

EMPLOYER RIGHTS AND RESPONSIBILITIES FOR EMPLOYEE FACEBOOK, MYSPACE, TWITTER, BLOGS AND OTHER SOCIAL NETWORKING POSTINGS

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JANUARY 8, 2010

An employee shows her supervisor another employee's Facebook or blog entry in which the employee is complaining about their supervisor, making derogative comments about co-employees or discussing information about a customer. What can and/or should an employer do with this information?

Employees used to complain about their trials and tribulations at work to their spouse, over coffee with a friend or to a friendly bartender. For the most part these comments and complaints were unknown to the employer, co-workers and customers. Even if their employer did hear something about the employee's comments, it was hard to determine what was actually said. This has now changed with employees now regularly venting about work on social networking sites and blogs. Comments may now be posted on open sites that anyone can read, and even if put on a site with restricted access may be forwarded by those with access to many others. Comments posted on these sites may remain accessible despite efforts to remove them. What was said is now clear and indisputable. Whether the employer discovers the comments itself or learns of the comments from an angry customer or co-worker, the employer may feel a compelling obligation to "do something about it."

Generally, when faced with this situation an employer should react in the same manner as it would had the comment had been made at work. For example, if an employee discloses confidential company or customer information in violation of company policies it makes no difference whether the disclosure occurred during work hours, took place on or off the work employer's premises, or

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was made using a home computer instead of a work computer. Similarly, illegal harassment by an employee of a co-worker or by a customer or vendor of an employee must be investigated and appropriate action taken by the employer regardless of the venue or whether it happened on or off the clock. An employer in these situations should investigate and take action that is consistent with its policies and practices for similar infractions in the workplace.

Employers need also be careful that its search for Internet “dirt” on an employee not be viewed as discriminatory or retaliatory. For example, if an employee has just made a request for FMLA leave, filed a wage claim, or spoken with an OSHA inspector, this would not be the time for an employer that doesn’t routinely monitor employees’ personal social networking postings to suddenly begin searching the Web for evidence of employee misconduct. That said, the fact that an employee may have engaged in a legally protected activity does not shield the employee from a good faith investigation of alleged wrongdoing. If a co-worker or customer raises a concern regarding an objectionable social networking posting by the employee, an employer could, and should, conduct an investigation in accordance with its workplace policies..

In checking an employee’s personal social networking postings, employers should never use trickery or hack into a restricted site to which they don’t have access. Doing so can subject an employer to a lawsuit for invasion of the employee’s privacy. Employers also need to be very careful not to violate employee rights under the National Labor Relations Act to “self-organize.. and to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection...” The key here is if an employee is engaging or attempting to engage with one or more other employees to help each other with situations in the workplace such as perceived safety violations, wage issues or any other “term or condition of employment” these “conversations” whether face to face or through postings are generally protected by this law and an employer is prohibited from taking any adverse action against an employee for having engaged in such activities. This is a tricky area and an employer faced with such a circumstance is well advised to consult with an attorney very familiar with this area of the law before taking any adverse action against an employee.

Employees often mistakenly believe that an employer can’t take any action against them for out of work statements or actions and are shocked to learn that their employer is disciplining them or even terminating them for something they have posted on a social networking site or blog on personal time, at their own home and using their own computer. In order that employees have a clear

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understanding of employer expectations and the consequences of their bad behavior, it is important that employers develop and disseminate policies with regard to social networking sites and blogs, and to clarify existing policies (such as confidentiality rules) so that employees understand that they are applicable inside and away from the workplace, and regardless of whether the prohibited conduct occurs in an Internet forum. These policies may be of critical importance in defending any adverse employment action your company takes against an employee for an objectionable posting. Please contact anyone in our group for assistance in reviewing or developing social networking policies for your workplace.

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