Social Media @nd the Workplace

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Social media has changed every aspect of our society, including the workplace. Employers are struggling to keep up with all aspects of social media, including positive uses of social media for things like marketing and recruitment, to the negative issues presented by social media such as employee misconduct and invasions of privacy. The laws related to social media and the workplace continue to develop as lawmakers and courts attempt to keep up with the ever-changing face of social media. This article highlights some of the current issues facing employers.

GENERAL RISKS AND EMPLOYER CONCERNS

Unquestionably, there are benefits to using social media and other emerging technologies in the workplace. For example, many employers make use of instant messaging, texting, chat rooms, online meetings and video conferencing to enhance workplace communication. There are apps developed every day to assist with the performance of a variety of job functions. Many employers have found that the use of social media and technology can increase productivity, improve employee engagement, increase collaboration, and enhance communication both internally and externally.

However, with every benefit, there are risks that must be addressed. Social media can be a time-waster. Indeed, Facebook's traffic peaks mid-week from 1:00 p.m. to 3:00 p.m. Employers have to be sensitive to the fact that confidential or propriety information can easily be shared over social media. Moreover, any type of employee misconduct that can happen "in real life" can happen on social media, except that on social media, there is usually a photograph attached and the misconduct has a much wider audience.

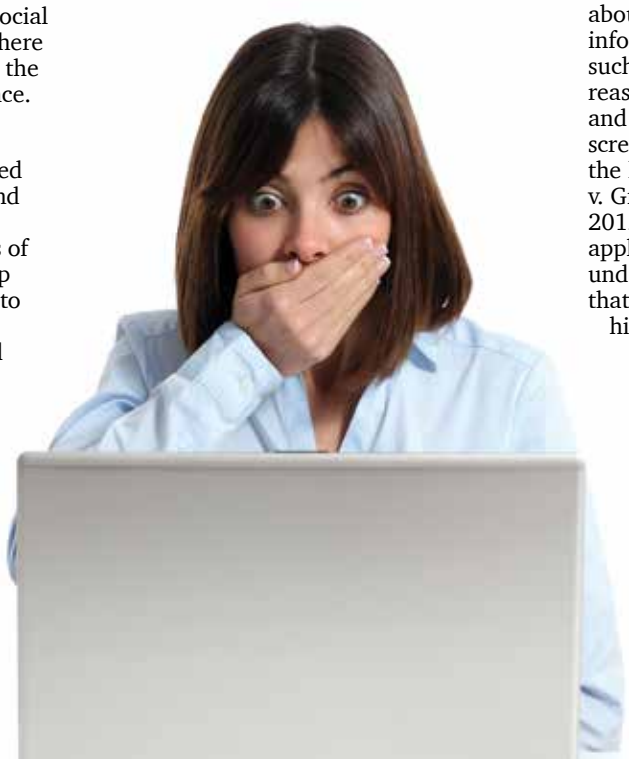
In addition, the legal risks associated with social media should not be ignored by employers. Potential harassment and discrimination claims, whistleblower claims, invasion of privacy, and claims of protected union activity are just the tip of the iceberg. Public employers have to worry about potential constitutional claims, such as freedom of speech and association. Any employer wanting to discipline an employee because of online activity should consult with legal counsel in advance of taking any action.

SOCIAL MEDIA AND PRIVACY

One of the major issues raised by social media is the impact on privacy. Social media users love to share. They share personal information, opinions, hobbies, relationship status, and major life events. This once private information is now readily available to the social media site, to the users of that site, and to the advertisers on that site.

Many social media sites, such as Facebook, offer different levels of privacy settings, with the default being that all content is publically accessible. There are settings and applications that can be used to stop (or at least reduce) online tracking of your activity. However, a recent Consumer Reports survey revealed that nearly 13 million U.S. Facebook users are not aware of the privacy control settings and about 30% of users do not use them.

Even when privacy settings are in place, there is never a guarantee that anything someone posts online will be private or remain with an intended limited audience. Indeed, a theme being repeated in appellate decisions across the country is that users have no expectation of privacy in any social media website. To the contrary, many courts routinely conclude that using social media is the opposite of expecting privacy According to one of the first decisions in California, no reasonable person who takes the affirmative act of posting information on a social media website has an expectation of privacy. Moreno v. Hanford Sentinel, Inc., (2009) 172 Cal.App.4th 1125, 1130. Or, as one New York court put it, "[W]hen Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publically available, she cannot now claim that she had a reasonable expectation of privacy." Romano v. Steelcase, Inc., (2010) 907 N.Y.S. 2d 650, 656.



This fundamental lack of privacy in on-line activity raises numerous questions that continue to plague employers. Can employees be disciplined for things they say on line? Can employers base a decision not to hire an applicant based on information learned from social media sites? Do litigants have a right to learn what their opponent says on line? Are there special concerns for use of social media by law enforcement officers or public officials? Although answers to some of these questions are beginning to emerge, the impact of social media in the workplace remains a rapidly developing legal area.

RECRUITMENT AND CYBER-VETTING OF APPLICANTS

One major concern involves the use of social media to screen applicants. According to a January 2016 publication from the Society for Human Resources Management, 81% of employers used social media for recruiting. In addition, 43% said they use social media or other online search engines to screen candidates, with 36% of employers saying they disqualified a candidate in the past year because of concerning information found on social media, such as illegal activities or discrepancies with the application.

