

MARCH 28, 2016 | DISCRIMINATION, HARASSMENT & RETALIATION

Legal Risks with Managing Employees in the Social Media Era

✖ Social media continues to be a growing platform for applicants, employees, and employers to use for marketing, company branding, and employee engagement. As with any computer technology, the use of social media in the workplace brings its own legal risks and compliance issues. Last week, I was asked to speak at an educational session at the [International Health, Racquet & Sportsclub Association \(IHRSA\)'s 2016 Conference](#) and below are some key points we discussed when a company uses social media with applicants and employees.

Social Media in Recruiting

Do you require your employees to be “social media savvy” as part of their jobs? If so, that job requirement could be a selection tool that eliminates older or less tech savvy workers. In addition, low income workers without access to computer technology could be limited and/or prevented from applying for the position. As a result, the company could face discrimination claims or failure to hire claims based on age. To avoid this legal risk, companies who want tech savvy employees should require applicants to be willing to learn how to operate social media platforms upon hire, and then follow up with specific orientation training on social media rules and policies.

Alternatively, does your HR team or hiring managers “cybervet” an applicant’s social media accounts in the hiring process? It is human nature to be curious about the people who are interested in your company or who are coming in for an interview. But, tread lightly with this practice, as it could expose your company to a lot of unsolicited personal information about the candidate that you would not otherwise have access to, including race, national origin, religion, sexual orientation, and disability. In addition, it is important that “cybervetting” is limited to information made available in the public arena and on public social media sites. Many state and local laws have restricted employers from accessing private areas of social media accounts or asking an applicant or an employee for usernames and passwords to personal sites. Despite these risks, if your company still wants to include a review of LinkedIn, Facebook or Twitter in its background check procedures, consider obtaining a waiver during the application process from the applicant before reviewing social media accounts. Most importantly, remember to base (and document) all hiring decisions on legitimate business factors because even having access to information not used in the hiring process could lead to an inference of improper motive, giving rise to a failure to hire discrimination claim.

Social Media Use as an Employee

If you allow your employees to use social media as part of their jobs, one of the most important policies for an employee handbook is a lawfully compliant social media policy, which sets forth in clear detail and specificity what is permissible conduct and what is prohibited on social media. The National Labor Relations Board (NLRB), which enforces the National Labor Relations Act, has taken a recently aggressive approach in reviewing and analyzing companies' social media policies, often striking the policies down as an unfair labor practice because the policies were over-broad and could be viewed as chilling an employee's protected speech rights.

Accordingly, regularly reviewing and updating the social media policy, with guidance from legal counsel, is a crucial compliance step in preventing unfair labor practice investigations from the NLRB. But, that does not mean that the NLRB has not allowed certain policies to be enforceable. The key is to have specific examples of what is prohibited conduct set forth in the policy so that employees are aware of what they can and cannot say on social media.

In addition to the ensuring the protections of the NLRA are met, an employer will want to ensure that the social media policy allows it to review and investigate work computers and work accounts for investigatory purposes, and make clear that employees do not have a right to privacy on work property and computer equipment. Employers will also want to be able to terminate access to company data or company social media account if an employee terminates, or an employee's device is lost or stolen.

Finally, to the extent that employees post to Facebook or tweet about company events as part of their job, remember that such time on social media is compensable time, and non-exempt employees must be paid for all hours worked performing these tasks.

Social Media in Terminations

I am often asked whether an employer can terminate an employee for posting something harmful to the company on social media. The answer depends on the context of the employee's post. Before taking any adverse action for an employee's social media activity, I ask two questions: (1) Was the employee discussing issues with another employee? (2) Was the employee critical of company policy or other terms of employment? If the answer to these two questions is "yes", then the activity is likely protected as concerted, protected activity under the NLRA, and you should tread very lightly in taking any action without advise of counsel. However, it is permissible to discipline or terminate employees for improper social media use that would include actions such as, complaints or threats against customers or vendors, harassing speech against a co-worker, disclosing confidential information about the company or customers, evidencing an employee engaging in deception or violating company rules (e.g., called in sick, but posted pictures attending March Madness games).

Social Media after an Employee's Departure

Finally, when an employee leaves your company, who owns the social media accounts? Can a company keep a departing employee's "connections" on LinkedIn that were developed while an employee? Generally, courts have concluded that the connections and contacts are property of the employee, not the employer, and an employer cannot force an employee to return them. What about if an employee uses his "connections" to solicit new business on behalf of his new employer? While this is a growing area for the courts, generally it has been

concluded that a general LinkedIn invite is not sufficient to violate non-solicitation agreements. More direct and specific solicitations using social media could be grounds for a breach of contract.

As use of social media continues to grow in the workplace, being mindful of these legal risks and the compliance tips will help keep a company out of a litigation landmine.