Has Your Business Adapted Its Internet and Social Media Policies to New Changes?

Changes in Technology and the Law Require Some Employers to Revise Internet and Social Media Policies

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If your business has a policy which regulates the use of the internet and social media by your employees, then congratulate yourself for taking this proactive step to maintain sound business practices and to help avoid liability. If your policy is more than a few years old, it is time to update your policy to reflect new changes in technology and the law. This article will touch briefly on three changes: the explosion of new devices and information systems, recent activity at the National Labor Relations Board (NLRB), and Michigan's Internet Privacy Protection Act.

CHANGES IN TECHNOLOGY

Older policies regarding the use of technology by employees were likely written when employees almost exclusively used company owned desktop computers and internet services while at their workstations. Many employers wrote these policies to discourage employees from viewing non-work related or inappropriate websites. Employees now typically use a much wider variety of devices and information systems such as smart phones, voicemail, text messaging, digital cameras, pagers, PDAs and thumb drives. With the advent of these and other new devices and information systems, employers should consider incorporating all or some of these devices and information systems into its policies. **An updated policy should define *which specific devices and information systems* the employer intends to regulate**.

In the not too distant past, employees primarily used company computers during work hours. Today employees often have continuous and instantaneous access to the internet, company networks, and text messaging through the use of smart phones, tablets and laptops. Employees often use these devices at home and work, for personal use and work use, during regular work hours and after hours. More employees now work from home and/or have flexible work schedules,

which may blur the line between work time and personal time. **Employers should review their policies to determine *when* their internet or social media policies apply to their employees**. If the employer intends to regulate use at all times, then it is critical that the employer make clear to the employee that he has no expectation of privacy with respect to any information on the employer's information system or devices, whether the employee is using it at work, home, for personal use, during business hours, or during free time.

LABOR RIGHTS

The rise of social media, like Facebook and Twitter, prompted many alert employers to adopt policies aimed to discourage employees from posting certain types of information about the employer, fellow employees and customers. These policies also typically prohibit the posting of proprietary, confidential, discriminatory, or slanderous content. According to the NLRB and its legal counsel, some employers' social media policies have gone too far. Policies which use overly broad or ambiguous language may be interpreted by employees to unlawfully restrict employees' right to discuss wages and conditions of employment with third parties as well as each other. The NLRB's legal counsel found each of the following social media policy examples to be so ambiguous as to violate these labor rights under the National Labor Relations Act:

Example 1

"You should never share confidential information with another team member unless they have a need to know the information to do their job."

Example 2

"If you engage in a discussion related to [Employer], in addition to disclosing that you work for [Employer] and that your views are personal, you must also be sure that your posts are completely accurate and not misleading . . ."

Example 3

"[O]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline."

Example 4

Employees may not post "disrespectful" or "critical" comments about the employer.

The NLRB and its counsel encourage employers to use more detailed examples in social media policies to better distinguish between legitimate employer restrictions and unlawful encroachments on labor's right to discuss the terms and conditions of their employment. For instance, broad language which instructs employees to be "respectful" "fair" and "courteous" when posting on social media can be ambiguous. But, if the policy also provides examples of legitimate restrictions, such as prohibitions on posting content which is threatening, obscene or intimidating, then the policy is more likely to be found lawful. The differences between a lawful and unlawful policy may be frustratingly nuanced. Nevertheless, employers should revise their social media policies to better clarify the meaning of broad or ambiguous language which could lead employees to believe that they

are not free to discuss the terms and conditions of their employment.

INTERNET PRIVACY PROTECTION ACT

In December 2012, The Michigan Legislature passed the Internet Privacy Protection Act. The Act was designed to discourage employers from gaining access to employees' or applicants' social media sites. The Act generally prohibits employers from asking an employee or job applicant to provide access to, allow observation of, or disclose information that allows access to or observation of "personal internet accounts" like Facebook. An employer who violates the Act is subject to both civil lawsuits and criminal penalties.

Significantly, the Act creates several exceptions important to employers.

- An employer may still lawfully request or require that an employee provide access to an account or service which is provided by the employer, obtained by virtue of the employment relationship, or used for the employer's business purposes.
- An employer may still lawfully prohibit an employee from accessing websites while using a device or network paid for by the employer.
- The employer may also lawfully monitor data stored on an employer owned device or employer network.
- In limited situations, an employer may conduct an investigation into an employee's personal internet account. Before doing so, an employer should consult legal counsel to ensure compliance with the Act.

Federal and state law is adapting to developments in workplace technology and how we use it. The employment and labor lawyers of Foster Swift can help your business adapt to those changes by revising your employment policies and practices to avoid liability and encourage sound business practices.