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Daily Labor Report®

TECHNOLOGY

The recent proliferation of social media significantly impacts employer-employee relationships nationwide, authors Jeffrey P. Englander, Keith A. Markel and Evan S. Lupion say in this BNA Insights article. They note that blurred boundaries between personal and professional online activity provide employers with a wealth of public information and a useful method of conducting litigation and discovery, yet simultaneously create risks to privacy rights and activity protected by the National Labor Relations Act.

Employers must be aware that although social media can assist in obtaining more detailed backgrounds of applicants and employees, utilizing these online tools can give rise to discrimination and privacy claims, the attorneys write. They add that employers should strike a balance between diligently monitoring derogatory online conduct and navigating the pitfalls of potential interference with an employee's NLRA and other rights.

Social Media's Impacts on the Employer-Employee Relationship

By Jeffrey P. Englander, Keith A. Markel and Evan S. Lupion

For many former New York City police officers and firefighters who say they are unable to work because of post-traumatic stress disorder, anxiety and depression in the aftermath of September 11th, their social media accounts paint a very different picture. Photographs posted on Facebook and other forms of social media are critical evidence being used to support fraud indictments against these former civil servants employed by the city of New York.1

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According to prosecutors, these individuals claimed to their employers that they were too emotionally distraught to leave their homes or return to work. However, these same individuals were openly posting photos online of themselves, among other things, fishing, riding motorcycles, operating water scooters, flying helicopters and playing basketball.

While these former employees have denied the claims brought against them and it remains to be seen whether they will be held culpable for criminal activity, these cases serve as a reminder of how social media

1 *See* William K. Rashbaum and James C. McKinley Jr., *Charges for 106 in Huge Fraud Over Disability*, N.Y. Times (Jan. 7, 2014), http://www.nytimes.com/2014/01/08/nyregion/retired-new-york-officers-and-firefighters-charged-in-social-security-scheme.html?_r=0.

 ISSN 0418-2693

have impacted all aspects of society, including the employer-employee relationship.

Employers thus continue to grapple with the evaporation of the lines between personal and work-related activity and between inappropriate employment-related conduct and protected, concerted activity, as defined by Section 7 of the National Labor Relations Act. Employers have also learned with ever-increasing proficiency to use to their advantage the invaluable resources publicly available to them through social media. Indeed, every day employers and employees alike are reminded of the power of social media in defining how employers recruit, manage, discipline, investigate and litigate workplace disputes in a communications-interactive modern world.

Managing Employees in the Social Media Era

Social media have changed the way employers search for and evaluate candidates for employment. Employers routinely post and accept job postings online through social media outlets such as Facebook and LinkedIn. Employers regularly use social media sites in evaluating prospective candidates and rely on that information in deciding whether or not to interview a prospective candidate, or even to extend an offer of employment.

While employers can now verify information about prospective employees through online sources without the necessity of background checks, employers are also learning more than they would have dreamed possible a generation ago. In fact, using information obtained about a potential employee online could give rise to claims of discrimination, if the applicant is not hired as a result of that information.

For example, employers can easily discover a candidate's personal attributes that would otherwise be unknown to the employer prior to an offer of employment—such as an individual's race, religion, age, disability, or sexual orientation—knowledge of any of which, if used as a basis to make a hiring decision, would violate various federal and state human rights laws that prohibit the use of such information as a basis for an employment decision.

As such, employers should train their employees involved in the recruiting and hiring process to understand the risks associated with learning about an applicants' personal information on social media sites, and ensure that hiring decisions are based on legitimate business reasons and are not tainted by unlawful factors discovered online. Employers should also ensure that they are only using social media searches to view publicly available information and avoid running afoul of statutory or common law privacy rights.

As of March 2014, at least 26 states have introduced or implemented legislation impacting social media. While each state's law is different, many states prohibit employers from (i) requiring or requesting applicants or employees to disclose their username or password, (ii) compelling an applicant or employee to access social media in the employer's presence, or (iii) demanding that an applicant or employee change his or her privacy settings.[2]

In short, the legislative trend concerning social media and the workplace is focused on allowing employees to keep information private if they so choose. Many employees, however, choose to ignore or are otherwise unaware of their own privacy settings and provide employers with public access to any and all information posted on their personal social media accounts. As a result, employers continue to learn more and more information about their employees that they would not have been able to uncover in the pre-social media era.

Like the situation with the New York police officers and firefighters alleged to have defrauded the Social Security disability system, employers regularly learn about employees who are absent from work for purported medical or other personal reasons yet have social media posts that suggest otherwise. Assuming such information was appropriately obtained through publicly available social media postings (and not through false pretenses or by requiring employees to turn over their personal information), employers are in a position where they can discipline or discharge employees for violating company policies (including dishonesty).

