

Corporate Counsel

Social Media in the Workplace Creates New Legal Risks



Contributed by David Barron, Cozen O'Connor

Facebook, Twitter, and YouTube have forever changed how people communicate. Every little detail of people's lives is now broadcast, tweeted, or blogged about on the Internet. The social media activities of employees have increasingly pushed the boundaries of lawful workplace behavior and created new legal challenges for employers seeking to control this new communication forum and minimize the legal risks to their organization.

This article will address recent developments in employment law involving social media and the clash between employee freedoms and employer rights and obligations. This article will also discuss practical suggestions for employers struggling with the challenges of drafting an effective social media policy which balances these same concerns.

Cyberbullying and Online Harassment

When employees gather to communicate, whether it is at the water cooler, a local bar, or online, there will always be instances of inappropriate or lewd behavior. Social media is a new frontier in this regard, and employees are increasingly raising complaints to human resources departments and management over offensive or harassing statements made online. No employer wants to become the Facebook police, but employers must investigate and address complaints which could implicate federal or state

anti-discrimination laws. For example, an employee using a racial slur online in describing a coworker or pressuring a subordinate for a date via social media would, almost certainly, give rise to a legal duty to act on the part of the employer. Such evidence can and will be used against an employer to establish a hostile work environment or to support a claim for biased treatment based on a protected class.

Just as employers were forced to update their policies to address the rise of the Internet and email, it is now important to again update these same anti-harassment policies to include inappropriate or offensive behavior on social media sites. It is especially critical for companies to train employees that there are limits to acceptable interactions and communications with coworkers on social media sites (especially younger workers who may be accustomed to unfiltered use of social media), and that behavior which violates the company's anti-harassment or discrimination policies can be subject to discipline, even if it occurs outside the workplace

Perils of Facebook Friending

In July of this year, the Oklahoma State Bar issued an ethics opinion restricting judges from becoming Facebook friends with lawyers who appear in their courtrooms.¹ Many school districts have likewise adopted similar policies restricting teachers from "friending" students for fear of inappropriate communications or the appearance of an improper relationship.² While some may view these rules as excessive, there is no doubt that, to others, being someone's Facebook friend implies a special relationship and that can be problematic where there is a professional need to appear impartial.

In the workplace, supervisors are charged by law with an obligation to make employment decisions without regard to race, sex, or other protected categories. Treating employees differently, especially if the different treatment cuts along racial or gender lines, can easily be construed as discriminatory intent.

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It is, therefore, not hard to imagine a scenario where a supervisor is charged with favoritism because only select subordinates of the same race are classified as “friends,” or if a “friend” receives a promotion while an employee who is not a “friend” is overlooked. Similarly, denying a subordinate’s request to be “friends” can easily lead to a perception of discrimination or retaliation if such status is perceived as necessary to advance or succeed in the workplace.

While there has not yet been any legal guidance from the courts or federal agencies regarding appropriate parameters for supervisors friending subordinates, prudent employers are reviewing this issue and providing at least guidance, if not formal policy guidelines, to members of management. Putting aside the important issue of favoritism, concerns over management becoming privy to confidential information regarding employee medical histories, religious activities, or union affiliations offer other good reasons for discouraging supervisor friending of subordinates. Exposing management to every aspect of their subordinates’ private lives through social media is a dangerous thing and can provide fertile ground for questioning in an employment lawsuit. Sometimes, “too much information” can be a bad thing.

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Online Gripes by Employees

Just as social media sites are popular forums for discussions about sports, family, or politics, the workplace is also a hot topic. Increasingly, employers made aware of negative employee postings on Facebook or other social media sites have attempted to take disciplinary action. For example, it would seem understandable that an employee who posts “my job stinks and my boss is an idiot” would soon be unemployed.

The National Labor Relations Board (NLRB), however, has aggressively prosecuted employers for violating the National Labor Relations Act’s prohibition of retaliation against employees who engage in “protected, concerted activity.”³ Simply, employees (even those who are not in a union) have a right to discuss their jobs, workplace gripes, and/or terms of employment without fear of reprisal. On September 2, 2011, an NLRB administrative law judge ruled for the first time that Facebook is an explicitly protected forum for employee activity and that five employees fired for complaining about their jobs on Facebook were to be

reinstated with full back pay.⁴ The General Counsel for the NLRB has also issued a report outlining the Board’s views on various social media cases and the criteria that will be relied upon in finding a violation of federal law.⁵ In sum, the report identifies an expansive view of protected activity on social media in terms of subject matter, but reaffirms the legal requirement that the activity be “concerted” in that it involves more than one employee acting in concert.

