

Mitigating risks

How to limit liability from the use of electronic media **Interviewed by Heather Tunstall**

The ubiquitous nature of technology allows businesses to acquire and share information nearly instantly across multiple platforms. And while this can be a great thing for networking, marketing and gathering information, it can be potentially devastating for a business if the technology is used inappropriately by an employee, says Todd Roberts, a partner at Ropers Majeski Kohn & Bentley PC.

Smart Business spoke with Roberts about the risks of electronic media and steps you can take to mitigate them.

Can an employer use social media to screen candidates during the interview process?

As time has gone on and as the labor market has become tighter, employers have been more aggressive in their efforts to screen prospective employees. One way they are doing that is to ask for not only the username of the applicant's Facebook page but also for the password so that they can see what's been posted and get to know that applicant in an unfiltered way.

Before employees were more sophisticated about the security settings of Facebook, it was not uncommon for the information that they had posted to be able to be viewed publicly, and for those who were hiring to access those web pages. Apart from the legal issues that are implicated, many prospective employees are completely put-off by what is perceived to be coercive and intrusive conduct.

There's a clash between the privacy rights of prospective applicants who are looking for a job and business owners who are looking to hire them. There is legislation that is now pending both in California and at the federal level that would restrict, if not prohibit, employers from asking for Facebook account information that includes passwords.

Until the legislation is enacted, however, employers are free to ask for an applicant's Facebook password, and if the prospective employee doesn't want to give it, he or she can't be forced to do so. However, declining may disqualify them for employment under the circumstances. There is definitely a move afoot to prevent that type of perceived invasion of privacy.

Is a business owner able to censor social media use by employees?

There is example after example of employees who have been terminated for acts of disparagement against the employer or other



Todd Roberts
Partner
Ropers Majeski Kohn & Bentley PC

misconduct posted on their Facebook page. There is some movement at the federal level through the National Labor Relations Board, which has stepped in on behalf of workers who are members of a union. Those workers have contended that disciplining an employee for complaints about the employer on a Facebook or other social media page is unlawful conduct in violation of the National Labor Relations Act, because it's protected concerted activity. These are laws enacted in the 1930s that the NLRB is trying to apply in the digital age.

How can business owners protect their company from improper use of social media by employees?

There are ways that employers can protect themselves to a certain degree, and the first is to adopt and implement both an electronic privacy policy and a social media policy as part of their employee handbook. The electronic privacy policy is fairly typical these days and basically states that any activity that employees engage in on their work computer is without any right of privacy. The policy inhibits the employee from frequenting certain websites, such as those that are inappropriate and unrelated to the employee's job duties.

Some employers prohibit the use of Face-

book at work and restrict access to other websites that are not reasonably related to the business. More recently, employers have been forced to adopt social media policies that restrict employees from making statements about the company, that appear to be on behalf of the company, or engaging in any use of social media that would cast the employer in a potentially negative light. There is no 'First Amendment' issue because private employers have the power to restrict the speech of their employees in the workplace.

The first step is to draft an electronic privacy and social policy, but the key really is in the implementation and the followup. You can have a 100-page manual consisting of all these regulations, but if an employer isn't doing anything to enforce the policy, it becomes less likely that a court is going to enforce it, either.

The next step after the adoption and implementation of these policies is to widely disseminate it to employees by way of training sessions. Each person should also be asked to sign off that they have read the policy, understand it and agree to comply with it. Where most employer's trip up is in the enforcement phase. If an employer becomes aware of misuse or violations that are occurring but turns a blind eye, it becomes more difficult to justify discipline over time.

How can employers address email, cell phone usage and other forms of electronic media?

There's some overlap, not only with social media, but also with the use of new technologies — email and text messaging are most prevalent — where employers and small business owners can get into trouble or be exposed to liability.

There are also multiple cases in which someone is using their cell phone for work-related activities even if it's on their day off or otherwise on their personal time. In this instance, the employer could be sued for an accident in which the employee is involved, because the actions involved circumstances arguably benefitting the company at the time of the accident.

Having an electronic and social media policy in place outlining the responsibility of the employee in regard to use of these programs and devices, and then policing and enforcing the policy, is vital to protect the company from unwanted lawsuits or damages. <<

TODD ROBERTS is a partner with Ropers Majeski Kohn & Bentley PC. Reach him at (650) 780-1601 or TRoberts@rmkb.com.

Insights Legal Affairs is brought to you by Ropers Majeski Kohn & Bentley PC

© 2012 Smart Business Network Inc. Reprinted from the June 2012 issue of *Smart Business* Northern California.