Social Media and the Workplace: Potential Liability to Employees

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Employees in almost every workplace use social media such as personal blogs, social networking, LinkedIn and YouTube. This is particularly true for retail businesses that generally have significant employee numbers and an overwhelming presence in social media. According to its own statistics, Facebook, the most popular social networking site in the world, has more than 500 million active users. The average Facebook user creates 90 pieces of content each month. Many retail businesses maintain Facebook pages and encourage employees to use Facebook for business reasons, which raises questions about an employee's right to privacy and a retailer's right to promote and protect its legitimate business interests.

According to a 2010 study by Proofpoint, an e-mail security and data-loss prevention firm, 17 percent of companies with 1,000 or more employees report having issues with employees' use of social media. Eight percent of those companies report dismissal of an employee for his or her comments on sites such as Facebook and LinkedIn. This figure has doubled from 2009, when only 4 percent reported firing an employee over social media misuse. One need only read newspaper headlines to find incidents such as the following:

- In the town of Cohasset, Mass., a teacher was terminated for comments she posted on Facebook, including calling local residents "arrogant and snobby."
- Three New York school employees were fired for "flirting" with students on Facebook.
- CNN let go a 20-year employee over a "tweet" in which she praised Ayatollah Mohammad Hussein Fadlallah, the Lebanese cleric who died last year
- American Airlines terminated a worker for posting a missive about how the company's website could be improved.
- Domino's Pizza fired employees who posted videos of food to YouTube.
- The Philadelphia Eagles let go an employee for posting a message critical of the football team on his Facebook page.
- An employee of Nationale Suisse called in sick, claiming "she could not work in front of a computer as she needed to lie in the dark." She was terminated when it was discovered that she was surfing Facebook from home.

With incidents such as these on the rise, employers increasingly are implementing or considering implementing social media policies. Most policies address whether such

activity is allowed in the workplace for personal and/or work-related use, what company-related subject matter is prohibited from discussion, whether and to what extent employees may discuss their affiliation or employment with the company, and whether employees may post images depicting their employer or employer's logos, insignias or other identifying information. Unlike office employees, most retail employees do not have computer access at work; therefore, their activity is typically conducted by hand-held device and/or outside of work hours, both of which provide unique challenges to retail employers in creating social-media policies.

Potential Liability to Employees

The lawfulness of an employer's "Blogging and Internet Posting Policy" was challenged in an Oct. 27, 2010, complaint filed in Connecticut by the National Labor Relations Board (NLRB), which recently settled. The complaint attracted significant national media attention. As detailed in the complaint, the employer, American Medical Response of Connecticut (AMR), maintained the following policies in its employee handbook:

- "Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC [Emergency Medical Services Corporation] Vice President of Corporation Communications in advance of the posting;
- Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, coworkers and/or competitors."

According to the NLRB complaint, AMR terminated an employee who "engaged in concerted activities with other employees by criticizing [an AMR supervisor] on her Facebook page," in violation of AMR's policy. The employee's negative comments about her supervisor drew supportive responses from her coworkers. AMR said it fired the employee for multiple complaints about her behavior, including negative personal attacks on a coworker, which she also posted on her Facebook page.

The NLRB charged that AMR violated what is commonly referred to as an employee's Section 7 rights under the National Labor Relations Act by firing her for the Facebook posts. The NLRB also claimed AMR's policy contained unlawful provisions that interfered with employees' rights to engage in protected concerted activity under Section 7. Section 7 protects the rights of employees to form, join or assist labor unions; bargain collectively through the representative of their own choosing; and engage in other concerted activities for the purpose of collective bargaining or other mutual aid protection. Section 7 applies to employers with union employees, as well as employers with non-unionized employees.

Under the National Labor Relations Act (NLRA), an employee is not likely to benefit from its protections if his/her social media communications are egregiously inappropriate. Section 8(a)(1) of the NLRA protects an employee's Section 7 right to "engage in…concerted activities for the purpose of

collective bargaining." However, this right is not without limits. The NLRB, in the 1979 matter of *Atlantic Steel Co*., established the following four-factor balancing test to determine whether employee speech is protected under the NLRA: "(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 the employer's unfair labor practice." *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979).

In *Media General Operations, Inc. v. NLRB*, F.3d 207, 211 (4th Cir. 2007), the NLRB held that the employer violated Section 8(a)(1) for firing an employee because of an outburst he made to his supervisor. The Fourth U.S. Circuit Court of Appeals overruled the NLRB's decision based on the third NLRB balancing factor, holding that the employee's outburst was sufficiently "profane and derogatory" that he had "forfeited the protections of the NLRA."

Notably, the AMR complaint marked a departure from the NLRB's prior guidance regarding the use of social media. In a Dec. 4, 2009 Advice Memorandum by NLRB associate general counsel, Division of Advice, in the matter of *Sears Holdings*, Case No. 18-CA-19081, the board concluded that an employer's social media policy that was quite similar to AMR's policy was lawful under the NLRA. In that case, the policy prohibited, among other things, "[d]isparagement of company's or competitor's products, services, executive leadership, employees, strategy, and business products."

The advice memorandum applied the following standard: (1) whether employees would reasonably construe the prohibition in question to apply to Section 7 activity; (2) whether the policy or rule was adopted in response to union activity; and (3) whether the employer had applied the policy or rule to restrict the exercise of Section 7 rights. In applying the standard, the NLRB determined that the employer's policy was legal because it had to be considered in context and was part of a broader policy that also prohibited egregious conduct such as discussing the employer's proprietary information, explicit sexual references, obscenity, profanity, references to illegal drugs and disparagement based on race or religion. The Division of Advice concluded that the policy would not "reasonably tend to chill employees in the exercise of their Section 7 rights."

