

State Regulations Update

Blogging and Social Networking: The Emerging Legal Framework for National Employers

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A growing number of employees maintain personal blogs. An even greater number of employees are members of social networking sites including Facebook, MySpace, and various dating services, to name a few. Not only can employees access these media sites while at work, but also, studies suggest, a majority of employees feel entitled to do so. Aside from simply abusing company time, an array of issues can arise for employers when, for example, an Internet posting is critical of an employer, conflicts with the business-related interests of the employer, or is of a suggestive and/or graphic nature.

BLOGGING AND SOCIAL NETWORKING WHILE ON THE JOB

Employers are essentially free to prohibit their employees from blogging and accessing social networking sites while on company time and/or via the employer's media systems. Generally speaking, given that the employment relationship is typically an "at-will" relationship, employers may legally take adverse action against an employee who accesses social networking sites during work hours, as long as the employer is not acting contrary to antidiscrimination or retaliation laws.

An overly strict approach to banning social networking during working time, however, is likely not a practical or wise approach for employers to take. Over-regulating employee behavior can result in low morale. Also, social networking can often benefit employers when, for example, employees blog positively about new products or services offered by their employers. Additionally, it can take considerable resources to actively monitor employee behavior and equally enforce a strict policy against such activity.

A middle-of-the-road approach, therefore, is likely the best one. Of course, employers can and should expect employees to use work time wisely. Employers should expressly advise employees that if they do access media sites at work or through company property, they must do so occasionally and exercise sound judgment when doing so.

OVERVIEW OF FEDERAL LAWS RELATED TO LAWFUL OFF-DUTY CONDUCT

Although federal employment laws do not specifically govern blogging, social networking, or off-duty conduct, certain statutes are relevant in this context. These primarily include laws protecting employees from discrimination and laws protecting union-organizing activities. Title VII of the Civil Rights Act of 1964,¹ which forbids discrimination on the basis of race, color, religion, sex, or national origin, is significant as is the National Labor Relations Act (NLRA),² which provides that nonsupervisory, nonmanagement employees of private employers may not be disciplined or retaliated against for engaging in concerted activities for the purpose of mutual aid or protection.³

To illustrate, suppose an employer stumbles across an employee's personal blog in which the employee expresses his or her religious beliefs. If the employer makes comments about the blog and subsequently terminates the employee, the employee may claim that the termination was based on religious discrimination; the employer may end up defending a federal employment lawsuit pursuant to Title VII. To prevail, however, the employee would still need to prove that the employer was actually motivated to terminate the employee based on what was written on the employee's blog.

With respect to the NLRA, employees who post messages about their wages, benefits, assignments, or other work responsibilities (and do so not solely on their own behalf) are protected from adverse action by their employers. If, however, an employee uses a blog for the purpose of simply griping about his or her work situation, the employee is not protected under the NLRA.

STATE LAWS RELATED TO LAWFUL OFF-DUTY CONDUCT

States may enact their own laws regarding employees' working conditions, including laws that afford workers more extensive rights than those provided under federal law. For example, although federal antidiscrimination laws apply to employers with 15 or more employees, many state employment laws are more inclusive and apply to employers with fewer than 15 employees. Certain states, including California, Colorado, Montana,

New York, and North Dakota, also have laws expressly protecting employees from adverse action for engaging in lawful activities outside of the workplace. Although these laws may not expressly discuss blogging and social networking, they are drafted broadly enough to encompass such activities.

California

In California, it is unlawful for an employer to take an adverse action against an employee based on "lawful conduct occurring during nonworking hours away from the employer's premises."⁴ The definition of *employer* includes any person regularly employing five or more individuals.

Colorado

In Colorado, an employer cannot discharge an employee for engaging in "lawful activities off the premises of an employer during nonworking hours."⁵ Colorado offers several exceptions to this law and allows employers to restrict the off-duty conduct of their employees (1) when it relates to a bona fide occupational requirement or (2) if it is necessary to avoid a conflict of interest, or appearance of conflict of interest, with any responsibilities that the employee owes to the employer.⁶

Montana

Montana's statute forbids discrimination against employees for use of lawful products during nonworking hours.⁷ "Lawful product" includes any product that is "legally consumed, used or enjoyed." Montana's statute also contains various exceptions, including one for conduct that conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment.⁸ Montana's law covers employers of one or more persons or an agent of an employer.

New York

New York's statute forbids employers from discharging, discriminating against, or refusing to hire employees because they engage in "legal recreational activities" outside of work hours and off the employer's premises.⁹ Like Colorado and Montana, New York's statute contains several exceptions, including one for conflicts of interest that relate to an employer's trade secrets and "other proprietary or business interest."¹⁰ New York's law applies to employers with four or more employees.

North Dakota

In North Dakota, it is unlawful for an employer to discriminate against an employee for participating in lawful activity off the employer's premises during nonworking hours "which is not in direct conflict with the essential business-related interests of the employer."¹¹ *Employer* means a person in North Dakota who employs one or more full-time employees for more than one-quarter of the year and a person, wherever situated, who employs one or more employees whose services are partially or wholly performed in North Dakota.

CONCLUSION

Although the number of employees joining networking sites and blogging is on the rise, most employers do not have policies that cover work-related blogging and/or blogging during work hours. As always, the safest way for employers to navigate this area and avoid problems is to revise policies so that expectations are clear. At a minimum, policies should specify that employees have no expectation of privacy using any employer system. They should also remind employees about the confidentiality of the company's proprietary information. It may also be wise for employers to provide examples of scenarios where company policies related to communications systems, blogging, and/or social networking are violated. Most importantly, however, employers must make sure adverse action in this context is carried out consistently and is in compliance with federal employment and labor laws, as well as emerging state laws providing employees protection from discrimination for lawful off-duty activities.

NOTES

1. 42 U.S.C. §§ 2000(e), et seq.
2. NRLA §§ 7 and 8(a)(1).
3. 29 U.S.C. § 157 (2008).
4. Cal. Lab. Code §§ 96(k), 98.6 (2008).
5. Colo. Rev. Stat. § 2434402.5 (2008).
6. Colo. Rev. Stat. § 2434402.5(1)(a)(b).
7. Mont. Code Ann. § 39-2-313 (2008).
8. Mont. Code Ann. § 39-2-313(3)(a)(ii).
9. N.Y. Lab. Law § 201d(2)(a)(c) (Consol. 2008).
10. N.Y. Lab. Law § 201d(3).
11. N.D. Cent. Code § 14-02.4-01 (2008).

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