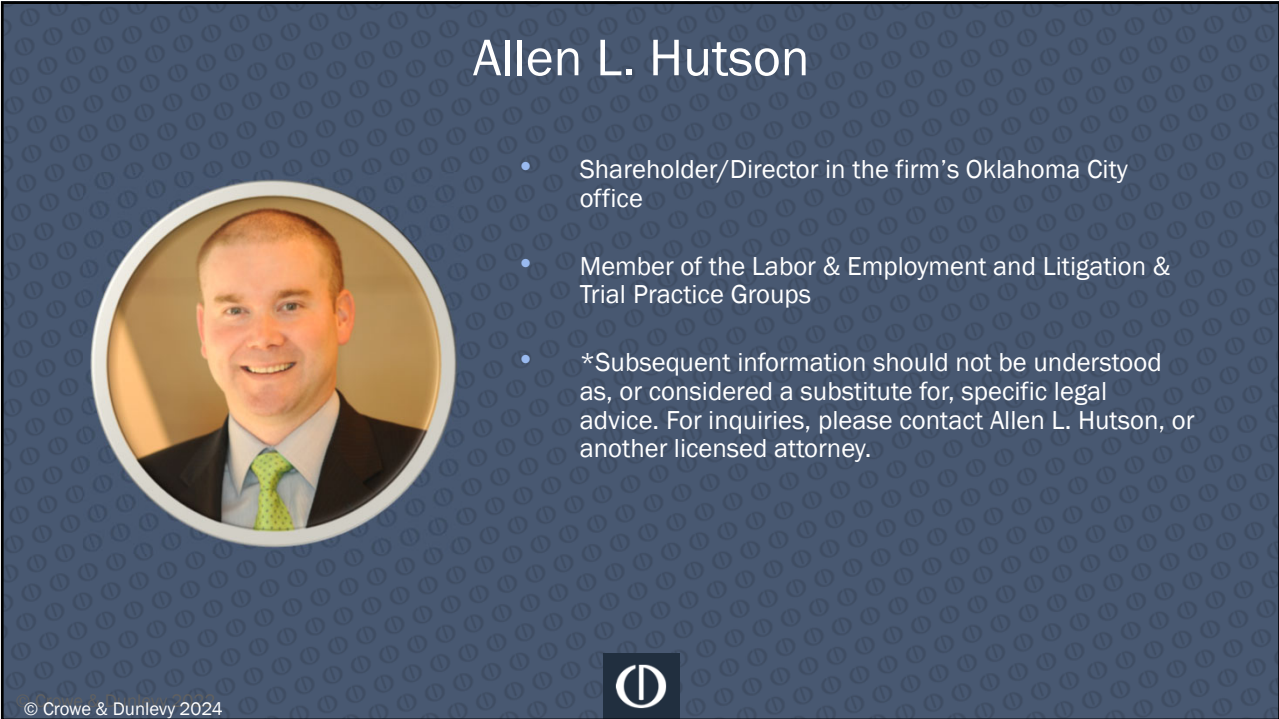
**Untangling the Spider's Web:
Best Practices to Manage
Online Workplace Issues**

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Introduction

Part I: Issues Related to Remote Work and Reasonable Accommodations

Part II: Managing Your Employees' Social Media Activity

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Part I: Issues Related to Remote Work and Reasonable Accommodations

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Remote Work aka “Working From Anywhere”

- 58% of American workers having the opportunity to work from home at least one day a week
- 35% of American workers having the option to work from home 5 days a week
- 87% want to take advantage of work flexibility options
- This applies across all industries, demographics, occupations, and geographies

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Remote Work and Disabilities

- According to research from the Economic Innovation Group, workers with disabilities are 22% more likely to work fully remotely than otherwise similar workers without disabilities, but only slightly more likely to work a hybrid schedule,
- The share of US disabled employees who were fully remote was 12.6% in the first quarter of 2024.
- Remote occupations have also seen the biggest increase in the disabled share of workers, which suggests remote work is enabling job opportunities across the board.

