

Social Media

A Legal Perspective

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April 2014

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Social Media

- ❖ Social Media impacts all aspects of workplace (and even pre- and post-employment)
- ❖ Various emerging issues include:
 - ▶ Unlawful discrimination/harassment/retaliation
 - ▶ Section 7 of NLRA – protected concerted activity
 - ▶ Confidential information and trade secrets
 - ▶ Disparagement claims
 - ▶ Job References
 - ▶ Privacy and Negligent Hiring



Pre-Employment Screening Applicants

- ❖ Content may be used by employers
- ❖ But -- Content may reveal more information than you want to know (or should know)
- ❖ Use in a non-discriminatory manner
- ❖ Consider a third party to screen information
- ❖ Don't believe everything you read online
- ❖ Some states have prohibited and other states considering such legislation

Workplace Environment

- ❖ Issues across all HR/Legal considerations
- ❖ General Categories
 - ▶ Crafting SM Policy and Policy Enforcement
 - ▶ Workplace Misconduct/Investigations
- ❖ This Presentation will address each category

Written Policy

- ❖ Formal written policy is important
- ❖ Train management on parameters and implementation of the policy
- ❖ Educate/train employees on the policy and the risks of social media
- ❖ Remember to keep policy updated, as social media is constantly changing!

Policy – Business Concerns

- ❖ Reduced productivity
- ❖ Reduced efficiency of computer network
- ❖ Disclosure of confidential information and trade secrets
- ❖ Discriminatory or harassing conduct and implication for other HR policies
- ❖ Disparaging comments about employer, customers, clients, affiliates
- ❖ Postings which create public relations issues (i.e., video of misconduct in workplace)

Considerations for Restrictions on Use

- ❖ Confidential and proprietary information
- ❖ Employer logos, trademarks
- ❖ Posting of false, harassing, discriminatory information
- ❖ Commentary on employer
- ❖ Subject to monitoring without notice or consent
- ❖ Personal use during business hours
- ❖ Use of employer e-mail address to register
- ❖ Misuse as grounds for discipline

Section 7 of the NLRA

- NLRA applies to non-union as well as unionized workforces – but only in private sector
- Public Sector – First Amendment Issues
- Why Mention NLRA if not applicable?

First Amendment

- ❖ What if public employee is using social media during work hours or on employer-owned equipment?
- ❖ What if public employee is using social media on personal time and personal equipment?
- ❖ Lines between work and non-work more blurred today.

First Amendment Issues

- ❖ Does not allow employees to say whatever they want
- ❖ Equally true regardless of forum – even social media
- ❖ If “public conduct” – during work hours or on agency equipment
 - ▶ Can regulate and should consult internal policies
 - ▶ Under some situations, even if on personal time or on personal equipment can be “public activity” covered by policies

First Amendment Issues (cont'd)

- ❖ Balancing test with private conduct.
- ❖ 1) Is the person speaking on a matter of public concern? If not, free speech protections do not apply
- ❖ 2) Is the person speaking as a citizen or public employee? If latter, free speech protections do not apply
- ❖ 3) Do the interests of the government in promoting efficient operations outweigh the interests of the employee in commenting on matters of public concern? If yes, can still discipline for the speech

Policy Takeaways

- ❖ Be clear in expectations about
 - ▶ How employees can conduct themselves in private lives
 - ▶ Especially when employer affiliation is discussed, posted or listed

Policy Takeaways (cont'd)

❖ Should address

- ▶ Employee access to social media
- ▶ Employee use during work hours
- ▶ Policies regarding handling electronic information for security, privacy, accuracy
- ▶ Policies regarding open records law, open meetings law, etc.

Unlawful Discipline



Enforcement Takeaways

- Distinguish between individual gripes and initiation of public activity.
- Generally public employer has more latitude than NLRB's recent enforcement actions suggest in private employer context.
 - Example – Professor in Idaho terminated for criticisms of University's administration
- BUT, tread lightly as “trend” is other way
- Expletives and personal attacks on supervisors and management not likely protected
- Criticisms of management? Close

Workplace Misconduct / Investigations

- ❖ Co-workers and/or supervisors may now use social media as a forum for unlawful discrimination/harassment/retaliation
- ❖ Rewrite discrimination policies to contemplate online discrimination and to encourage employees to report such conduct
- ❖ Educate supervisors on the risks involved in social networking with their subordinates

Social Media in Workplace

- ◆ Assess business concerns
- ◆ Determine what types of limitations on social media work best for workplace
- ◆ Draft & implement a written policy

Social Media in the Post-Employment Context

- ❖ Employment References, such as on LinkedIn
- ❖ Possible Retaliation
 - ▶ Recent FLSA Case – *Stewart v. CUS Nashville, LLC* (Aug 2013)

Patchwork of State Laws

- ❖ Impact on pre-employment screening
- ❖ Impact on investigations
 - ▶ Password protection (is that same as a “friend” request from manager? Does it prohibit “shoulder surfing”? What if learned from “friended” co-worker?)
 - ▶ But, negligent hiring concerns

Questions ??

