Taylor Authors Insight on Social Media

The Corporate Counselor
12.2013

Commercial & Technology Transactions and Privacy & Data Security Senior Counsel Todd Taylor was published on the front page of the December issue of *The Corporate Counselor*. Taylor's article, "Can Using Facebook Be a Firing Offense?", discusses whether or not employees have legal rights concerning their social media statements. Full text can be seen below.

Can Using Facebook Be a Firing Offense?

Employee Speech in the Age of Social Media

Whether you subscribe to *The Wall Street Journal* or you get your news from the Drudge Report, you have likely read stories of employees being fired for poorly thought-out Facebook posts or controversial Tweets. Depending on your point of view, you may be sympathetic to the employer's desire to avoid being associated with offensive or controversial statements made by an opinionated worker — or you may be appalled that an employer would concern itself with an employee's use of social media.

Of course, lawyers advising the employer (or employee) want to know whether an employee has any legal rights concerning his or her social media statements that would restrict the employer from disciplining or terminating that employee. To provide the lawyer's favorite two-word response: it depends.

The Rise of Social Media

Social media is commonly thought of as any online site or platform that is used for social interaction and networking. It is the modern Internet-based version of the bulletin board, the speaker's soapbox, the town barbershop/beauty salon, the family photo album and the political rally — all rolled into one. A few popular social media sites include Facebook, LinkedIn, Twitter, Tumblr and Pinterest, among many others. All of these sites allow users to upload and share content online with other users.

Social Media is widely used. One recent study estimated that over 72% of U.S. adult Internet users also use online social media. This rapid advance of social media into almost all aspects of life has the obvious potential to create friction in the employer/employee relationship.

Does the First Amendment Allow Employees to Like You?

In the 1968 case of *Pickering v. Board of Education*, the U.S. Supreme Court ruled that government employees do have at least some First Amendment free speech protections that shield them from disciplinary action for their speech. *Pickering* requires courts to engage in a balancing test when analyzing the constitutionality of speech-related disciplinary actions by public employers. Under the *Pickering* test (as modified by subsequent Supreme Court rulings), if an employee acting in his or her capacity as a private

citizen (and not in an official capacity) comments on matters of public concern, the interest of the individual making those comments must be balanced against the public employer's interest in promoting the efficiency of public services.

Facebook was featured prominently in a recent First Amendment decision involving application of parts of the *Pickering* test. In *Bland v. Roberts*, decided in September of this year, the U.S. Court of Appeals for the Fourth Circuit ruled that Deputy Sheriff Daniel Ray Carter of Hampton, VA, was engaging in speech on a matter of public concern when he hit the "like" button on the Facebook page for a candidate for the Sheriff's office then held by B.J. Roberts, Carter's boss. The court further found that Carter's interests in expressing his approval for Roberts' rival outweighed the Sheriff's interest in providing effective services to the public.

While the First Amendment does provide some protection to public employees, it does not address the speech rights of private employees in their context of their employment. However, this does not mean that employers have *carte blanche* to discipline employees for their social media use.

The National Labor Relations Act

The National Labor Relations Act is a Depression-era law addressing collective bargaining and other workplace employment rights. The NLRA applies to almost all private employers in the U.S. — regardless of whether they have a unionized work force. Many employers may be surprised to learn that the NLRA applies to them and it protects at least some social media activity of employees.

In recent years, the National Labor Relations Board (NLRB, the federal agency charged with enforcement of the NLRA) has issued rulings and guidance that limit an employer's ability to discipline employees for statements made on social media sites. In doing so, the NLRB has relied of Section 7 of the NLRA. In essence, Section 7 allows an employee to advocate with or on behalf of other employees for better work place conditions.

Hispanics United of Buffalo, Inc. v. Ortiz, decided in 2011, is one of the most recent (and controversial) decisions of the NLRB involving social media use. At its core, the case involved a Facebook flame war. The Facebook exchanges started when Marianna Cole-Rivera, a Hispanics United (HUB) employee, used her Facebook page to urge some of her co-workers to express their frustration with Lydia Cruz-Moore, another HUB employee who believed that her colleagues were not doing enough to help HUB clients. In response to Cole-Rivera's Facebook attack, Cruz-Moore launched her own Facebook salvo at her attackers and complained to HUB management. HUB terminated Cole-Rivera on the grounds that her Facebook posts regarding Cruz-Moore constituted bullying and harassing behavior.

The NLRB found that HUB engaged in an unfair labor practice when it terminated Cole-Rivera as she, along with some of her other co-workers, were clearly engaged in protected activity as they were using Facebook to defend attacks on their work performance.

The NLRB has also published various guidance documents related to employee social media use. In short, through its publicly released guidance, the NLRB has stated that online discussions among employees about workplace issues or problems are protected activities under Section 7, but a single employee posting a personal gripe about the workplace is not protected under Section 7. Unfortunately, the NLRB guidance does

not always clearly distinguish the difference between collective employee complaints about workplace matters and solitary employee gripes.