In an ensuing series of dissents, Wilma B. Liebman, the current NLRB chairman, suggested that she would apply a stricter standard of whether an employer's policy could possibly chill an employee's exercise of his Section 7 rights. The chilling effect on employee's exercise of those rights is precisely what the NLRB contends is the issue in the *AMR* case. In addition, although it was not the reason cited for the AMR employee's termination, the NLRB was likely to have examined AMR's policy of prohibiting employees from describing the company in any way on the Internet without the company's permission—an aspect of the policy that appears overly broad on its face.

The closely watched *AMR* case settled on Feb. 7, just before it was scheduled for a hearing. The NLRB's Office of the General Counsel issued a press release regarding the settlement that sent an unequivocal message to employers about their social media policies. According to the press release, under the terms of the settlement, AMR "agreed to revise its overly broad rules to ensure that they do not improperly restrict employees from discussing their wages, hours and

working conditions with coworkers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions."

Although the press release did not identify the specific AMR policy the NLRB considered overly broad, the lesson for employers is that sweeping social-media policies are likely prohibited under the NLRA. Unfortunately, without a formal NLRB decision, employers will continue to lack precise guidance on the application of the NLRA to social media, particularly since AMR's policy contained language commonly found in employer social media policies.

The *AMR* case underscores the need for employers of both union and non-union employees to be aware of the NLRB's heightened interest in challenging social media and other policies that could be construed as overbroad and infringing on employees' rights under the NLRA. It is permissible to prohibit conduct that is clearly not protected under the NLRA, including the restriction of social media communications, such as (1) conversations about an employer's proprietary information, (2) explicit sexual references, (3) criticism of race or religion, (4) obscenity, profanity or egregiously inappropriate language, (5) references to illegal drugs and (6) online sharing of confidential intellectual property. For retail employers, the most relevant confidential information likely deals with pricing and marketing initiatives.

Accessing the Site

The way in which an employer gains access to the social media site is also important. While many employers will sympathize with AMR, things could have been worse for them. The NLRB's complaint makes no mention of how AMR obtained access to the employee's Facebook page. How an employer gains such access has been the subject of other recent litigation. In *Pietrylo v. Hillstone Restaurant Group*, 2009 WL 3128420 at *1 (D.N.J., Sept. 25, 2009), a jury found the employer violated the Stored Communications Act, 18 U.S.C. §§2701-12, and a parallel New Jersey state law, which makes it "an offense to intentionally access stored communications without authorization or in excess of authorization," by accessing a password-protected online discussion group maintained by its employees through MySpace.

In *Hillstone*, a group of employees formed a password-protected discussion site, which included sexual remarks about management and customers, references to violence, illegal drug use and confidential employer information. Although one of the employee members of the group voluntarily showed a manager some of the discussions, another manager later asked the same person for the group's password so that he could review the various postings. The two employees who moderated the discussion group were subsequently fired. Based on the testimony that the employee member gave management the password out of fear of retaliation, a jury concluded that the employer, through its managers, accessed the discussion group without authorization in violation of the Stored Communications Act and the similar New Jersey statute, and ordered the employer to pay both compensatory and punitive damages.

The lessons of *Hillstone* are significant for employers seeking to learn more about potential hires through social media websites, and for employers attempting to obtain discovery materials through adverse parties

or non-party witnesses. In the course of litigation, such material obtained from social media sites could give rise to employer liability under the Stored Communications Act or similar state laws.

Insurance Policies May Not Cover the Risk

Many businesses may incorrectly assume they are insured for social media risks, but the reality is that insurance policies have not kept up with the exposure risk.

The social media tools that have allowed firms to market and advertise at low cost have also made them more vulnerable to potentially high-cost claims for copyright infringement, defamation, privacy violations and other liabilities. The problem is that these risks were not anticipated in standard media policies or advertising injury endorsements that many companies have purchased.

Underwriters are focusing much more on the procedures and guidelines of a company to ensure that everyone in the organization understands what activities on social media sites should or should not be done by employees. However, as described above, it is not clear what an employer's guidelines on social media use should or can be. Insurance companies have carefully monitored the *AMR* case. Some insurers offer a "Social Media Coverage Matrix," a tool that helps employers identify their exposures and insurance options. Other insurers provide coverage to professional-services employers that operate in the social media space and to firms that simply inhabit the space. One company offers a combination form that can include technology errors and omissions (E&O), regular E&O and privacy coverage. This insurer also can provide privacy and media coverage to most other companies.

According to insurance brokers, the biggest increase in claims from the web-related risks has been from privacy breaches. Insurance companies are developing most of their policies around that risk.

Conclusion

The *AMR* case demonstrates that retail employers should take the precautionary measure of reviewing their social media policies to ensure they include a statement that the provisions of the policy will not be construed or applied in a way that interferes with employees' rights under federal labor law. Moreover, employers should tread lightly when considering termination of employees for their social media activities. *AMR* raises the specter of the severe consequences of an overbroad policy. All discipline issued under such a policy may be unlawful, even if the conduct punished does otherwise violate a lawful rule or policy. Employers should also make sure that their conduct does not violate the Stored Communications Act and related state law. Finally, employers should review their insurance policies and contact their insurance brokers to review existing coverage, and consider new insurance products on the market.

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