The Risks of Social Media Use by Employees, and How Public Employers Can Create Strong Social Media Policies

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Social media use on smartphones has exploded, and given that one's phone is rarely out of arm's length, activity on social networking sites like Facebook, Twitter, Instagram and SnapChat has soared. As of November 2016, 79 percent of all adults online were using Facebook – 88 percent of adults aged 18-29, and 84 percent of those aged 30-49 according to a PEW 2016 Social Media Update. Contrast this with 2005, when only 7 percent of adults used social media.

Due to the increasing prevalence of social media, lots of questions have arisen about the extent to which public employers can monitor and regulate the use of social media in public employment.

These questions implicate a number of constitutional and statutory doctrines, and public employers need to be aware of the effects of their social media policies (or lack thereof) so as not to run afoul of the law. A new body of law - both court decisions and statutes - is growing to address social media use in the workplace. It's a brave new world out there when it comes to social media-based content, and public employer social media policies need to evolve as swiftly as the underlying technology and consumer behavior.

SOCIAL MEDIA USE AS PROTECTED ACTIVITY

Public employers must be mindful that, when it comes to developing a social media policy, certain employee activity is legally protected.

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. The NLRB has issued guidelines and decisions making clear that employees may lawfully discuss "concerted activity" through their personal social media accounts.

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. Public employers should be mindful that the inclusion or enforcement of social media policies in an employee handbook, if not carefully tailored, may be considered to infringe on employees' rights to engage in concerted activity, and therefore violate the PERA.

FEDERAL STORED COMMUNICATIONS ACT AND INTERNET PRIVACY PROTECTION ACT

Some employers use social media to research job applicants, including to find information concerning the candidate's qualifications and to see what other people are posting about the candidate. Others review social media pages of current employees to monitor issues such as absenteeism.

Employers need to be aware of the Federal Stored Communications Act (FSCA), which prohibits unauthorized access of electronic communications stored on electronic communication services. Employers reviewing the social media activity of employees or applicants 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. The First Amendment guarantees free speech rights, but it is not without limits. This is true both online and offline.

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.

DISCRIMINATION, HARASSMENT AND RETALIATION

Social media, to some extent, has blurred lines between employees' personal lives and work lives. Social networking by employees - when they become Facebook friends, for example - poses risks for employers. Indeed, many employment cases involve allegation of social media being used as a vehicle for harassing a coworker or other individual, and employers can be found liable for such activity. Accordingly, public employers should discourage employees from discussing their coworkers on social media.

GUIDELINES FOR A GOOD POLICY

Social media use by employees is not going away - in fact it's growing by leaps and bounds. It's incumbent upon public employers, therefore, to craft sound policies in order to protect themselves and to provide guidance to their employees. Here are a few principles to keep in mind:

- **Use Specificity:** A vague, overly broad policy opens the door to liability, and will be difficult for employees to comply with.
- **Keep in Mind Protections for the First Amendment and Concerted Activity:** The U.S. Constitution and state and federal statutes, such as the NLRA (in the case of private employers) and the PERA (in the case of public employers in Michigan), protect a range of speech from regulation.
- **Understand the Statutory Framework:** When crafting a policy, employers must be aware of and comply with both state and federal laws, including things like the NLRA, PERA, FSCA and IPPA.
- **Inform and Enforce:** Keep your workforce apprised of policies, and then enforce them when violated.

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.

Keep in mind that, like most employment policies, your social media policies should reflect your individualized needs, goals and objectives. There is no single approach, but there are best practices. 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.