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Employment Policies

Employers Urged to Tread Carefully When Investigating Workers' Web Posts

An employer that monitors employees' personal Web postings on blogs or social networking sites like Facebook and MySpace might be motivated by the reasonable goals of protecting its reputation or proprietary information; however, an employer that proceeds incautiously could create liability on several fronts, attorneys and a consultant who advises companies on social media policies told BNA in interviews conducted June 29 to July 8.

The commentators warned that employers that monitor employee Web postings must consider how they attain access to employees' social media sites; the public or private nature of employees' Web accounts; whether the information in the postings is protected under federal labor law or reveals employees' protected status under discrimination laws; and what steps it could take if it were to find defamatory content.

Although some legal issues are unclear, management-side commentators suggested that employers can minimize their potential liability by incorporating references to social media into existing policies on confidentiality and external communications and by making the rules on what employees may and may not post as specific as possible so that the employees are ''on notice.''

''I caution employers to resist the temptation to unleash the IT department to burrow into employees' non-workplace social networking sites,'' John ''Lou'' Michaels Jr., with Baker & McKenzie in Chicago, said.

Stored Communications Act. John ''Lou'' Michaels Jr., a management attorney and partner with Baker & McKenzie in Chicago told BNA July 2 that employers can ''run afoul'' of the federal Stored Communications Act if they use illicit or coercive means to access employees' private social media accounts in an effort to root out critical or disgruntled employees.

Michaels said the SCA is extremely broad and prohibits third parties from accessing electronically stored communications such as e-mail and social media accounts without proper authorization.

''I see the issue as being how the employer finds out about the criticism. I caution employers to resist the temptation to unleash the IT department to burrow into employees' non-workplace social networking sites,'' Michaels said.

Public or Private Posting? What type of monitoring is permissible may depend on the type of social media involved, according to Lewis Maltby, president of the National Workrights Institute, a worker advocacy organization in Princeton, N.J.

''If employees put something on the Internet for all the world to see, then they are taking a chance. That is the risk they took in posting on public sites. Password-protected and nonpublic sites such as [private pages on] Facebook are a different matter. If the employer did something improper such as use spyware to get an employee's account access, then the employer could get into trouble,'' Maltby told BNA July 7.

But Maltby said it is not clear under current law how far employers can go in pressuring employees to reveal passwords to private accounts.

Maltby said whether an employee acts voluntarily when he or she acts under threat of termination is ''one of the age-old questions in employment law.'' According to Maltby, employers claim it is voluntary because the worker ''chose'' to comply with the request rather than work somewhere else.

Employer Coercion. Maltby said this was the issue in *Pietrylo v. Hillstone Rest. Group d/b/a Houston's* (D.N.J., No. 06-5754, *jury verdict* 6/16/09), where two employees were fired for complaining about management and posting sexual remarks about managers and customers on a password-protected MySpace account after a third employee gave managers her password to access the account.

''The jury decided the [third] employee was impermissibly pressured into revealing the password [in violation of the SCA]. But it is not an open-and-shut case as to whether it is illegal to threaten employees with termination under these circumstances, and this case could easily have gone the other way,'' Maltby said.

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Robert Lavitt, a partner at Schwerin Campbell Barnard Iglitzin & Lavitt in Seattle, told BNA July 7 that for vulnerable employees, there is little difference between being asked to provide social media access voluntarily versus being coerced to provide the access information to employers.

''That is not a meaningful distinction for most employees who are dependent on their weekly paycheck. It is a particularly hollow distinction, especially in the current, fragile economy,'' said Lavitt, whose law firm represents unions and individuals in employment matters.

Enforcement Concerns. Lon Safko, a New York-based consultant who advises companies on how best to use social media, told BNA July 1 that more employers are developing social media policies, but how far they may go in enforcing those policies remains murky.

''Do employers, for instance, have the right to censor employees' use of social media outside of the workplace?'' Safko asked. Such censorship is akin to trying to stop employees from socializing outside of work at a bar or restaurant and venting about the office, according to Safko, co-author of the book *Social Media Bible: Tactics, Tools And Strategies For Business Success*.

Management attorney Michaels said it is clear that employers can terminate employees for publishing defamatory statements about the company or fellow employees on Web sites, but he reiterated that they can still face liability if they accessed the defamatory content in an illegal manner.

''I think it is a violation of the Stored Communications Act for employers to go to an employee's work computer and retrieve keystrokes to access passwords and private [social media] account information,'' Michaels said.

Michaels cautioned employers that a recent decision from the U.S. Court of Appeals for the Fourth Circuit allowed punitive damages under the SCA, even absent a showing of actual damages, where an employer had accessed an employee's personal e-mail account without the worker's authorization (*Van Alstyne v. Elec. Scriptorium Ltd.*, 560 F. 3d 199, 28 IER Cases 1441 (4th Cir. 2009); 52 DLR AA-1, 3/20/09).

