Social Media in Your Workplace/The Employer-Employee Perspective

Margo Wolf O’Donnell
Shareholder, Vedder Price, P.C.
modonnell@vedderprice.com
(312) 609-7609
Presentation Overview

- Understanding the extent of employee usage and the problems employees can cause
- Avoiding the wrath of the NLRB
- Monitoring employee use of social media
- Use of social media in the hiring process
Social Media:
(Nearly) Everybody Is Doing It

- Facebook now is reported to have more than 1 billion users
- LinkedIn has more than 360 million users
- Twitter has more than 300 million active users

Source -- Statista.com
Social Networking: How Employees Misuse It

- By disclosing their employer’s trade secrets and proprietary information,
- By leaking confidential information such as marketing tactics or pricing strategies
- By violating state consumer fraud acts
- By violating Federal Trade Commission regulations re: promotional practices
- By violating CAN-SPAM Act and Telephone Consumer Protection Act
- Potential liability for defamation and other torts
Social Networking: How Employees Misuse It

- By infringing on intellectual property rights
- By posting inappropriate or criminal content, including discriminatory or pornographic comments and images ("sexting")
How Can Employees Misuse Social Media?

- By checking work e-mail during off hours without authorization
  - Could cause inadvertent FLSA violations
    - Non-exempt employees
    - Exempt employees on vacation
- By texting/e-mailing while driving
  - Violating state laws
  - Creating liability for employer
The NLRB Enters the Fray
Section 7 Rights

The National Labor Relations Act

- The NLRA provides employees with the right to engage in concerted activities for the purpose of their mutual aid or protection.
- These protected concerted activities, also referred to as Section 7 rights, can involve two or more employees taking action on their own behalf regarding the terms and conditions of their employment.
  - or a single employee taking action for the aid or protection of other employees.
- Terms and conditions of employment—it is as broad a concept as the phrase implies.
Section 7 Rights

- They apply to unionized workplaces
- They apply to non-union workplaces
- Employers may not take an adverse employment action against an employee who engages in an activity that is protected and concerted
- If an employee believes that he or she was disciplined and/or discharged for taking part in a protected concerted activity, the employee can file an Unfair Labor Practices (ULP) Charge with the NLRB asserting a violation of their Section 7 rights
Employees Can Forfeit These Protections

- The NLRB applies the following test when assessing whether an employee has forfeited his or her Section 7 rights:
  - The place of the discussion;
  - The subject matter of the discussion;
  - The nature of the employee’s outburst; and
  - Whether the outburst was, in any way, provoked by an employer’s unfair labor practice.

- Employers have the right to maintain their premises, operations and production in an orderly, efficient fashion and to discharge disruptive or violent employees or prohibit conversation that is contentious and emotionally charged.

- Keep in mind, however, that it is the employer who bears the burden of proving justification of its actions.
NLRB and Social Media Policies

- Reports of the NLRB
  - Advises specificity in social media policies

- Recent cases
- Take-away: Beware general prohibitions
When advising clients on social media policies--be aware that the NLRB has taken the position that the following types of policies would violate employees’ rights under Section 7 of the NLRA:

- A policy that broadly prohibits employees from making disparaging comments about the employer;
- A policy that broadly bars employees from making defamatory or harassing comments about the work environment;
- A policy that broadly proscribes employees from disclosing confidential or sensitive data about the employer without prior approval;
- A policy that prohibits employees from presenting objectively, but not subjectively, false information regarding wages, hours, or terms and conditions of employment;
- A policy that broadly restricts the rights of employees to use the employer’s name or logo; and
- A policy that requires employer approval before an employee can identify or reference their employment.
Monitoring Employee Use of Social Media
For What Legitimate Reasons Might an Employer Want to Monitor?

- To safeguard its confidential information/trade secrets
- To avoid or reduce harassment/discrimination claims arising from offensive content posted on social media
- To increase employee productivity by reducing time spent at work using social media for personal purposes
Monitoring Employee E-mails

- You can absolutely do it
  - The Supreme Court upheld monitoring of text messages sent by an employer-issued pager
Practical Considerations

- Why do you want to monitor?
- Beware of claims of selective enforcement – do you allow “limited personal use”
- Is the manager citing e-mail usage as a pretext for another reason, covering up lax management?
- Do not allow managers to scrutinize e-mail/use of social media only of employees in certain categories (e.g., whistle-blowers, employees who have complained to HR, only “select” employee classifications)
What Can You Do?

- Monitor Social Networking Sites/Blogs/Communities
  - Misconduct...
    - She said what about her manager or coworker?
    - She said what about the company?
  - ... or protected activity
    - National Labor Relations Act
    - EEO complaints
    - Sarbanes-Oxley or other whistleblower complaints
What Can You Do?

- Do not access password-protected websites without permission; this could be a violation of the Stored Communications Act
Lawful, Off-Duty Conduct

- Be mindful of expanding State law protections of private, off-duty conduct
- Degree of protection for off-duty conduct varies
- Not clear how far protections extend
Use of Social Media in the Hiring Process
Use of Social Media in the Hiring Process

- Are you consistent? You should follow same protocol with every applicant to avoid disparate treatment claims.
- Is there a job-related reason for doing this, or are you just indulging your curiosity?
- If you deny employment to those who don’t use social media, you could have a disparate impact claim (e.g., based on age or race).
Use of Social Media in the Hiring Process

- TMI! Too much information is not necessarily a good thing.
- Do not assume that information gleaned from social media is accurate.