

## **Social Media and the Employer-Employee Relationship**

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The widespread popularity of social media presents novel challenges for employers and for the employment relationship. This paper examines two dimensions of the new landscape: the degree to which employers may assess employees' conduct on social media in making employment decisions, and the proper application for employers' counsel of ethics rules in the context of new technology.

This paper addresses these significant areas of intersection between the workplace and technology, and offers some considerations for employers' counsel.

### **Social Media: Uses and Abuses**

Social media refers to those websites and web-based programs that allow individuals to post messages, pictures and videos, and to communicate with other users. Facebook is the one of the most popular social media sites, with more than one billion users, but other popular social media outlets include Twitter, Instagram, Vine and LinkedIn. There are limits on what employers may require of employees with regard to their private social media activity.

### **Pre-Employment Background Checks**

Employers may review prospective employees' social media profiles and posting activity provided that the information is publicly available and has been posted by the job applicant.

Twelve states have banned employers from requesting social media username and passwords from job applicants.<sup>1</sup> Many employers that do request this information often do so on a voluntary basis; employees are free to decline to share the information.

### Monitoring During Employment

Employee comments on social media sites may reflect poorly on employers and may also expose the employer to legal liability.<sup>2</sup>

For example, if an employee with management responsibilities posts racially insensitive comments on his personal Facebook site, his management decisions may be scrutinized for evidence of illegal bias.

An employer's policy may prohibit an employee from making social media posts that are, *inter alia*, libelous, obscene, amount to harassment or bullying, or reveal proprietary company information.<sup>3</sup> But, as noted below, employers should eschew policies that seek to forbid

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<sup>1</sup> The twelve states are: California, Delaware, Illinois, Maryland, Michigan, Nevada, New Jersey, New Mexico, Oregon, Utah, Vermont and Washington.

<sup>2</sup> *See Protect Your Business: Define a Social Media Policy*, Law360 (Dec. 6, 2010) (providing “examples of employee activities on social media sites that may expose employers to legal liability”).

<sup>3</sup> Note that First Amendment considerations only apply to public-sector employees and, further, only apply when the speech is made in the employee's capacity as a citizen on a matter of public concern.

employees from talking about their wages, hours or working conditions.

In a recent decision, the New York Supreme Court ordered a plaintiff-employee to provide the defendant-employer access to private and deleted pages from her social networking profiles on Facebook and MySpace. The plaintiff claimed that she had sustained permanent injuries after a fall from a chair provided by her employer. The employer's counsel sought the materials from the social media sites in order to show that the employee was not permanently disabled and lived an active life; for instance, she had posted pictures of a trip to Florida on the public portion of her Facebook page. The Court reasoned that the employee lacked a reasonable expectation of privacy because "she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings." *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010).

#### Pretextual Use of Technology

Counsel for employers should be wary of the temptation to access information on social media sites by means of dissemblance.

For example, an attorney for an employer should use caution before using a third person to "friend" nonparty witnesses on Facebook in order to gather information about them.

The Philadelphia Bar Association issued an advisory opinion<sup>4</sup> on this scenario in March 2009, stating that

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<sup>4</sup> Philadelphia Bar Assoc., Prof. Guidance Comm., Opinion 2009-02 (March 2009), *available at* <http://www.philadelphiabar.org/WebObjects/PBARea>

such conduct implicated three ethical rules,<sup>5</sup> and that the communication was “deceptive” because it “omits a highly material fact, namely, that the third party who asks to be allowed access to the witness’s pages is doing so only because he or she is intent on obtaining information and sharing with a lawyer for use in a lawsuit.” The opinion also stated that the lawyer was responsible for the acts of the third party even if the lawyer himself did not act deceptively.

The New York County Lawyers’ Association has issued an opinion stating that it may be ethically permissible in some cases for lawyers to direct investigators to engage in “dissemblance . . . limited to identity and purpose” in order to gather evidence. The evidence must not be “reasonably and readily available through other means,” among other conditions.<sup>6</sup>

It may be less problematic for an employer’s attorney to visit, for example, the websites or blogs of represented individuals. The Oregon Bar Association opined that a lawyer visiting the public website of an opposing party does not implicate ethical obligations because such conduct does not constitute a communication.<sup>7</sup> But, a lawyer should

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dOnly.woa/Contents/WebServerResources/CMSResources/Opinion\_2009-2.pdf.

