ORANGE COUNTY BUSINESS JOURNAL

GIBSON, DUNN & CRUTCHER LLP's LEGAL INSIGHTS

Employer Perils in the Social Networking Age

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As the popularity of social networking sites such as Facebook, Twitter and LinkedIn continues to explode and their user demographics broaden, employers face a myriad of risks created by the blurring (or even disappearing) lines between employees' private lives and the workplace. With the press of a button, employees can share with their co-workers the most intimate details of their lives. While wise employees might refrain from sending disparaging or offensive emails at work and may scrutinize every word in an email to avoid being misunderstood, many people do not exercise that (or any) degree of care when they "post" on social networking sites. This is not surprising–a recent study by Deloitte revealed that 60% of employees believe their social networking activities are private and none of their employer's business, but 53% of employers believe they have the "right" to monitor their employees' social networking activities. This clear disconnect emphasizes the need for employers to develop and implement policies regarding their employees' online conduct to minimize potential liability.

The problematic scenarios that might arise from employees' social networking activities are not hard to imagine. For example, employees may claim they have been subjected to "virtual" sexual harassment if their co-workers or supervisors make inappropriate comments or share information about their sexual exploits online. Disgruntled employees may assert that a supervisor's knowledge of information disclosed online by the employee, such as the employee's sexual orientation, religious affiliation or medical condition, led to discriminatory treatment. Companies may face reputational harm if employees post negative comments about the company or their jobs. Well-intentioned supervisors who "recommend" subordinates on LinkedIn may create evidence that would prevent summary judgment or preclude an employer from establishing that it terminated a "recommended" employee for poor performance.

On the other hand, many employers find social networking sites provide a goldmine of useful information about prospective and current employees. Indeed, many employers "screen" job applicants and current employees to ensure diligence in the hiring and promotion process. Although this is not a bad practice, it carries risk. For example, if a decision-maker obtains information on a social networking site regarding the protected status of an applicant, the decision-maker's knowledge may create difficulties in defending a claim for discrimination even if she did not base her decision on that information. Employers who gain access to employees' personal sites through other employees or by other means of pretext may face liability for those actions as well. Companies must also be careful not to run afoul of California law, which prohibits employers from taking adverse employment actions based on an employee's lawful off-duty conduct.

More subtle issues may also arise because people have little guidance regarding appropriate social networking etiquette. For example, is it appropriate for a supervisor to invite a subordinate to be "friends" on Facebook? What if Employee A "unfriends" Employee B but not Employee C? In some situations, an employer's carefully tailored policy discouraging employees from connecting with one another may provide a much appreciated shield for employees grappling with these issues.

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Employers will face risks somewhat beyond their control as long as employees connect online with their co-workers, supervisors or subordinates. Consequently, employers should establish clear policies regarding social networking, tailored to the company's values and culture, and strive to heighten employee awareness regarding the potential ramifications of their online behavior. An admonition as simple as, "If you wouldn't say it in person or write it in an email, don't 'say' it on your Facebook page," might provide useful guidance to employees who do not consider their audience when they share the details of their personal lives online. At a minimum, employers should consider giving the following key "reminders" to their employees:

- The information and comments employees post on social networking sites are not private and are likely not protected speech. In a recent case, a California appellate court held that the plaintiff had no reasonable expectation of privacy as to information posted on her MySpace page.

- The fact that a co-worker accepts an invitation to connect online does not mean that the co-worker would welcome viewing offensive comments or comments about a co-worker's sexual exploits any more than they would welcome hearing about those things in person.

- If employees do not want co-workers to know their political affiliations, sexual orientation or other personal information, they should refrain from connecting, block co-workers from "following" them or simply not post their personal information online.

- Employees who post negative comments about their company or their jobs could harm the company's reputation. Where applicable, employees must also be reminded of their obligation to retain the confidentiality of their company's trade secrets and other proprietary and confidential information.

As the case law governing employee and employer rights and obligations in this area develops, company management should stay attuned to legal developments and work closely with their employment professionals and legal counsel to meet the challenges created by the intersection of social networking and the workplace.

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