

MY EMPLOYEE POSTED WHAT ON THE INTERNET?

The explosion of social networking sites, *i.e.*, Facebook and MySpace, proliferation of personal blogs, availability of media sharing sites, like YouTube, and arrival of Twitter are posing new challenges for employers. These new communication channels have enabled employees to disseminate information to a far-reaching audience, often without any restrictions or limitations.

Employers have legitimate reasons to be concerned about the information that may be posted on the internet via these means. Often employees feel comfortable posting information or making comments that they otherwise would not in face-to-face interactions and there is no cost to the employee to use these outlets. With a few keystrokes, employees can publish a company's confidential or proprietary information or disclose other information that the company would rather keep private. In addition, postings may form the basis for harassment or discrimination suits or result in workplace friction and disputes. Client relationships could be adversely impacted. Employee's personal viewpoints may be mistaken to reflect those of the company, especially if an employee uses his or her employer's logos or other branding. Moreover, a permanent record is created and the further spread of the information is no longer within the employee's control if it is repeated on other sites or blogs.

Despite these concerns, employers must also remain cognizant of the legal limitations on the actions that they may take. Some states have enacted statutes that prohibit employers from taking adverse employment action against employees for their lawful, off-duty conduct. In addition, the National Labor Relations Act ("NLRA") may be implicated. The NLRA makes it an unlawful employment practice for employers to prohibit employees from or take action against employees for engaging in "concerted activity," which includes discussing the terms and conditions of their employment. Therefore, if an employee is blogging about employment policies, benefits or pay, even if highly critical of his or her employer, this may be protected by the NLRA. Other nondiscrimination laws, whistleblower protections and financial disclosure or securities laws and regulations may also be relevant.

As a result, we recommend that all employers adopt a policy that details their expectations with respect to these online communication methods and fits with their company's culture. However, this policy should be clear that it only restricts the employee to the extent that the employee's actions impact the employer or the employee's coworkers. Employers should make clear whether employees may engage in these activities during work time and use employer-provided equipment and systems. Additional issues that should also be addressed in the policy include: the relationship to other policies; requirements that mandate employee use of disclaimers clarifying that any statements are not the opinion of the company; whether posting of employer-related content is permitted with company approval; reminders that an employer's confidential and property information and other intellectual property must be protected from unauthorized disclosure; the extent to which the employer may monitor these communication channels; and when disciplinary actions may be taken against the employee.

If you would like assistance drafting or reviewing an internet communications policy or have questions about this topic, please contact a member of Koley Jessen's Employment, Labor and Benefits Group.

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