In addition, social media create new avenues by which employers can discover whether employees are being disloyal or have violated certain covenants agreed to as a condition of their employment. Through social media, employees routinely update their profiles to notify colleagues and customers/clients of new information that could be in conflict with an employee's obligations to his/her current or former employer. While the law continues to develop in this area, there has been litigation surrounding the question of whether posting and connecting with another, on LinkedIn, for example, violates a non-solicitation prohibition.

In 2010, an information technology staffing firm sued three former employees over alleged violations of their restrictive covenants based on their use of LinkedIn and being ''connected'' with current employees of the firm. The lawsuit, *TEKsystems, Inc. v. Hammernick*, D. Minn., No. 0:10-cv-00819, *complaint filed* 3/16/10, was filed in the U.S. District Court for the District of Minnesota, and although the litigation settled prior to any adjudication on the merits, the case illustrates how easy it is for departing employees to communicate with former co-workers or clients through social media sites, potentially in violation of their restrictive covenants.

Through social media posts, employees can post employment-related comments, videos or images that might, at a minimum, violate the employer's code of conduct and could rise to the level of defamation or invasion of privacy.

Finally, but quite critically, through social media posts, employees can post employment-related comments, videos or images that might, at a minimum, vio-

[2] National Conference of State Legislatures, Employer Access to Social Media Usernames and Passwords, available at http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx.

  DLR ISSN 0418-2693

late the employer's code of conduct and could rise to the level of defamation or invasion of privacy. Indeed, in certain circumstances an employer might have an obligation to address an employee's conduct on social networks, such as in a situation in which the conduct might rise to the level of actionable discrimination or harassment against another employee.

In many situations, an employee's social media posts will not constitute unlawful conduct, but conduct that an employer nonetheless deems inappropriate and grounds for discipline. In *Smizer v. Cmty. Mennonite Early Learning Ctr.*, 538 F. App'x 711, 120 FEP Cases 1106 (7th Cir. 2013), for example, the Learning Center terminated a teacher's aide after he posted derogatory language believed to be targeted at the director of the Learning Center, who was also his relative. The Learning Center cited the Facebook posting as the reason for terminating the employee for insubordination and unprofessional conduct.

The employee challenged the termination claiming discrimination on the basis of his gender and disputing that he ever wrote the alleged Facebook post. The Seventh Circuit affirmed the summary judgment dismissal of the claim. The court concluded that even in the absence of an image of the Facebook post, the employee could not provide any evidence to challenge the employer's, legitimate, non-discriminatory belief that the employee wrote a disparaging post on Facebook.

Nevertheless, before disciplining an employee for his/her social networking activity, employers must consider whether the conduct relates to working conditions such that it could be considered protected activity under Section 7 of the NLRA. Specifically, the National Labor Relations Board, the agency charged with enforcing the NLRA, has found that disciplining an employee for discussing terms and conditions of employment on social media interferes with an employee's statutory right to discuss and engage other employees in those communications.

Factors that employers must weigh in determining whether the discipline would be considered a violation of the NLRA include whether the posting was intended to target other employees rather than personal friends or family members, whether other employees did in fact participate in the dialogue, whether there was an explicit mention of terms and conditions of employment, and whether the comments that appeared on the social network were related to conversations or issues being discussed by co-workers in the workplace.

Not all postings on social media, however, will run afoul of Section 7 of the NLRA and an employee subject to discipline must be able to present sufficient evidence to show that the social media postings were in fact a protected activity. For example, the NLRB in the recent case of *World Color (USA) Corp.*, 360 N.L.R.B. No. 37, 198 LRRM 1489 (Feb. 12, 2014), dismissed an unfair labor practice charge where the record ''provide[d] scant evidence'' regarding the nature of the social media posts. Critical to the NLRB's decision was the fact that an actual printout of the Facebook postings was absent from the record. The NLRB held that unspecified comments or criticism of the employer by an employee will not be deemed to constitute protected concerted activity.

Thus from pre-hire to the post-employment relationship, social media have had a dramatic impact on the employment relationship.

Employment Litigation in the Social Media Era

Given the breadth of information available on social media sites, employers have begun and will continue to alter how they litigate employment disputes. Indeed, reviewing social media sites is becoming a routine step when investigating or litigating a complaint. Employers must take caution to ensure that they are not in violation of any social media laws, as described above; namely using online information that an employee has taken steps to maintain as private.

