Labor & Employment Corner

by Gregory A. Hearing and Jeffery L. Patenaude

Social Media in the Modern Workplace

Social media permeates many facets of the modern work-place. Indeed, a recent survey revealed that 72% of workers access social media on the job at least one time each day, a majority of whom access social media several times per day, while 28% of employees spend at least an hour on social networking sites each day.[1] This article provides a brief overview of some of the ways in which social media can impact employers and employees.

Social Media and the National Labor Relations Act

Employers can violate the National Labor Relations Act, 29 U.S.C. § 157 (NLRA), by maintaining overbroad social media policies. According to the National Labor Relations Board (NLRB), social media policies are unlawful when they interfere with employees' Section 7 rights.[2] The NLRB has released several recent memoranda explaining that an employer violates the NLRA by implementing policies that "would reasonably tend to chill employees in the exercise of their Section 7 rights."[3] In March 2015, the NLRB released a memorandum concerning employee handbooks.[4] Among other things, the memorandum identifies specific handbook provisions concerning social media that the board deems unlawful,[5] including the seemingly innocuous provisions: "[I]t is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer's] business operation or reputation," and "[You may not e]mail, post, comment, or blog anonymously. You may think it is anonymous, but is most likely traceable to you and the Company"[6] The board, has, however, approved of some more narrowed social media policies, including: "Do not make negative comments about our customers in any social media," and "Use of social media on Company equipment during working time is permitted if your use is for legitimate, preapproved Company business."[7]

Additionally, several recent cases reflect the NLRB's broad position on employees' rights under the NLRA in connection with social media. *See, e.g.,* Triple Play Sports Bar, 361 NLRB No. 31 (Aug. 22, 2014) (finding a NLRA violation where the employer terminated employees due to their participation in a profanity-laced Facebook status discussion criticizing the employer); Metro-W. Ambulance Serv. Inc., 360 NLRB 124, 2014 WL 2448663, at *1, *16, *41-42 (May 30, 2014) (holding that employer unlawfully retaliated against a paramedic's Section 7 activities where the paramedic set up a pro-union Facebook page). Notwithstanding the broad scope of protection the NLRB has afforded social media, other cases have previously found circumstances where social media speech was unprotected. *See, e.g.,* Richmond District Neighborhood Center et al., 361 N.L.R.B. 74, 2014 WL 5465462 (Oct. 28, 2014) (finding that employees' Facebook comments advocating insubordinate acts, such as "[l]et's f—k it up. I would hate to be the person takin your old job," were not protected under the NLRA); Landry's Inc., No. 32-CA-118213 (N.L.R.B. A.L.J. Jun. 26, 2014) (holding that a handbook policy urging employees not to post information regarding the company or other employees which could lead to morale issues did not violate the NLRA).

Social Media in Workplace Investigations

Employers routinely investigate employees and prospective employees by reviewing their social media accounts. Such a practice presents both benefits and risks. For example, social media has helped at least one defendant prevail in a case brought under the Family and Medical Leave Act (FMLA) where the employer suspected abuse. *See, e.g., Lineberry v. Detroit Medical Ctr.,* No. 11-13752, 2013 WL 438689 (E.D. Mich. Feb. 5, 2013) (finding that the employer had an honest suspicion of FMLA fraud where the employee admitted to lying after being confronted with Facebook photos of the employee on vacation in Mexico). Likewise, reviewing a prospective employee's social media account may provide employers insight into the employee and whether he/she may be the best candidate for a position.

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When investigating prospective employees through social media, employers generally may rely on publicly available information posted by the applicant; however, they should understand that the postings may not be entirely accurate.[8] Furthermore, employers should consider the risks of conducting such investigations. Indeed, social media investigations pose the risk of stumbling upon a person's legally protected characteristics and could lead to the discovery of information that may be unlawful to consider during the interview process.[9] Should employers conduct social media investigations, it is important that they retain the results of their search. *See Butler v. Edwards-Brown*, No. 13-1378, 2014 WL 1776035 (E.D. Mich. May 5, 2014) (denying summary judgment, in part, due to the absence of the exact text which the plaintiff posted on her Facebook account).

Recently, there has been a trend to curb employers' access to employees' social media accounts. Indeed, at least 18 states now restrict employers' abilities to demand that employees and/or applicants disclose means for accessing their personal social media accounts (i.e., user names and passwords).[10] This trend has gained momentum within the last few years and is likely to continue. States began enacting these laws in 2012 and, in 2014 alone, five states (Louisiana, Oklahoma, Rhode Island, Tennessee, and Wisconsin) enacted them. The statutes provide a variety of protections to employees. As for applicant screening, many of them prohibit employers from requesting log-in credentials, permission to view social media accounts, and privacy setting changes.[11] With respect to workplace investigations, some of the statutes provide limited exceptions for such investigations, while others do not.[12] For example, Illinois and Nevada do not provide any exception for workplace investigations that might require access to an employee's personal social media accounts.[13] In contrast, California, Oregon, and Washington provide exceptions to investigations of legal violations and alleged misconduct, allowing employers to ask employees to provide social media account content relating to alleged misconduct.[14] Still, Arkansas permits an employer to request any employee's social media login credential to investigate workplace misconduct.[15] Notably, all but one of the state statutes (Oklahoma) exempt devices or accounts provided by the employer to the employee from protection.[16]