For example, the report discusses a case involving a newspaper reporter who was terminated for posting unprofessional comments on a work-related twitter account and whose claim was dismissed. The NLRB distinguishes this case from others by noting there was no evidence that the reporter discussed his concerns about his job with his coworkers before posting them on his twitter account. It is also notable that the reporter was warned regarding the employer’s policy and yet continued to tweet inappropriate comments.

Similarly, the NLRB discusses in the report a case involving a bartender who was fired over a Facebook conversation with a relative (as opposed to a coworker) wherein he complained that he “hadn’t had a raise in five years” and also called the employer’s customers “rednecks” whom he “hoped would choke on glass as they drove home drunk.” The employee did not discuss his posting with any of his coworkers, and none of them responded to it. Again, the Board found that such activity was not protected since it was not concerted under the NLRA.

These cases make clear that terminating employees for off-duty comments on social media, even if they disparage the company, its management, or customers, is an area fraught with legal risk. Although employers have a right to craft a social media policy which restricts employees from engaging in disparaging comments about the organization, such policies must be balanced against employee rights to collectively organize and discuss their employment conditions online. No doubt this will be an area of great focus and litigation in the upcoming years.

Privacy Rights

In the past, most company investigations were conducted by interviewing witnesses and perhaps searching company lockers, purses, or desks. Now, the digital revolution means that employers must also view emails, cell phones, text messages, or Facebook postings as part of regular investigations into employee misconduct. Inevitably, these actions will result in employee pushback and claims of invasion of privacy.

Generally, federal and state laws allow employers to engage in reasonably-tailored workplace searches as long as employees are on notice that they have no expectation of privacy in the item or area being searched. For example, most employers have policies placing employees on notice that their desks or even personal bags or purses can be searched in the work place. To avoid claims of invasion of privacy, such policies should be expanded to now include cell phones, blackberries, and any other electronic devices used for communication. To the extent

such devices have password protection, employer policies should require that employees cooperate and allow access pursuant to company investigations. For example, if an employee claims that a coworker sent an illicit text message, it may be necessary to request that the accused employee allow management to review the cell phone to determine whether the offensive text message was, in fact, transmitted.

Employees who fail to cooperate with legitimate company investigations can lawfully be terminated. Of course, each case should be reviewed independently by legal counsel. Although this is an emerging area of the law, there should be no legal distinction between an employee who refuses to open his bag to cooperate in a theft investigation, and one who refuses to allow access to his cell phone as part of a sexual harassment investigation.

Protecting Confidential Information

Lastly, the prevalence of twitter accounts and other avenues for employees to discuss their work lives raises serious concerns about whether an employer can and should place limits on what an employee can share about their job online. For example, the injured star running back from the Houston Texans NFL football team “tweeted” the results of an MRI, which caused many to question whether such information should have been made public and available for competing teams to review. The same logic can apply to employees engaged in sensitive work. For example, is it appropriate for a Human Resources employee to tweet that he is traveling to the Scranton branch to investigate a “messy sexual harassment complaint?” Obviously, not.

Beyond the mere common sense need to maintain the confidentiality of sensitive business matters, employers also are legally required to do so in several important respects. First, employers are legally required to protect the confidentiality of employee health information under the Americans with Disabilities Act (ADA) and the Health Information Portability and Accountability Act (HIPAA). In addition, there are a myriad of state and federal laws which protect employees from retaliation based on various protected actions, such as filing a workers compensation claim, reporting a violation to OSHA, etc. Loose lips by a member of management on social media can easily be twisted by a clever attorney into evidence of retaliatory intent or an effort to “out” the employee as a troublemaker.

The takeaway from these examples is that company policies and confidentiality agreements should expressly include social media. Companies should be careful, however, that such restrictions do not conflict with some state laws which protect employees from disciplinary action for engaging in lawful off-duty activities. For example, New York law protects employees who engage in “legal recreational activities” which could easily be interpreted as including blogging or posting on social media sites.⁶

Conclusion

In sum, having a social media policy is no longer something that is only relevant for high tech companies and large corporations. Social media is here to stay and the employment law implications are significant for companies of all sizes and industry. Although most employees will act with decorum and respect while participating in social media communications, some will not, and, in those instances, employers must be well-armed and informed so they can take proper actions to protect their legal interests and reputations.

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¹ Oklahoma Judicial Ethics Opinion 2011-3 (July 6, 2011)

² See, e.g., Ohio District puts Facebook limits on teachers, by Lisa Cornwell, Associated Press (Aug. 31, 2011), posted on greenwichtime.com.

³ 29 U.S.C. § 157

⁴ Hispanics United of Buffalo Inc., No. 3-CA-27872 (NLRB Div. of Judges September 2, 2011)

⁵ National Labor Relations Board, Acting General Counsel releases report on social media cases (Aug. 18, 2011), available on the NLRB website.

⁶ New York Labor Law § 201-d