The Best Defense is a Good Offense

Proactive social media policies and what they can do for you.

By Len Brignac

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Despite the fact that the number of social media cases have increased in the past years, most employers do not have policies governing their employees' use of social media. Many users of Facebook and Twitter firmly believe that the employer has no right to control any comments, photographs or other use of the employee's private account. On the other hand, trigger-happy employers believe they can fire employees based on any negative information that an employee posts on private accounts. As a result of these misconceptions, both are finding themselves in difficult and unwanted legal situations.

Employment termination based on certain critical comments by employees may violate current National Labor Relations Act ("NLRA") as enforced by the National Labor Relations Board (NLRB). For example, the NLRB became involved in a dispute between an employer who reprimanded an employee who criticized management on Twitter. The NLRB contacted the employer and advised that the employee had the right to engage in "concerted protected activity" with co-workers with the goal of improving working conditions, and the employer is prohibited from limiting these employee rights.

The NLRB has taken a more aggressive stance with respect to social media policies and have reviewed disciplinary actions taken against employees who criticize the employer through social media. In February 2011 the NLRB settled a complaint against an employer for having an alleged overly broad social media policy under which the employer disciplined an employee for the employee's critical comments against a supervisor.

Employers also face a risk in having an overly restrictive policy regarding the employee's use of their social media, which can infringe on employee's rights. The NLRA provides that employees have "the right of 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 and shall also have the right to refrain from any and all such activities." This extends to social media.

However, employers also face a risk in not having an appropriate policy governing an employee's use of Facebook and Twitter accounts. Employers that do NOT have a policy can lead to PR nightmares, damaging the company's image in the public eye. Employers need policies to educate their employees on consequences of misusing social media and to protect their own image in the public eye.

In 2011, an employee's misuse of social media resulted in embarrassing public relations consequences. An employee tweeted disparaging comments about an aviation company that was a major client of his employer. While the comment had nothing to do with the company where he was employed, the client complained and the employee was fired because the company felt that his internet posts compromised the good relationship between the company and the client. The posts were not protected under NLRA and there were no legal ramifications for the employer.

Employers need proactive social policies in place to avoid any unpleasant involvement with the NLRB's enforcement, potential claims by the employee, or negative public comments about its products, services and clients. The NLRA protections apply to all forms of social media, and an employer may find itself in a lawsuit should it not fully understand what content is and is not protected by the NLRA. Policies should serve to educate the employee about their rights, protect the rights of the employer and must be carefully drafted to comply with the existing laws and current enforcement.

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