Social Media and Harassment/Retaliation/Discrimination

Cellphones and other digital devices connect employees to each other constantly. This added connectivity allows for greater employee engagement; however, it also creates opportunities for harassment and blurs boundaries of appropriate conduct. Governmental agencies and courts have generally viewed harassment via social media and digital devices in the same manner as face-to-face harassment. Even where employees post harassing comments about coworkers outside the workplace, employers may be liable for a hostile work environment if they were aware of the comments or if the employee posting the comments used devices or accounts owned by the employer. Indeed, it was noted during a Jan. 14, 2015, meeting held by the EEOC that workplace harassment is alleged in roughly 30 percent of all EEOC charges and that the ease of posting and responding to messages and images through social media has spawned employee complaints of harassment.[17]

Recent cases highlight the seriousness of employee harassment through social media. For example, in *Espinoza v. County of Orange*, No. G043067, 2012 WL 420149 (Cal. App. 2012), the California Court of Appeals upheld a $1.6 million verdict against an employer where the plaintiff was harassed by co-workers on a blog, the plantiff reported the harassment to his supervisor, and it was not addressed. Additionally, in August 2012, the EEOC reached a $2.3 million settlement with a national electronics retailer in a case involving an assistant store manager who sent sexually charged text messages to a sales associate.[18] Other courts have found that a manager's social media posts concerning a terminated employee could be relied on to find the employer liable for retaliation. *See Stewart v. CUS Nashville LLC*, No. 3:11-CV-0342, 2013 WL 456482, at *11 (M.D. Tenn. Feb. 6, 2013).

Discovery and Social Media

There has been considerable litigation over access to social media accounts through discovery. Social media material is generally discoverable where the material is relevant to a claim or defense and discovery of the same is not limited for reasons of oppression, embarrassment, and the like. Indeed, the employment litigation in this area continues to yield a number of cases permitting social media discovery. *See, e.g., EEOC v. The Original Honeybaked Ham Company of Georgia*, No. 11-cv-02560, 2012 WL 5430974, *2-3 (D. Col. Nov. 7, 2012) (establishing a special master process to facilitate the production and inspection of Facebook material); *Glazer v. Fireman's Fund Ins. Co.*, No. 11Civ.4374, 2012 WL 1197167 (S.D.N.Y. Apr. 5, 2012) (ordering production of social media material). As courts are becoming more attuned to the nuances of social media accounts, however, they are requiring that requesting parties hone their requests based on relevance. *See, e.g., Palma v. Metro PCS Wireless Inc.*, 18 F. Supp. 3d 1346, 1347 (M.D. Fla. 2014) (noting that social media content is neither privileged nor protected by any right of privacy, but that this principle does not give defendants the right to serve overbroad discovery requests); *Giacchetto v. Patchogue-Medford Union Free School Dist.*, 293 F.R.D. 112 (E.D.N.Y. 2013) (limiting discovery to postings that specifically referenced the plaintiff's claimed emotional distress, treatment she received, or alternative potential stressors as well as accounts of the events alleged in her amended complaint on social networking sites).

Another issue parties should be especially sensitive to is the impact of "bring your own device" (BYOD) policies on discovery. Although legal guidance on BYOD policies is limited,[19] such policies implicate numerous concerns, including issues surrounding lost or stolen devices,[20] confidentiality of protected health information contained on employee-owned devices,[21] and the protection of company trade secret/confidential information contained on employee-owned devices.[22] Putting aside these concerns as well as other issues surrounding cybersecurity, nonexempt wage-and-hour issues, and even record preservation issues under the Public Records Act, what is not yet known is how BYOD policies will affect e-discovery. At least one court addressing the issue denied a plaintiff's motion to compel text messages sent or received by employees on their personal cellphones because of a lack of any showing that the employer had any legal right to obtain the text messages. *See Cotton v. Costco Wholesale Corp.*, No. 12-2731, 2013 WL 3819974 at *6 (D. Kan. Jul. 24, 2013). The decision was based on the lack of custody or control, with the court noting that the plaintiff had not claimed that Costco issued the phones or that the employees had used their phones for work-related business. The outcome could have been different if the company had maintained a BYOD policy.

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To the extent that parties attempt to use social media postings or comments as evidence to support or refute employment claims, they must consider evidentiary issues, including authentication and hearsay issues, surrounding such evidence. *See In re Carrsow-Franklin*, 456 B.R. 753, 756-57 (Bankr. D. S.C. 2011) (explaining that blogs are not self-authenticating); *see also Miles v. Raycom Media Inc.*, No. 1:09cv713-LG-RHW, 2010 WL 4791764 *3 n.1 (S.D. Miss. Nov. 18, 2010) (holding that unsworn statements made on Facebook page by nonparties constituted inadmissible hearsay).