Employers should also be aware that the NLRB may strike down employer social media policies that the agency views as being overly broad. For instance, the NLRB has held that one company's policy that prohibited employees from making online "statements that 'damage the company, defame any individual or damage any person's reputation' clearly encompasses concerted communications" that would be protected under Section 7 of the NLRA.

State Free Speech Protection for Employees

A number of states have enacted laws that may limit an employer's ability to discipline an employee for online speech. Some examples of these laws include:

- A Connecticut statute that bars public and private employers from disciplining or discharging an employee for exercising their First Amendments rights, as long such exercise "does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employer and employee."
- California laws prohibiting any employer from making or enforcing any regulations or policies either forbidding employees from engaging in political activity or controlling the political activities of any employees; and using coercion or termination threats to influence an employee's political activity.
- A New York law that prohibits an employer from discriminating against the after-hours political activities or legal recreational activities of an employee (or prospective employee) conducted outside the workplace.
- In my own state of North Carolina, an employer cannot refuse to hire a prospective employee, or discharge or otherwise discriminate against any employee, simply because that individual engages in or has engaged in the lawful use of lawful products outside the workplace during non-working hours.

These laws are just a few examples of state legislation that potentially limit an employer's ability to restrict employee use of social media.

Social Media Password Protection Laws

Over the last two years, 12 states have adopted employee social media password protection laws: Arkansas, California, Colorado, Illinois, Maryland, Michigan, Nevada, New Jersey, New Mexico, Oregon, Utah and Washington. The laws themselves — while not directly addressing the content of employee social media — do provide some measure of protection for employees against intrusive employer social media investigations.

There is little uniformity among the various state employee social media password protection laws. As a general rule, the statutes restrict an employer from requiring job applicants and employees to divulge the usernames and passwords for their social media or other online accounts (such as accounts on Face-book, Twitter, LinkedIn, Hotmail or Gmail — to name just a few).

The social media password protection legislation of Washington State may provide a useful example for exploring the extent of these new laws. Under the Washington act:

- An employer may not require employees or job applicants to: disclose login information for the employee or job applicant's "social networking account"; access their account in the employer's presence; add persons to the list of contacts associated with the account; or alter the privacy settings on the account.
- An employer cannot take adverse action against an employee or job applicant for the failure of the employer or applicant to undertake any of the above actions if requested by the employer.

Washington's law — unlike some of the password protection legislation in effect in other states — does allow an employer to: 1) obtain information from an employee's social networking account in connection with investigations related to legal compliance obligations and the protection of employer proprietary information; or 2) take actions to comply with certain regulatory requirements that may be imposed by law or certain self-regulatory organizations (such as Financial Industry Regulatory Authority [FINRA] duties to monitor the online activities of brokers or investment advisers). While many states do not allow an employee or job applicant to initiate a civil suit against an employer for violation of the social media password protection statutes, the Washington law does allows an employee or job applicant to bring a private cause of action for violation of the act.

Addressing Social Media Issues

What should an employer do to best address social media use by their employees, and the potential damage that may result from an employee's offensive or controversial social media posts?

While the law in this area continues to rapidly evolve, an employer should consider taking the following: 1) Understand the laws that may apply to you. 2) Public employers generally face greater restrictions on their ability to discipline employees for social media use. In addition, employers in certain states may be subject to state statutes that protect employee speech, activity or online social media account information. 3) Have clear policies that are targeted toward protecting the legitimate interest of the employer.

Regarding number three above, many state laws that would otherwise restrict an employer from disciplining an employee in connection with online activity do recognize that the employer has a legitimate interest in protecting: 1) workplace cohesion and efficiency (particular during working hours); 2) employer technology systems; and 3) employer proprietary information, trade secrets and financial information.

Employers may rightfully maintain policies that impose reasonable restrictions on using company devices and networks during work hours for social media postings. It is a good practice to have policies that allow an employer to reasonably monitor an employee's use of employer owned devices and systems to ensure that an employee does not transfer employer proprietary information or trade secrets to an employee's personal

online accounts, though the employee should be put on notice regarding such monitoring activity.

To avoid NLRA-related issues, an employer should avoid using policy language that contains broad prohibitions on employee use of social media in a manner that may be "harmful or damaging" to the employer. While it will not be a perfect defense to an unfair labor practice claim, employers should consider including language in their social media policies that specifically recognizes the right of employees to engage in concerted activity related to addressing or improving workplace conditions.

Consider Best Practices for Maintaining Employee Morale

Overly intrusive monitoring of employee social media activity — particularly if that activity occurs outside of the work environment — may not be in the employer's best interest. Even in circumstances where disciplining an employee for his social media posts may be legally defensible, the employer should weigh the benefit of imposing such discipline against the potential negative impact on overall employee morale.