Lavitt also urged caution saying, ''Employers need to be very careful about accessing private password-protected social networking sites—and the SCA adds another layer of concern for employers.''

Discrimination, Labor Law Issues. Lavitt also pointed out that employers may find information about employees on the Internet that could make it hard for the employer to defend itself against allegations that later employment actions violated antidiscrimination laws.

''Employers need to be careful because they don't know what they will find out about employees when they go digging into their Facebook or MySpace accounts. Employers can't 'unscramble the eggs' once they know about an employee's age or sexual orientation or ethnicity,'' he said.

In addition Lavitt said overly broad policies that constrain employees' use of social media run the risk of violating Section 7 of the National Labor Relations Act. Section 7 protects employees' right to form, join and assist labor organizations, engage in collective bargaining, and to engage in other concerted activities for mutual aid or protection.

''There may be legitimate reasons why employers might monitor an employee's blog in order to protect its brand or image. The rub is where employers view working condition complaints as harming its image and try to tamp down on it. This can have a chilling effect on legitimate employee communication about workplace terms and conditions such as salaries and benefits that are protected under Section 7,'' Lavitt said.

The Associated Press implemented a social media policy for its employees on June 18 that has generated similar Section 7 concerns from the union that represents some of its employees. The AP policy prohibits employees from posting material about AP's internal operations on their personal Web pages and states that employees should remove third-party posts from their sites if they violate AP standards, Tony Winton, president of the News Media Guild Local 31222 told BNA June 29.

''It just makes us cringe that the company is telling employees to delete the posts of others off of their Facebook and other sites. We also think the policy on not discussing internal operations conflicts with Section 7 [of the NLRA] and we have asked the company to rescind the new policy,'' Winton said.

AP spokesman Jack Stokes told BNA July 8 that the policy was consistent with standards already in place at the AP. ''The social networking guidelines were requested by a number of staffers, and are not at variance with our longstanding Statement of News Values and Principles,'' he said.

Michaels, the management attorney, said the AP policy on third-party posts would be extremely difficult to police and enforce, and that employers with such policies would be viewed unsympathetically by juries in bias cases.

''In theory, in an at-will employment state an employer could fire an employee for anything. But it could result in an employment discrimination case and in terms of jury appeal—that is not a case I would want to take to a jury,'' Michaels said.

''Employers need to be careful because they don't know what they will find out about employees when they go digging into their Facebook or MySpace accounts. Employers can't 'unscramble the eggs' once they know about an employee's age or sexual orientation or ethnicity,'' Robert Lavitt, with Schwerin Campbell Barnard Iglitzin & Lavitt in Seattle, said.

Clarify 'Rules of Engagement' to Improve Workplace. Safko said overly broad policies are a mistake. ''Employees have a right to communicate using social media and employers don't have the right to coerce or to invade employees' privacy.''

Safko suggested that employers encourage social networking but clarify the ''rules of engagement'' and use employee feedback to improve the workplace.

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''Even where employers have policies of monitoring workers' e-mail, I am kind of itchy about them doing it. It is a little too 'big brother' for me. What companies need to do is find out if they have disgruntled employees and then work to bring morale back up,'' Safko said.

''The reality is people are social—they will tweet [referring to the social messaging site, Twitter]. Control over employees' use of social media is an illusion. We can have chaos or we can have controlled chaos,'' Safko said.

Explicit Social Media Policies Advised. In devising ways to protect the company's reputation or proprietary information, Safko said employers don't need to develop entirely new policies.

Rather, he said, employers should add the language ''social media'' and ''social networking sites'' to existing policies, such as those limiting employees' right to discuss proprietary company information outside of the workplace or those limiting employee contact with reporters.

Instead of imposing an outright ban on blogging and social networking, companies should give workers guidelines on what they can and cannot blog about, Safko said. Employers should have policies recommending that workers bring workplace-related issues and complaints to the attention of human resources departments before blogging about them, Safko said.

Michaels agreed that adding ''social media'' and ''social networking sites'' to existing policies was probably sufficient but recommended that such policies be as specific as possible. Employers also should put employees on notice of their social media policies, according to Michaels.

In addition, ''companies should set Google alerts so they can keep up with who is talking about the company and what they are saying,'' Safko said.

Safko said that employer unease over workers' unfettered use of social networking sites is merely a reaction to the rapid development of communication technology. ''Social media for the first time in history gives us these incredible tools for two-way conversations. Instead of being hostile, employers should engage their employees.''

Lavitt compared some employers' response to new social media to an initially cautious approach many took to employees' use of e-mail at work. ''It takes a while for workplace policies and laws to catch up with the technology. That is the tension we are seeing now,'' he said.

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