<sup>5</sup> The ethics rules are: Rule 5.3, Responsibilities Regarding Nonlawyer Assistants; Rule 8.4, Misconduct; and Rule 4.1, Truthfulness in Statements to Others.

<sup>6</sup> N.Y. County Lawyers’ Assoc. Comm. On Prof. Ethics, Formal Opinion No. 737, May 23, 2007.

<sup>7</sup> Oregon Bar Assoc., Formal Opinion No. 2005-164, Communicating with Represented Persons: Contract

refrain from further interaction, including posting a comment on the blog.

### **Social Media and “Concerted Activities”**

The National Labor Relations Act (“NLRA”) protects the rights of employees to act together to address conditions at work, with or without a union. The National Labor Relations Board (“NLRB” or the “Board”) has taken the position that this protection extends to certain work-related conversations conducted on social media, such as Facebook and Twitter.

The NLRA (29 U.S.C. § 151, et seq.) grants to most employees—not just those in unionized workforces—a number of rights, including (in Section 7) “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” This includes the right to communicate with other employees concerning compensation and other terms and conditions of employment.

The NLRA also prohibits (in Section 8) “unfair labor practices,” including “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].” The NLRB has held that an employer commits an unfair labor practice if it maintains a policy that explicitly restricts protected activity or “would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), enforced 203 F.3d 52 (D.C. Cir. 1999). A policy or rule has

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Through Web Sites and the Internet, *available at* [http://www.osbar.org/\\_docs/ethics/2005-164.pdf](http://www.osbar.org/_docs/ethics/2005-164.pdf).

such an effect if employees would reasonably construe the policy to prohibit Section 7 activity. *Lutheran Heritage Village –Livonia*, 343 N.L.R.B. 646, 647 (2004). Policies that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the policy does not restrict Section 7 rights, are also unlawful. See *University Medical Center*, 335 N.L.R.B. 1318, 1321 (2001).

With the increasing popularity of social media, many employers have adopted policies advising employees that they should not disclose employer information or discuss matters relating to the employer in publicly available media. In 2010, in a highly publicized complaint, the NLRB challenged such a policy, taking the position that an employer's decision to discharge an employee for posting derogatory comments on a social network violated the NLRA because it interfered with employees' Section 7 rights. *American Medical Response of Connecticut, Inc.*, Case No. 34-CA-12576 (Region 34, NLRB) (Oct. 27, 2010). That case was settled.

The Board has been very active in this area. In May 2012, the Acting General Counsel of the NLRB issued a report summarizing a number of opinions he has given concerning whether employers' policies regulating employees' use of social media violate the NLRA. In most of the cases described in the report, the Acting General Counsel concluded that the employer's policy violated the NLRA, but the report also sets forth guidelines for policies that might be acceptable and provides a sample policy he concluded was lawful. The Acting General Counsel's report was his third report in less than a year on cases concerning social media policies.

The Board has summarized the import of the reports of its General Counsel regarding social media (discussed further below) as follows:

- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.

#### Selected Board Complaints

In late 2010, the NLRB brought a complaint against American Medical Response of Connecticut, Inc. for allegedly firing an employee after she criticized her supervisor in a Facebook post.<sup>8</sup> The NLRB complaint argued that the employer's internet policy was in violation of Section 8(a)(1) of the National Labor Relations Act, which forbids an employer from interfering with, restraining, or coercing employees in their rights under Section 7.

The employer's Internet policy banned employees from disparaging other employees online. The employee had called her supervisor various off-color names on her Facebook page, and was fired one month after making those posts. The employee had "allegedly requested union

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<sup>8</sup> See Steven Greenhouse, *Company Accused of Firing Over Facebook Post*, N.Y. TIMES (Nov. 8, 2010), available at <http://www.nytimes.com/2010/11/09/business/09facebook.html>.

representation during an internal . . . disciplinary process and was refused,” which was what allegedly caused her to air her grievances online.<sup>9</sup>

On November 9, 2010, the NLRB posted the following on its Facebook page about the Board’s complaint: “What’s the line? When do Facebook comments lose protected concerted activity status under the National Labor Relations Act? A four point test applies: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.”<sup>10</sup>

The complaint was settled without a hearing, and the Board provided no detailed description of which aspects of the employer’s social media policy conflicted with the NLRA.

