SOCIAL MEDIA DEVELOPMENTS IN THE MODERN WORKPLACE

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Social media in the workplace is a fact of life these days. To what extent can an employer limit an employee's use of social media, and can an employer gain access to an employee's social media postings?

In 2012, California Governor Jerry Brown signed into law two new bills that increase privacy protection for social media users in California. Assembly Bill 1844 has now been codified as California Labor Code Section 980 and prohibits employers from requiring their employees and job applicants to provide their user names, passwords, or any other information related to social media accounts. "Social Media" is defined as "an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations." Think Facebook, Twitter, etc. An employer does have the right to request personal social media "reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations." In addition, an employer may require disclosure of user names and passwords for employer-issued electronic devices.

Senate Bill 1349, codified as California Education Code Section 99121, establishes a similar policy for post-secondary education students. This Bill also prohibits both public and private schools from requiring students, prospective students and student groups to disclose user names, passwords and other social media identifying information. However, this prohibition does not affect a school's right to investigate and punish student misconduct.

In the employment context, while an employer cannot require disclosure of access information to an employee's social media account, in the event posts concerning the employer are discovered, the National Labor Relations Board ("NLRB") has received numerous requests recently for guidance in situations involving employer actions against employees for posts concerning the employer.

The NLRB has issued a number of opinions and decisions on the issue of the extent to which an employer can intrude into, and discipline an employee for, information posted on an employee's social media page. For example, in *Hispanics United of Buffalo, Inc.* NLRB ALJ, No. 3-CA-27872 (09/02/11), an employer discharged five employees for complaining on Facebook about a co-worker's allegations of poor job performance. The decision found the terminations unlawful under the National Labor Relations Act ("NLRA") and ordered the employees reinstated.

Section 7 of the NLRA provides that employees have a right to communicate with one another about the terms of their employment. When such communication qualifies as "protected concerted activity" an employer cannot discipline an employee for partaking in such communication. So what constitutes "concerted activity?" According the NLRB, it is activity in which the employee discusses "the terms and conditions of his or her employment in a manner that is meant to induce or further group action."

In a case investigated by the NLRB, an employee was terminated for posting comments on his Facebook page that criticized a sales event held by the employer. The NLRB opinion found that this activity qualified as protected concerted activity because the employee was "vocalizing the sentiments of his coworkers and continuing the course of concerted activity that began when the salespeople raised their concerns at the staff meeting."

However, in another case, an employee's Facebook post complaining about the employer's tipping policy did not amount to protected concerted activity because the employee did not discuss the policy with his coworkers, none of them responded to the posting, and the post did not grow out of the employee's conversations with coworkers.

Another issue related to social media considered by the NLRB is the extent to which an employer may limit an employee's social media activity at work. A distinction has been drawn between "working hours" and "company time." While an employer may have a policy that prohibits employees from using social media while working, an employer may not prohibit use of social media during breaks and other non-working time.

Facebook, LinkedIn, Twitter and other social media are a fact of life today and employers are still finding their way in creating policies that protect the employer, but also respect the privacy of their employees.