Conclusion

Social media has caused many legal issues in the employment law arena. Because social media cases and decisions are issued nearly every day, it is impossible to capture them all. Nevertheless, the sampling of topics and cases discussed herein provide insight into some of the most salient issues employers and employees face. Both employers and employees must be cognizant of these issues and be on the lookout for new developments in this evolving area of the law. ⊙

Endnotes

[1]*See* Julie A. Totten & Melissa C. Hammock, *Personal Electronic Devices in the Workplace: Balancing Interests in a BYOD World*, 30 A.B.A. J. Lab. & Emp. L. 1 (2014); *see also National Business Ethics Survey of Social Networkers: New Risks and Opportunities at Work,* Ethics Res. Ctr. 1, 8, 20 (2013), www.ethics.org/downloads/SocialNetworkingFinal.pdf.

[2]Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, protects employees' right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," whether they are members of a union or not. Protected concerted activities involve employees joining in concert to affect wages, hours, and other terms and conditions of employment.

[3]The NLRB's memoranda can be located at www.nlrb.gov/.

[4]*See* Memorandum from the NLRB Office of Gen. Counsel (OM 15-04) (Mar. 18, 2015).

[5]*Id.*

[6]*Id.*

[7]*Id.*

[8]Other authors have likewise recognized such social media-related risks. *See, e.g.,* Christine Lyon & Melissa Crespo, *Employer Access to Employee Social Media: Applicant Screening, 'Friend' Requests and Workplace Investigations*, BNA Social Media Law & Policy Report (Mar. 11, 2014).

[9]Such issues were specifically discussed during a March 12, 2014, hearing held by the EEOC concerning employers' use of social media. *See* www.eeoc.gov/eeoc/newsroom/release/3-12-14.cfm.

[10]*See* Bryan Knedler & William Welkowitz, *States Continue to Protect Workers' Social Media Privacy in 2014*, BNA Social Media Law & Policy Report (Feb. 10, 2015), www.bna.com/states-continue-protect-n17179922967/.

[11]*See* Lyon & Crespo, *supra* note 8.

[12]*Id.*

[13]*Id.*

[14]*Id.*

[15]*Id.*

[16]*See* Knedler & Welkowitz, *supra* note 10.

[17]*See* EEOC Press Release, *Workplace Harassment Still a Major Problem, Experts Tell EEOC at Meeting* (Jan. 14, 2015), www.eeoc.gov/eeoc/newsroom/release/1-14-15.cfm.

[18]*See* EEOC Press Release, *Fry's Electronics Pays $2.3 Million to Settle EEOC Sexual Harassment and Retaliation Lawsuit* (Aug. 30, 2012), www.eeoc.gov/eeoc/newsroom/release/8-30-12.cfm.

[19]Indeed, there is little case law addressing BYOD policies. Furthermore, neither the NLRB nor the courts have ruled on the NLRA's application to BYOD policies. *See* Totten & Hammock, *supra* note 1.

[20]For example, while employers may adopt procedures allowing them to remotely wipe employer-owned devices where a device is stolen or lost, their ability to wipe employee-owned devices (which results in the wiping of all data on the devices) without the employee's written consent may be limited by the Stored Communications Act and/or the Computer Fraud and Abuse Act. *Id.*

[21]Employers that access employee-owned devices may run afoul of the Health Insurance Portability and Accountability Act (HIPAA) or the Genetic Information Nondiscrimination Act (GINA). *Id.*

[22]Protecting confidential and trade secret information is the biggest concern for most employers. Indeed, a 2012 survey revealed that half of employees who left or lost a job in the preceding 12 months retained confidential corporate data, and 40 percent planned to use it in their new jobs. *Id.*

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upon the rights of the governed, and those on the left who believe too many people have been locked up for "nonviolent" drug crimes, resulting in "mass incarceration." Libertarian approaches to criminal justice, once unacceptable in "tough on crime" circles during Ronald Reagan's era, receive wider acceptance today.

The legislative proposals under consideration by Congress address only the federal criminal justice system, not the states. The vast majority of the American prison population resides in state and local prisons and jails, many for drug possessory crimes. Only one-tenth of the 2 million prisoners in the United States are federal prisoners, and of those, approximately half were convicted for drug trafficking, not mere drug possessory crimes. Recidivism among drug traffickers is high; according to the U.S. Sentencing Commission, one out of every two released drug traffickers is back behind bars within five years for selling or distributing significant quantities of heroin, meth, PCP, and other dangerous drugs.

Repairing the federal criminal justice system will require ways to ensure that justice is served and that prisons do a better job at not only incapacitating but also rehabilitating. Whether Congress lives up to the challenge of producing meaningful criminal justice legislation, as an election year begins, remains to be seen. ⊙