#### NLRB May 2012 Report on Social Media Policies

On May 30, 2012, the Acting General Counsel of the NLRB issued a report summarizing a number of opinions he had given recently concerning whether employers’ policies regulating employees’ use of social media violate the NLRA.

In most of the cases described in the report, the Acting General Counsel concluded that the employer’s

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<sup>9</sup> See Declan McCullagh, *Yes, Insults on Facebook Can Still Get You Fired*, CNET NEWS (Nov. 9, 2010), [http://news.cnet.com/8301-13578\\_3-20022276-38.html](http://news.cnet.com/8301-13578_3-20022276-38.html).

<sup>10</sup> See <https://www.facebook.com/#!/NLRBpage>.

policy violated the NLRA, but the report also sets forth guidelines for policies that might be acceptable and provides a sample policy he concluded was lawful.

The Acting General Counsel's Report describes seven recent cases involving employer policies limiting employees' ability to communicate about the employer by social media. In six of those, the Acting General Counsel concluded that the employer's social media policy was unlawful. The cases are fact specific, but they illustrate the NLRB's view of the types of policies that violate the NLRA.

For example, in one case, the Acting General Counsel concluded that a policy of a retail store employer instructing employees not to "release confidential guest, team member or company information" on social media violated the NLRA, because the instruction "would reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves—activities that are clearly protected by Section 7." (Report at 4.)

In another case, the Acting General Counsel found unlawful an employer's policy stating that the employer "encourages employees . . . to consider using available internal resources, rather than social media or other online forums, to resolve [concerns about work]." The Acting General Counsel explained that "[a]n employer may reasonably suggest that employees try to work out concerns over working conditions through internal procedures" but, "by telling employees that they should use internal resources rather than airing their grievances online, we found that this rule would have the probable effect of precluding or inhibiting employees from the protected activity of seeking redress through alternative forums." (Report at 11.)

In a third case, the Acting General Counsel found unlawful a policy prohibiting employers from “posting information regarding [the employer] on any social networking sites . . . that could be deemed material non-public information or any information that is considered confidential or proprietary.” The Report states that “[t]he term ‘material non-public information,’ in the absence of clarification, is so vague that employees would reasonably construe it to include subjects that involve their working conditions.” Similarly, the Report states that “[t]he terms ‘confidential or proprietary’ are also overbroad. The Board has long recognized that the term ‘confidential information,’ without narrowing its scope so as to exclude Section 7 activity, would reasonably be interpreted to include information concerning terms and conditions of employment.” (Report at 12-13.)

The Report describes and attaches one social media policy that the Acting General Counsel found lawful. In explaining his endorsement of the policy, the Acting General Counsel emphasized that the policy “provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity.”

The policy prohibited “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct.” The Acting General Counsel explained that “[w]e found this rule lawful since it prohibits plainly egregious conduct, such as discrimination and threats of violence, and there is no evidence that the Employer has used the rule to discipline Section 7 activity.” (Report at 20.)

Since the Report was issued, the NLRB has upheld an Administrative Law Judge’s decision that terminations at a non-profit organization in response to the

employees' Facebook postings were unlawful. *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37 (Dec. 14, 2012). The NLRB found that the five employees engaged in protected concerted activity by posting comments on Facebook that responded to a coworker's criticism of their job performance.

### **Employer E-Mail Systems and Employee Expectations of Privacy**

It is perfectly permissible for employers to establish policies limiting or monitoring an employee's use of electronic platforms and hardware provided by the employer. But confusion may arise in connection with an employee's use of a personal e-mail accounts —*e.g.*, Yahoo or Hotmail—on a work computer. A recent case decided by the New Jersey Supreme Court cautions an employer to make its policy very clear on this score.

In *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300 (2010), an employee sent e-mails to her attorney on her personal, password-protected, web-based e-mail account while using her company-provided laptop. In the subsequent discrimination case, the employee's counsel objected to the employer's recovery and review of those e-mails, the images of which had been saved to the cache on the computer's hard drive.