The law does not, however, restrict an employer's ability to search the wealth of publicly available information that can serve as a useful tool to prosecute or defend employment claims. For example, a Florida appeals court ruled recently that an employer did not have to pay its former employee $80,000 as part of an age discrimination claim settlement, because the former employee's daughter had violated the confidentiality terms of the settlement agreement by posting that her father had ''won the case'' on her Facebook page (*Gulliver Sch., Inc. v. Snay*, 121 FEP Cases 1421, 2014 BL 51911 (Fla. Dist. Ct. App. 2014); 42 DLR A-4, 3/4/14).

Social media have also changed the way discovery is handled during employment litigation. Traditionally, preservation obligations and electronic productions were considered the exclusive burden of the employer. While the burden of electronic discovery still largely falls on employers, courts have now imposed similar obligations on individual litigants to preserve and turn over social media information to their former employers in the context of discovery in employment litigations.

Courts increasingly order the production of password-protected social media. For example, in *Giacchetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 F.R.D. 112 (E.D.N.Y. 2013), the defendant argued that the plaintiff's social media postings were ''relevant to [her] claims of physical and emotional damages,'' as they represented an accurate depiction of her levels of social interaction and illustrated her emotional and psychological state at the time of the particular posting.

Cases such as *Pecile v. Titan Capital Grp.* and *Pereira v. NYC* illustrate that courts will not permit employers to go on a fishing expedition in the hope of finding something potentially damaging to plaintiff's case, but they will allow for discovery in this area if they can establish in some manner its relevance to the case.

The court also ordered plaintiff to produce postings from the private section of her Facebook page that were related to the emotional distress she alleged in her complaint. The court further held that the ''plaintiff has opened the door to discovery into other potential sources/causes of that distress'' and ordered the pro-

duction of any postings that ''refer to an alternative potential stressor.''

Likewise, in *Reid v. Ingerman Smith, LLP*, 116 FEP Cases 1648, 2012 BL 339744 (E.D.N.Y. 2012) (01 DLR A-10, 1/2/13), the court ordered plaintiff to turn over certain postings from her social media accounts as relevant information that was discoverable on the issue of physical and emotional damages resulting from alleged sexual harassment. The court acknowledged that the law on the scope of e-discovery in this area is still unsettled but stated that ''social media information may reflect a 'plaintiff's emotional or mental state, her physical condition, activity level, employment, this litigation, and the injuries and damages claimed.' ''

Ultimately, while the court found that not all the information contained in plaintiff's social media should be produced, it ordered the plaintiff to turn over any social media communication and photographs that ''reveal, refer or relate to any emotion, feeling, or mental state . . . [and] that reveal, refer or relate to events that could reasonably [be] expected to produce a significant emotion, feeling or mental state.''

The court ordered the plaintiff to turn over to her counsel all posts, communications and photographs that she had made in the relevant time period so as to better be able to identify the information that fit within the court's order, and further explained that posts or photographs by third parties in which plaintiff is ''tagged'' must also be produced if they depict or discussed plaintiff during the relevant time period as well.

The foregoing case holdings notwithstanding, social media networking does not give employers a free pass to obtain any possible information concerning a plaintiff. For example, in *Pecile v. Titan Capital Grp., LLC*, 113 A.D.3d 526, 979 N.Y.S.2d 303 (1st Dep't 2014), the court refused to order plaintiffs to turn over their social media postings. The plaintiffs in the case are two former receptionists who sued the company for sexual harassment. The court concluded that the employer's ''vague and generalized assertions that the information [contained on the plaintiffs' social media sites] might contradict or conflict with plaintiffs' claims of emotional distress,'' was not a proper basis for the disclosure.

However, defendants have successfully argued for the production of private information from social media sites by using the information that was publicly available. For example, in *Pereira v. City of New York*, 975 N.Y.S.2d 711 (Sup. Ct. Queens Cnty. 2013), the plaintiff objected to the production of information from his Facebook and MySpace accounts. In response, the defendant provided the court with several photographs from the plaintiff's publicly available Facebook page that showed the plaintiff playing golf and traveling after the accident at issue.

The court found that because the publicly available postings were ''probative of the issue of the extent of plaintiff's alleged injuries,'' it is ''reasonable to believe that the other portions of his Facebook account may contain'' further relevant information.

Cases such as *Pecile* and *Pereira* illustrate that courts will not permit employers to go on a fishing expedition in the hope of finding something potentially damaging to plaintiff's case, but they will allow for discovery in this area if they can establish in some manner its relevance to the case. At a minimum, an employer should make an evidentiary showing based on publicly available information that employees' private social media postings contain information relevant to the claims and defenses at issue in the litigation.

In sum, social media's impact on the employer-employee relationship is significant. While employers need to keep apprised of developing law in this social media area, employers and their counsel should embrace the wealth of information available through social networks and develop policies and practices that allow them to capitalize—lawfully—on this information in an ever-changing analysis of the workplace and the work environment.

  DLR ISSN 0418-2693