Social Media Perils for Public Employers

Michael R. Blum
Foster Swift Municipal Law News
January 30, 2014

AUTHORS/ CONTRIBUTORS
Michael R. Blum

PRACTICE AREAS
Municipal & Public Entity Law

Social media is proliferating in the workplace. Social networking sites such as Facebook, Twitter, LinkedIn, Google Plus+, Pinterest, Tumblr and Flickr have become commonplace on employee smartphones and computers. This phenomenon is beneficial to employers in many respects but is also fraught with peril for the unwary. This article focuses on the impact of constitutional and statutory doctrines concerning the use of social media in public employment.

SOCIAL NETWORKING AS STATUTORILY PROTECTED LABOR ACTIVITY

In the private sector, labor relations is regulated by the National Labor Relations Act (NLRA). Section seven of the NLRA provides employees the right, among others, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The National Labor Relations Board (NLRB), a federal agency responsible for enforcing the NLRA, has been very active in addressing social media policies in the private sector. In several recent decisions, the NLRB found that policies it determined to be overly broad, or that did not clearly define what employees were permitted to include in social media postings, unlawfully chilled the exercise of rights guaranteed by section seven. Similarly, the NLRB has found unlawful discipline taken against employees in enforcing overly broad policies or based on comments made in social media concerning workplace conditions.

Like the NLRA, Section 423.209 of the Michigan Public Employment Relations Act (PERA) states: "It shall be lawful for public employees to … engage in lawful concerted activities for … mutual aid and protection …." Thus, NLRB precedent likely will be followed by the Michigan Employment Relations Commission (MERC), which enforces PERA. For example, MERC recently held that an employer violated PERA when it suspended a police officer for operating an off-duty website utilized by the officer, his fellow officers and the public to discuss police department affairs. In another case, MERC determined that even rude,

insulting, or offensive employee comments are protected under PERA, unless the conduct is so flagrant or extreme as to seriously impair the maintenance of discipline or render that individual unfit for further service.

INTERNET PRIVACY PROTECTION ACT

Employers who use social media when researching applicants or when deciding to implement employment decisions must also consider Michigan's Internet Privacy Protection Act (IPPA). The IPPA prohibits both public and private sector employers from (1) requesting that an employee or an applicant "grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal Internet account" and (2) discharging, disciplining, failing to hire, or otherwise penalizing an employee or applicant for failing to disclose or provide access to a personal Internet account.

The IPPA does include some exceptions, which permit an employer to:

- Request or require an employee to disclose log-in information for an electronic communication device paid for in whole or in part by the employer.
- Request or require an employee to disclose log-in information for "an account or service provided by the employer, obtained by virtue of the employee's employment relationship with the employer, or used for the employer's business purposes."
- Discipline or discharge an employee for transferring proprietary or confidential employer information to an employee's personal Internet account without authorization.
- Conduct an investigation or require an employee to cooperate in an investigation under certain limited circumstances.
- Implement or enforce a workplace Internet usage and/or monitoring policy.

FREEDOM OF SPEECH IN PUBLIC SECTOR EMPLOYMENT

Over the years, courts have made a clear distinction between the rights entitled to a private citizen, and a public sector employee. Social media has blurred the lines between professional and personal life. In order to challenge an employment-related decision under the First Amendment, a public sector employee must (1) show their speech addresses a matter of public concern, and (2) show free-speech interests outweigh the employer's efficiency interests.

If an employee can show that comments made through social media involve a matter of public concern, courts will evaluate whether the speech:

- Impairs discipline or harmony among co-workers.
- Has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary.
- Interferes with the normal operation of the employer's business.

CONCLUSION

Social media is now pervasive in our society and presents significant challenges in determining legal protections afforded to public sector employees. Employers should recognize that social media can be useful but is also fraught with peril for the unwary.

Given the government's review of these policies it would be prudent to have your social media policy reviewed by experienced labor counsel prior to implementation. If you have an existing social media policy, periodic review by your labor attorney to take into account recent policy interpretations and court decisions is advised.

For more information on social media for public employers please contact Mike Blum at mblum@fosterswift.com or 248.785.4722. Mike is an experienced Michigan labor and employment lawyer.