

Social Media in the Workplace – Legal Landmines

Workplaces All A’ “Twitter”

By Kenneth R. Gilberg, Esq.

Flaster/Greenberg PC

(215) 279-9915

Kenneth.Gilberg@flastergreenberg.com

Social Media has generated a lot of interest – and many legal concerns. The profound impact of social media on the workplace has made it both a boon and a bane for modern business. Twitter, Facebook, blogs, wikis and smartphones and iPads/tablets have changed the way employees communicate—both on and off the job. Social media now permeate every aspect of the employment cycle, from pre-employment screening to post-discharge situations. As the use of social media continues to grow, so, too, does the legal risk for employers. The National Labor Relations Board (NLRB) has addressed a number of situations involving an employee’s use of social media relating to the workplace. Many of these investigations/decisions have cost employers (both union and non-union) substantial sums of money in back wages.

An employer may establish social media policies prohibiting clearly unlawful conduct i.e. harassment of co-workers, threats of violence and the disclosure of confidential business information. However, employers must be aware that it is likely the NLRB will find social media policies containing broad prohibitions on an employee’s right to depict an employer in a negative light or from making disparaging comments about co-workers or management overly broad and a violation of the National Labor Relations Act (NLRA). Therefore, employers (union or non-union) should be cautious before imposing disciplinary action against an employee’s unfavorable use of social media because it may violate Section 7 of the NLRA, which protects an employee’s right to engage in concerted activities with other employees for the purpose of mutual aid and protection. The protection extends to both union and non-union employees.

Troubling Issues for Employers in Social Media

Problem areas employers may face as a result of employee use of social media in the workplace setting include the following:

- While offensive and frustrating, employees’ derogatory, negative or disparaging social media postings may be protected from discipline if they constitute protected concerted activity (generally, two or more employees acting together or one employee acting on behalf of other employees to improve the terms and conditions of their employment). Employers that discipline employees for actions and comments that fall under protected concerted activities risk committing an unfair labor practice and violating the employee’s rights under Section 7 of the NLRA.
- Employers routinely utilize social media as a means to compile information in connection with employee hiring decisions. Applicants for employment may reveal information about themselves through messages and photos contained in social media. Although employers may use this information in their decision-

making process, they must exercise caution to ensure they do not use such information to unlawfully discriminate.

- Use of social media may engender inappropriate familiarity between a supervisor and an employee. Such familiarity may create not only awkward situations but also the potential for employer liability. An employee, for fear of employer retaliation, may feel compelled to accept a supervisor's invitation to be a "Facebook friend" or otherwise accept a supervisor's request to be allowed admission to an employee's "private" social media site. A supervisor with such access may learn information about the employee's social activities and other personal information, or engage in inappropriately familiar or off-color communications, either of which could lead to claims of discrimination, sexual harassment or hostile work environment.
- Employees' improper utilization of social media at work and during their working time raises concerns about lost productivity. Employees also may improperly use social media to defame or harass other employees. An even greater concern is that employees may misuse social media to misappropriate proprietary company information such as trade secrets or other confidential information.
- Potential legal issues may arise when members of management use social media to comment about an employee who has left the company. Although many employers have adopted a policy to provide only a "neutral reference" (dates of employment and position held) for departed employees, this caution is frequently ignored when supervisors and managers respond to reference requests through social media sites such as LinkedIn.
- Many states, including New Jersey, have enacted legislation prohibiting employers from requiring employees to grant access to an employee's private social media site. Also, courts have determined that employers may violate an employee's privacy rights if the employer accesses an employee's "private" social media information. This may even be the case in situations when the information that has been accessed is contained on an employer-provided device or an employer managed server.

Steps Employers Can Take To Avoid Risks

It is apparent that with the benefits accompanying the use of social media in the workplace there is a potential downside that may include employee lawsuits and a myriad of other legal issues. Since the use of social media is pervasive and not likely to disappear, it is prudent for employers to be cognizant of and prepare for these risks. Some suggestions for employers to avoid these risks include:

- Craft in clear and easily understood language the company's social media policy and regulations and be specific about what is and is not permitted. Policies that are "overly broad" or have a "chilling" effect are generally prohibited. Due to the complex nature of the legal issues relating to social media at work, we highly recommend obtaining legal or expert advice before adopting or revising any policy.
- In general, employers may prohibit the disclosure or use of confidential information, trade secrets and customer data, but such prohibitions must be narrowly tailored so as to prohibit only the disclosure of truly proprietary information, and the employer must be able to demonstrate it has taken steps to preserve the confidentiality of such information.
- Inform employees that misuse of social media can be grounds for discipline, up to and including termination.

- Restrict and discipline employees' use of personally-owned technology during their working time and make clear the employer has the right to monitor employee communications made using the company's computer and communication systems.
- Require employees to disclose that any statements or comments posted on social media that is either in the company's name or could reasonably be attributed to the company, are not posted on behalf of the company, unless the employee is promoting the company's products or services. Federal Trade Commission regulations require employees to disclose they work for a particular company, if they are endorsing the company's products or services.
- Provide training for management on how to handle social media issues with employees as well as handling privacy issues that concern employee usage of company-owned technology.
- Comply with all federal, state and local privacy rules and off-duty conduct regulations.
- Notify employees who resign or are terminated that access to and use of the company's computer system and its information is prohibited.
- Immediately confiscate company-issued laptops, smartphones, etc. from departing employees and consider the inspection of such devices to evaluate whether certain company information has been misappropriated.
- Require all employees to acknowledge, in writing, that they should not have any expectation of privacy for any information that is sent, received or stored on the employer's computer and communication systems and that the employer reserves the right to intercept and monitor employee communications on its systems. Moreover, make employees recognize that the company considers all social media accounts used for business purposes on behalf of the company proprietary, including all login and password information and associated content.

Employers must recognize that their social media policies must be continually updated or they risk exposure to legal liability. If you would like me to review your current social media policy to ensure that it complies with current laws, regulations and case decisions, or if you would like to discuss preparing a social media policy for use at your company, please let me know and I will be pleased to assist you.