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Remote Work and the ADA

- Under the ADA, covered employers must provide a reasonable accommodation to a qualified individual with a disability unless doing so causes an undue hardship. Employers are often faced with telecommuting and related arrangements as requests for accommodations.
- The Equal Employment Opportunity Commission (EEOC) has recognized that working remotely is a form of reasonable accommodation and has provided guidance for employers.
- Employers may also need to provide accommodations to workers already working remote.

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EEOC Guidance on Remote Work

The ADA does not require an employer to offer a remote work program to all employees, but:

- Employers that do offer remote work must allow employees with disabilities an equal opportunity to participate; and
- Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to work remotely;

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EEOC Guidance on Remote Work (cont.)

An employer should determine whether working remotely is a reasonable accommodation by engaging in an interactive process with the employee by:

- identifying and reviewing all of the essential job functions, and
- determining whether some or all of the functions can be performed at home

Factors to consider may be:

- whether any duties require the use of certain equipment or tools that cannot be replicated at home;
- whether there is a need for face-to-face interaction
- whether the position requires the employee to have immediate access to documents or other information located only in the workplace.

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Avoiding Discrimination Claims

Employers could face discrimination claims from employees that they were unfairly denied a request to work remotely or denied an accommodation request while working remote. To minimize the risk of discrimination claims, employers should:

- Handle all such requests consistently,
- Require employees to submit written requests to work remotely to both managers and the human resources department, and
- Train managers on how to handle remote work requests,

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Other Considerations for Employers

- **Review your remote work policy:** Does your remote work policy allow an employee with disabilities to qualify for higher workplace flexibility or an on-site mandate exemption?
- **Update your software infrastructure:** Does your software include closed captioning, recording capability, text-to-speech translation?
- **Discuss home setups:** Does the employee require training or supplies to support safety and productivity in a home office?
- **Modifying the workplace:** Can you make workplace accommodations instead, such as building a ramp, reassigning minor tasks, etc.?

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Part II. How should employers navigate their employees' social media activity?

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Social Media and the First Amendment

- The First Amendment protects the government from infringing on an individual's political and ideological speech. Thus, the First Amendment does not prevent employers from regulating an employee's speech in the workplace.
- But what about other federal laws?

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Social Media and Title VII of the Civil Rights Act of 1964

- Title VII does not restrict an employer from regulating its employee's speech in the workplace.
- In fact, Title VII imposes a duty on private employers to regulate an employee's speech if it is discriminatory, harassing, or intimidating.
- For example, if the employer learns that an employee is sexually harassing another coworker online, the employer likely has a duty to take disciplinary action against that employee.

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Social Media and the National Labor Relations Act (NLRA)

- Unlike the First Amendment and Title VII, the NLRA does limit an employer's ability to regulate its employees' speech.
- The NLRA protects unionized and nonunionized employees' rights to discuss wages, benefits, and other terms and conditions of employment with co-workers as part of and to spur "concerted activity."
- Can an employee's social media activity be "concerted activity" under the NLRA? Yes!

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What social media activity could be protected under the NLRA?

- Posts, comments, messages, or even “likes” related to the terms and conditions of employment are more likely to be protected. This may include:
 - Posts about the employee’s wages,
 - Commenting about the employer’s safety policies,
 - Sharing Facebook posts historical race or gender discrimination
- However, certain activity is less likely to be protected. This includes:
 - Abusive, discriminatory, or extremely offensive speech;
 - Defamatory or insulting speech that is false,
 - Speech that does not seek to involve other employees,
 - Speech that does not relate to shared terms and conditions of employment

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Protected Activity

- An employee posted on a former coworker’s Facebook page that he should “think about getting a lawyer and taking the employer to court” and “contact the labor board too.” These remarks were in response to another employee’s post about getting fired for telling a patient about the poor condition of the company’s vehicles.
- Employees complained among themselves about an employer’s sales event and its affect on their commissions. One employee then criticized the sales event on Facebook. No other employee commented on the post.
- An employee posted that she hated her employer and couldn’t wait to leave. She also blamed the operations manager for much of the drama as well as the poor work environment. She posted this as a response to a coworkers’ post about workplace drama and poor management.

