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Labor Relations Board ruling allows employees to vent online

Employers still need to craft extremely concise social media policies

By Sydnie Moore, Special to The Daily Transcript
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Can an employee be fired for what he or she posts on Facebook?

Possibly, but according to local attorneys, it is not always a clear-cut issue.

In general, what employees do on their own time is their decision, says **Daniel Gardenswartz**, a partner with **Solomon Ward Seidenwurm & Smith LLP**.

However, there are some significant exceptions to that. "Posting a confidential customer list, offensive racial or sexual remarks directed at a co-worker or violating a copyright, for example, may subject the employee to serious consequences," he said.

Yet this is unchartered territory, and the legal ramifications for firing someone for online activities are still murky. The solution, says Gardenswartz, is a clear, carefully thought-out social media policy detailing what is and is not appropriate to post online.

"Complaining about the hours, wages or working conditions is, under a recent National Labor Relations Board (NLRB) ruling, a protected activity that an employer cannot punish," he said. "Given these serious issues and the rapidly increasing use of social media, it is essential to inform both employees and supervisors -- ideally via a thoughtful policy and specified training -- on the do's and don'ts of social media conduct related to the company."

While employers do have a right to protect confidential information, if an employee posts something negative about an employer, it could very well be a protected activity as NLRB has interpreted, said Mitch Danzig, a partner with Mintz Levin Cohn Ferris Glovsky and Popeo PC and head of its California employment practice.

“This is a new frontier,” he said. “How does an employer protect itself without stepping on rights of employees as interpreted by NLRB or the courts? We will see more of this tension over the months and years to come.”

Further complicating matters, a new California law (AB 1844) makes it illegal for employers to require an employee or job applicant to provide their username and password for social media accounts.

English Bryant, director of employment practices at Tyson & Mendes, maintains that the new law hinders employers on many levels and needlessly freezes an employer’s right to conduct thorough background searches on job applicants.

“Why do employees who typically ‘friend’ more than 300 people need ‘privacy’ in their Facebook pages?” she said. “Furthermore, when employees take leave from work for medical reasons and then post their vacation pictures for 300 of their closest friends to admire, why should the employer not have access, as well?”

While the new privacy law protects employees, they should not be lulled into a false sense of security.

The law does allow employers to request an employee’s social media password in the course of an investigation of employee misconduct, Bryant said. However, “employers who request passwords, should have good cause to do so -- and should make certain that they possess legitimate cause for an investigation of misconduct before requesting any employee’s password.”

Ultimately, says Gardenswarts, “any posts on a social media website are, by definition, public, and employers will continue to pursue any relevant information about a candidate or current employee who may be under investigation. My job is to make sure those efforts are legal.”

The access to social media -- and laws around it -- is unpredictable and ever-changing. “This is an area that did simply not exist even five years ago,” Danzig said. “As far as social media and related legal issues are concerned, we are constantly evolving, and will see more laws and cases emerging as a result.”

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