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Social media: Why every employer needs to be concerned and proactive

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The term social media refers to at least six different forms or means of interactive communication on the internet where individuals meet (virtually) to post, share and exchange communications. The content can be any subject or issue, from gossip or griping about what happened at work that day, to serious discussions about world affairs. Some social networks, such as Facebook, lend themselves to chit-chat and day-to-day gossip, while other networks, like LinkedIn, focus on business-related issues.

Social media: A real problem for employers

Social media can be a real problem for any employer. The most obvious problem – employees chatting on social media during the work day instead of doing their jobs – is actually the easiest problem to address. Employers can adopt and enforce a personnel policy prohibiting employees from accessing social media sites when at work, except when on their own time (e.g. lunch) and only with their own devices. The policy would also

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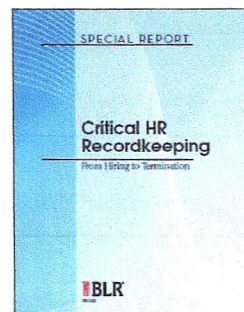
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Make sure you have the information you need to know to keep your records in order.

prohibit employees from using company information technology equipment or systems to access social media while at work, even during lunch, and employers can block such access on company equipment. Problem solved.

The real problem for an employer is what employees say on social media about the company, its owners and executives, its products or services, business practices, ethics, clients/customers, or the workplace. These comments are typically made when employees are at home on their personal computers posting on Facebook, or on a blog, where potentially anyone can read their postings, including a manager at one of the company's major customers. The crux of the problem for employers is that there are significant legal limitations in their ability to control what employees say about their work when they are on social media in their private lives.

This problem is compounded by the fact that social media is the most equalitarian form of communications ever invented. All business owners or executives realize this is true when asked if they know and want to befriend a low-level employee of the company on Facebook. This occurs regularly because Facebook suggests connections between people employed by the same company.

Consider, for example, the patient who is facing surgery and wants information about the hospital and surgeon, aside from their official websites. Online, the patient finds a post from an operating room nurse that includes a cell phone photo of the operating room, and her sometimes not-so-flattering remarks about her work situation. Apply this example to any business, and employers can readily understand the potential problems of employee social media.

Employee rights

Unlike the situation in which employees are on work time, and the employer can simply prohibit all social media activities and block sites on company IT systems, employers cannot exercise such blanket control over employees when they are not at work. This is because employees have a right of privacy which is well established in the law. In fact, more than 40 years ago, the U.S. Supreme Court found that this right of privacy is in the Constitution, although it is only implied.

In addition, this right of privacy applies not just when an employee is at home or otherwise not at the workplace. Employees are entitled to their privacy even while at work, when they are on their own time, such as during lunch or other break periods, and even when they are in the worksite during these periods. So during lunch, while employees are in the cafeteria on their personal iphones, they can be blogging, texting, or posting about anything that happened at work, perhaps involving sensitive or confidential information or events.

Only employees of the government have a constitutional right of free speech to say what they think about their government employers. (But, even this right has some limitations.) While employees of non-governmental employers do not have this free speech right, their right of privacy has much of the same effect in protecting what employees say about their employers on social media in their private lives away from work.

Examples of employee privacy concerns

Here's a scenario: An employee posts negative comments about his company, and how it conducts business on Facebook for his small circle of friends. The employer accesses the employee's Facebook account without his consent, and then fires the employee for the comments. The employee sues for wrongful termination and wins because the employer invaded the employee's privacy. The employer winds up paying monetary damages.

Recently, a jury in federal court in Newark, N.J., awarded monetary damages to two restaurant employees because the employer, without the employees' consent, eavesdropped on their My Space forum and fired them for their comments about the restaurant. The comments posted in the discussion group used crude terms to criticize managers and customers, and made references to violence and illegal drug use. A manager had gained access to the My Space forum by coercing a coworker to provide her password. Hence, there was an invasion of the privacy of the two fired employees because they had not consented to the employer's access to the forum.

In addition to the right of privacy, employees are protected from adverse actions by their employers when, in their private lives, their postings on social media are about alleged discrimination, sexual or other harassment, or other forms of workplace activities which are prohibited by various federal and state discrimination laws, and which regulate employer conduct toward employees.

Similarly, if an employee is complaining on social media about an employer's activities which the employee reasonably believes violate any law or public policy, these postings or blogs are protected by whistleblower protection laws, sometimes even in situations where the employee is wrong about the alleged violation.

Employer rights

An employer does have the right to protect the company's public image, its confidential and proprietary information, its trade secrets, and the information/secrets of its customers. An employer also has the right to enforce:

- personnel policies which prohibit discrimination and harassment in the workplace;

- personnel policies which require employees to treat each other with dignity and respect;
- its Code of Ethics and Business Conduct; and
- its policy on whistleblower protection.

Individual corporate officers and executives may also have the right to bring libel and slander actions against employees for statements they make on social media which disparage the officers/executives or hold them up to public ridicule or disrespect. However, such lawsuits may do more harm than good in terms of furthering the company's interests; or, depending on the circumstances, may be just the right vehicle for impressing on the entire workforce the need to be careful about what they say on social media.

Protecting employers from social media

The first steps in protecting employers from the possible negative impacts of employee activities on social media are to adopt and enforce two personnel policies: one on Electronic Information Systems and the other on Social Media.

Electronic Information Systems Policy: This policy addresses employee use of the company's electronic information devices and systems at any time, both when at work, and during non-work hours, even when at home. This policy must be drafted in the broadest of terms to include any devices/systems which are located at the worksite and any that employees take home, including, laptops, cell phones, and ipads, which the company either provides for the employee or pays for, either through a stipend, reimbursement, expense account or otherwise.

Based on recent court decisions involving employee privacy rights, this policy should cover situations where employees use company-provided or paid-for devices, including on personal time, to access their personal e-mail, Facebook, LinkedIn, Twitter, blog, etc., even when they use their own private access codes to do so.

Employees must clearly be placed on notice that they cannot have any expectancy of privacy in any of the above-described situations. In addition, because all these devices and systems are owned by the company, it can impose a blanket prohibition on their use, at any time, even during non- work hours, for any purposes other than those which are work- related.

The company is also entitled to monitor employee use of these devices/systems for compliance with this prohibition, again provided employees are properly notified of such monitoring. Finally, this policy should also list prohibited activities, such as visiting pornographic websites, making discriminatory or harassing statements about co-workers, etc.

Social Media Policy: Admittedly the Electronic Information Systems Policy does not and cannot address the situation where employees, in their personal lives, use personal devices to comment on social media sites about the company and work. This situation must be addressed by a Social Media Policy, which, for the reasons discussed above, must be more carefully drafted to protect employee rights, and cannot include a blanket prohibition on social media discussions about the company.

At a minimum, a carefully drafted Social Media policy should clearly advise employees that even in their personal lives, and on their personal devices, they:

- cannot disclose confidential, proprietary or trade secret information about the company, its clients, customers, vendors, suppliers or anyone else with whom it does business;
- must affirmatively state that they are not speaking as a representative of the company when they are discussing anything related to work on social media;
- cannot make any comments which violate the company's policies on discrimination, harassment, and treating co-workers with dignity and respect;
- similarly cannot make any comments which violate the company's Code of Ethics and Business Practices;
- cannot use the company's image or logo; and
- cannot take any photographs in the interior of the worksite and post them.

Litigation on the competing rights of employees and employers in the use of social media is on-going, and this area of the law is developing literally day-by-day. Legal counsel is absolutely essential in drafting, implementing, and enforcing employer policies on Electronic Information Systems and Social Media.

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