The trial court held that the employee had waived the attorney-client privilege by her use of the company laptop, pursuant to a company policy which stated that the employer retained the right to search the computer. *Stengart v. Loving Care Agency, Inc.*, No. BER-L-858-08, 2009 WL 798044, at \*1 (N.J. Super. Ct. Law Div. Feb. 5, 2009). The employer's policy stated: "The company reserves and will exercise the right to review, audit, intercept,

access, and disclose all matters on the company's media systems and services at any time, with or without notice."

The Appellate Court reversed and the New Jersey Supreme Court affirmed the reversal, holding that the employer's attorney had breached ethical rules by reading the e-mails. *Stengart v. Loving Care Agency, Inc.*, 201 N.J. at 308. The Supreme Court held that the employee had a reasonable expectation of privacy in the e-mails sent from her personal, password-protected, web-based e-mail account, and, therefore, the e-mails were privileged communications.

The opinion only addressed those e-mails sent by the employee from her personal e-mail account to her attorney. The opinion did not reach e-mails sent on her company e-mail account, or e-mails sent to others on her personal account.

The N.J. Supreme Court stated that the company's electronic communications policy was "not entirely clear" and did not provide employees with "*express notice* that messages sent or received on a personal, web-based e-mail account are subject to monitoring if company equipment is used to access the account." The Court noted that the policy "does not warn employees that the contents of such e-mails are stored on a hard drive and can be forensically retrieved and read" by the employer. *Id.* at 314-15 (emphasis added).

In its discussion of the employer's policy, in connection with its holding that the employee had a reasonable expectation of privacy, the Court explained that the employer's electronic communication policy: (i) did not address personal accounts at all; (ii) did not "warn employees that the contents of e-mails sent via personal accounts can be forensically retrieved and read by the company"; and (iii) because it permitted the occasional personal use of e-

mail, “created doubt about whether [personal] e-mails are company or private property.”

But the Court went on to state that even if the employer’s policy had been unequivocal about the employer’s right to monitor all of the employee’s communications made by way of the employer’s property or even banned all personal computer use, “because of the important public policy concerns underlying the attorney-client privilege,” a policy that stated an employer had the right to retrieve an employee’s communications with his attorney on a “personal, password-protected e-mail account using the company’s computer system” “would not be enforceable.” *Id.* at 325.

Employer’s counsel should be wary of electronic communications policies that do not address this issue, and also wary of reading employees’ e-mails to attorneys without first examining local law as well as the company’s policy (to assess whether the employee had a reasonable expectation of privacy in the e-mails and had therefore waived privilege).

### **Considerations for Employers**

Employers are understandably concerned about how to navigate the landscape occasioned by the latest developments in technology. Employers may wish to consider the following:

E-mail communications made with company property: Although the *Loving Care* decision speaks to the specific context of privileged attorney-client communications, employers should consider being as unequivocal as possible

in cordoning off the areas in which employees should and should not have reasonable expectations of privacy.<sup>11</sup>

Social media policy: To protect against common law privacy claims in states in which such claims may be asserted, employers should consider notifying employees that the employer might monitor social media websites or employee blogs, provided that the information is publicly accessible and not password protected.<sup>12</sup>

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<sup>11</sup> See *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 251-52 (Bankr. S.D.N.Y. 2005) (developing a four-part test to “measure the employee’s expectation of privacy in his computer files and e-mail” and finding that the evidence was “equivocal” about the existence of a corporate policy allowing monitoring of e-mail).

<sup>12</sup> New York State’s “off duty” statute, N.Y. Lab. Law § 201-d, is highly unlikely to provide protection for employees’ social network postings. The law provides that an employer may not take adverse employment action against an employee or applicant on the basis of his “political activities outside of working hours,” “legal use of consumable products,” “legal recreational activities,” or union membership or the exercise of union rights. The law does not protect activity that “creates a material conflict of interest related to the employer’s trade secrets, proprietary information or other proprietary or business interest.” The statute defines “recreational activities” as including “any lawful, leisure activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of telephone, movies and similar material.” Courts that

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have analyzed this statute—which are few—have declined to interpret this phrase expansively.