Non-Protected Activity

- In a Facebook conversation with a relative, a bartender complained about his employer’s tipping policy, commented that the customers were “rednecks,” and wished that the bar’s patrons choked on glass as they drove home drunk.
- An employee posted: “Hey everybody!!!! Im f***** broke down in the same s*** I was broke in last week because they don’t wanta buy new s***!!!! Cha-Chinnngggggg chinnng-at this Convenience Store.” The vehicle was actually his, not the employer’s.
- Two employees engaged in a Facebook exchange shortly after the employer offered to rehire them. They claimed that they would take students on “[f]ield trips all the time to wherever the f*** we want” and that the program could just “figure out the money.”

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Balancing Title VII and the NLRA

- Certain political conversations make it difficult for employers to comply with the NLRA and Title VII.
- For example, the NLRB General Counsel has cautioned against prohibitions regarding:
 - Pay equity
 - Minimum wage
 - Immigration
 - Abortion
- But discussion of these topics could result in employees feeling discriminated against or harassed.

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Create a Social Media Policy that Satisfies the NLRA

- Avoid provisions that:
 - Ban all disparaging comments regarding the workplace, coworkers, employers, and supervisors,
 - prohibits conduct that is generally offensive, discourteous, or rude,
 - bars untrue statements or statements that might damage the reputation of the employer or its staff.
- Add provisions that:
 - incorporate other policies, such as your anti-discrimination and harassment policy
 - Incorporate the NLRA standard for unprotected concerted activity

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Create a Social Media Policy that Satisfies the NLRA

Example 1

“Employees may not make discriminatory, **defamatory**, or harassing Internet posts about specific employees, the work environment, or work-related issues on social media sites.”

Example 2

“Employees may not use social media to make posts about coworkers, supervisors, or the employer **that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the employer’s workplace policies against discrimination, harassment, or hostility**, on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic.”

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Protecting Your Confidential Data Under the NLRA

- Employees have a right under the NLRA to discuss the employment terms and conditions with each other and with third parties. Thus, employers must narrowly tailor confidentiality policies to avoid interfering with these rights

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Protecting Your Confidential Data Under the NLRA

- Confidentiality policies are unlawful if:
 - They *expressly prohibit* employees from discussing employment terms and conditions, including wages, hours, or workplace complaints;
 - Employees would *reasonably understand* them as prohibiting employees from discussing employment terms and conditions; or
 - They broadly encompass “employee” or “personnel” information, without clarification or limitation.

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Example Language

“You must treat the Company’s and its customers’ trade secrets, intellectual property, and other proprietary information as confidential. Avoid using your social media to jeopardize or unwittingly disclose this information. In addition, you should avoid misappropriating or infringing on the intellectual property of other companies and individuals, which can create liability for yourself and for the company.”

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Employees' Social Media Privacy

- More than two dozen states have enacted laws addressing employer access to current and prospective employees' social media accounts. These laws, which are designed to protect employees' privacy rights, vary in their specific provisions. With certain exceptions, the laws generally prohibit employers from asking employees and prospective employees to provide their usernames and passwords to personal social media accounts.

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Social Media—Prohibitions

Employers may not:

- (1) require an employee or applicant to:
 - Disclose their social media usernames or passwords; or
 - Access their personal social media in the employer's presence
- (2) Retaliate against an employee solely because of his or her refusal to give the employer the username or password to the employee's personal online social media account
- (3) refuse to hire a prospective employee solely because the individual refused to give the employer his or her username and password to the individual's personal online social media account

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Exceptions

Employers may:

(1) Request or require an employee to disclose a username and password to access any:

- computer system, information technology network, or electronic communications device that the employer provided or subsidized; or
- accounts or services provided by the employer, or by virtue of the employee's relationship with the employer, or that the employee uses for business purposes.

(2) Conduct investigations

- to ensure compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct based on the receipt of specific information about activity on a personal online social media account or service, or
- Of an employee's actions based on the receipt of specific information about the unauthorized transfer of proprietary or confidential information or financial data to a personal online social media account or service.

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Liability

If an employer violates these rules, it may be liable for:

- (1) Injunctive relief, or
- (2) \$500 per violation

However, employers will not be liable for not reviewing, requesting, or accessing an employee's personal social media account.

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