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BLOG WARS- EMPLOYERS' RIGHTS TO CONTROL EMPLOYEE'S SOCIAL MEDIA ACTIVITY WITHOUT INFRINGING UPON EMPLOYEES' RIGHT TO FREEDOM OF SPEECH

Image and privacy on social media, such as Facebook, Twitter and other blogs, should be priority concerns to businesses. Companies have a right to protect their public image and their confidential information. But problems abound for employers when they must deal with employees who discuss work on social media. An employee may publicly cast his employer in a negative light, or maybe just in a way the employer would prefer not to be cast. An employer must take care to be appropriately *reactive* in this situation. At this point, disciplining the employee may, or may not, undo any damage done. The appropriate reaction may set an example to others and prevent future breakdowns in protection. An inappropriate reaction may create legal problems for the employer who oversteps its bounds in disciplining the employee and subject the employer to legal action for violating the employee's right to freedom of speech.

Meanwhile, an employer should also take care to be appropriately *proactive*. It should institute policies on employees' social media commentary regarding work, advise its employees on conduct and discussion, and most importantly, recognize it has a right to protect its public image. These considerations all must be taken under the veil of scrutiny of various labor and employment laws, and laws protecting freedom of speech.

Several recent cases help to illustrate this issue.¹

- A Connecticut ambulance service company fired an employee after she posted negative comments about her employer and her supervisor on her Facebook page. The employee used profanity and made disparaging remarks about her boss. Co-workers of the employee responded and commented on her post, to which the employee further responded. The National Labor Relations Board (“NLRB”) issued a complaint against the employer for unlawful termination and for having an overly broad Internet posting policy, which prohibited employees from depicting the company in any way on the internet. Eventually, the case settled with the employer agreeing to amend its policy.
- A California, internet-based, home improvement company fired one of its employees after the employee posted comments about the employer and possible labor violations on Facebook. Co-workers of the employee responded to the post. The employee filed a complaint with the NLRB alleging unlawful termination. The case settled with the employee declining reinstatement but recovering for lost earnings.
- A New York nonprofit fired five employees after they participated in a series of postings on Facebook that criticized their employer's working conditions. Initially, one employee posted a comment on Facebook criticizing the employer and the services it provided, to which several other employees responded by defending themselves. The employer fired the responding employees, claiming that they harassed the employee who originally posted. The NLRB issued a complaint against the nonprofit, which is set for hearing at the end of June 2011.
- A Chicago car dealership fired an employee who posted photos and comments on his Facebook page, to which other employees had access, criticizing the car dealership's recent sales event and the food offered at the event. The dealership asked the employee to remove the post, which the employee did. Nonetheless, the

¹ Press releases discussing these cases can be found on the website of the National Labor Relations Board at www.nlr.gov.

dealership fired him. The employee filed a complaint with the NLRB, with the case set to be heard in July 2011.

Clearly, social media presents a unique concern for employers. Previously, employers had significant control over public dissemination of their image – whether through advertising, marketing, etc. Now, employees can take to the public forum at will and discuss work and express their opinion about their employer, management etc. The balance of power is shifting. Furthermore, employees are provided protection through the First Amendment and various laws, most notably, the National Labor Relations Act (“NLRA”).

Generally, the NLRA forbids employers from retaliating against certain types of employee speech or intimidating employees who engage in it. The protected speech includes talk of *wages, terms and conditions of employment with other employees*. The NLRA protections do not apply, however, to all speech. An employee cannot make disloyal, defamatory or untrue statements about the employer to non-employees. Essentially, this includes any talk that disparages the employer or its products, breaches confidentiality, or makes deliberately false accusations about the employer.

All this means an employer may discover it has some employees who are unhappy about work and who are not afraid to talk about it on the Internet. Caution in proceeding is key for the employer. It must be careful in how it scrutinizes its employees’ social media commentary. Any scrutiny cannot amount to “surveillance,” which is in violation of the NLRA. An employer should hesitate before firing the employees. The employer must take care not to retaliate by discriminating against the employee in some way. These difficulties in appropriately reacting are why proactively addressing the issue is important.

To be proactive, an employer should have a policy regarding employee commentary. The most obvious policies include those regarding confidentiality, and maintaining trade secrets or financial information. Just as important is a reminder that employees must post disclaimers that they do not blog or comment on the company’s behalf. Obviously, employers cannot restrict employee speech completely. Policies cannot forbid employees from discussing wages, terms or conditions with each other, or even with customers. Policies restricting speech on unionizing or solicitation of unions are not valid. The legality of a policy prohibiting employees from discussing the employer on the internet at all is doubtful. Employers also should not tell employees they cannot blog period.

In addition to instituting policies, employers should be proactive by advising and talking with their employees about blogging and social commentary. Reasonable employees probably understand the concerns the employer has. Employees who care about the business would be willing to adhere to guidelines – they probably would view policies as promoting company image rather than limiting their own personal freedoms. While employers should not require employees to use other complaint procedures or forums before blogging, opening up such procedures and forums probably will help to alleviate any employee tendency to tell-all on the Internet.

When it comes to employees using social media to discuss work, employers must be appropriate in how they react and, furthermore, in how they proactively address the issue. Employers must strike a balance between protecting their own image and privacy, and allowing employees the freedom to communicate about and discuss work on social media. Employees,

themselves, must be mindful to maintain the balance between exercising freedoms and taking responsibility for their actions. Ultimately, for sake of the business, it will be a team effort.

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