Of employers not using social media to screen applicants, 76% cited concerns about legal risks or discovering information about protected categories such as age, race, gender, etc. as the reason. This concern is not unfounded, and employers using social media to screen applicants should be aware of the legal risk. For example, in Nieman v. Grange Mutual Casualty Company, 2012 WL 5029875 (C.D. Ill. 2013), an applicant sued for age discrimination under Title VII and the ADEA, claiming that the employer learned his age from his LinkedIn profile (based on the date of his graduation from college). He also alleged that he was not hired because the employer learned through an internet search that he had sued a prior employer. The Court concluded that such conduct by an employer was sufficient to trigger the protections of those statutes and the employer was not permitted to make an employment decision based on age information from LinkedIn.

Although the information may be public, once an employer has it, it can be difficult to prove that it was not used in the hiring decision.

While social media and the internet provide a wealth of information – although employers should remember that the internet is not always the most reliable source – relying on such information creates potential legal risks. Although the information may be public, once an employer has it, it can be difficult to prove that it was not used in the hiring decision.

SOCIAL MEDIA AND THE NLRB

The National Labor Relations Board ("NLRB") has been one of the most active administrative agencies in addressing social media. Between 2011 and 2012, the NLRB issued a series of reports concerning social media cases. The reports note a significant increase in cases dealing with the protected and/or concerted nature of union and employee postings on social media and the lawfulness of employer social media policies. Essentially, the NLRB's position has been that where employees discuss wages, hours or working conditions on-line, they have engaged in "concerted activity" within the meaning of Section 7 of the National Labor Relations Act ("NLRA"), and they cannot be disciplined for that conduct. However, general on-line complaints about the workplace, particularly if not shared with co-workers, fall outside the protections of the NLRA. Moreover, social media policies that are written in a fashion that punish or deter protected or concerted speech are being struck down as overbroad and unlawful.

In one case, the employer, a nonprofit social services provider, unlawfully discharged five employees who had posted comments on Facebook relating to allegations of poor job performance and lack of service by a coworker. The subject of the Facebook comments learned about them and reported them to the employer as cyber-bullying and harassing behavior. The employees who engaged in the on-line discussion were terminated. According to the Board, the Facebook discussion was a textbook example of concerted activity, even though it transpired on a social network platform. The discussion was initiated by one employee in an appeal to her coworkers for assistance.

Through Facebook, she surveyed her coworkers on the issue of job performance to prepare for an anticipated meeting with the Executive Director.

The resulting conversation among coworkers about job performance and staffing levels was therefore concerted activity. The Board has found employee statements relating to employee staffing levels protected where it was clear from the context of the statements that they implicated working conditions. This finding of protected activity does not change if employee statements were communicated via the internet. See, e.g., Valley Hospital Medical Center, 351 NLRB 1250, 1252-54 (2007), enfd. sub nom. Nevada Service Employees Union, Local 1107 v. NLRB, 358 F. App'x 783 (9th Cir. 2009).

Additionally, the discharged employees did not lose the Act's protection. Although there was swearing and/or sarcasm in a few of the Facebook posts, the conversation was objectively quite innocuous. The discussion did not rise to the level of "opprobrious" under the Atlantic Steel Co. test, 245 NLRB 814, 816-817 (1979), typically applied to employees disciplined for public outbursts against supervisors.

The guidance offered by the NLRB General Counsel's office provides employers with critical guidance on the appropriate scope of a social media policy and what kind of on-line discussion is protected under the NLRA.

- Be mindful of the NLRA, and avoid overbroad statements and ambiguous words that could be interpreted to "chill" Section 7 rights. The NLRB has disfavored terms and phrases such as "confidential information" and "disparaging comments" – without further explanation or context – as being too vague and likely to violate the NLRA. Employer policies should not be so sweeping that they prohibit the kind of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- Provide examples whenever possible. The Board has repeatedly indicated that a particular policy might have been lawful if it had included specific examples of prohibited conduct. Thus, instead of stating that the policy prohibits "inappropriate behavior," consider providing examples such as harassment, bullying, etc. Employers should work with employment law counsel to craft appropriate and workplace specific policy language.
- Include a savings clause to exclude protected Section 7 activity from the scope of a social media policy. Although a savings clause will not cure an otherwise unlawful and overbroad policy, it might enable the court to narrowly construe the policy or excise an offending portion and preserve the rest, and there is no downside to including one.

BEST PRACTICES

Without question, the most important thing an employer can do to address social media concerns is develop clear, comprehensive policies that address both the employer's use of social media and an employee's use of social media. Employers should revise these policies when laws change and when new technologies emerge. Ideally, the drafting of these policies would include input from legal counsel, information technology, and human resources, as well as any other relevant parties in the organization. Employers should obtain employees' written acknowledgement of their receipt of the policy, and to provide training to all employees on the policy.

Some of the topics that employers should consider addressing in policy include:

- A statement that the employee has no expectation of privacy when using the employer's system and devices;
- An express reservation of the right to monitor employee use of the employer's system and devices;
- A statement that due to the nature of the internet, employees may not have an expectation of privacy when using social media sites;
- Identification of the person(s) authorized to speak on behalf of the employer, and an express prohibition against any non-authorized employees speaking on behalf of the employer;
- Identification of the person(s) responsible for maintaining the employer's presence on social media;
- A statement that use of social media or the internet in any way that violates employer policy will be grounds for disciplinary action, up to and including termination;
- Person(s) to contact with personnel and technical questions; and
- A signed acknowledgement.

About the Authors

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