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What Are Employers To Do About the New Social Media

New potential liabilities arise from blog postings

By David W. Garland

In recent years, millions of employees have joined the world of Web 2.0, which includes social networking sites such as Facebook and LinkedIn, blogs, wikis, podcasts, video sharing sites and RSS feeds. Today, technology allows virtually anyone easily to post a message, picture, audio and/or video to his or her networking page, blog or other Web site. In this constantly changing new world, where individuals have the ability to disseminate information about their employers to a potentially world-wide Internet audience, employers need to evaluate their existing technology policies and, where necessary, implement new policies and strategies.

The Web 2.0 environment has given rise to new potential liabilities for employers. An employer, for example, may have responsibility and hence liability for the messages posted on its message boards or intranet. Continental Airlines learned that lesson when the New Jersey Supreme Court held that the air carrier could be liable for co-employees' harassing, retaliatory and sometimes defamatory messages about a co-employee on a work-related forum (the company's Internet message board) where it knows or has reason to know of the conduct. Blakey v. Continental Airlines, Inc., 164 N.J. 38 (2000). While the Court emphasized that "employers do not have a duty to monitor private communication of their employees" (e.g., e-mail), once they have actual or constructive notice of harassing activity they have a duty to end it or face liability.

New Jersey, like most other states, is an at-will employment state, which means that an employer may terminate an employee for any reason that is not unlawful or discriminatory or for no reason at all. Similarly, as long as its decision is not based upon discriminatory factors, an employer is free to hire or not hire who it pleases. But what liability will an employer have if it decides not to hire an applicant or terminates an employee based on the content posted by that individual on the Internet?

The law does not currently require employers to notify individuals that they may review and take action based upon an individual's on-line profile or information available on the Internet. But a number of issues come to mind should an employer take action based on an individual's postings on the Internet, and employers are more frequently encountering the dilemma of what to do in these situations.

Delta Airlines terminated a flight attendant, Ellen Simonetti, for posting provocative pictures of herself in her uniform on an empty Delta plane. Christine Negroni, "Fired Flight Attendant Finds Blogs Can Backfire," The New York Times, Nov. 16, 2004, at 9. The airline deemed the pictures "inappropriate" and a misuse of her uniform. Simonetti filed a charge with the United States Equal Employment Opportunity Commission alleging gender discrimination because the airline allowed male employees to post pictures of themselves in their uniforms on other Web sites. She also started an on-line petition demanding that employers advise employees of their blog policies.

Of course, content matters, and before any action is taken, the content must be evaluated. Disclosing the company's trade secrets on the Internet is far different from exposing allegedly financial wrongdoing by management in the selling of mortgage-backed securities. The former would constitute a breach of

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an employee's duty of loyalty, misappropriation of trade secrets and potentially a breach of any contractual confidentiality or nondisclosure agreements, all justifiable grounds for the employee's termination.

The latter, if the employee also reported the wrongdoing, could be protected whistle-blowing activity. Thus, as long as an employee is not engaged in a protected activity (e.g., whistle-blowing or union activity), an employer is free to terminate him or her for inappropriate conduct discovered through the Internet, particularly where the employee has violated a company policy. At the same time, companies should ensure equal enforcement of their policies to avoid discrimination claims.

On the other side of the fence, many employees erroneously assume that the First Amendment protects their blogging and social networking Internet activity. While the First Amendment only covers state action and thus only covers public employees, it does provide some protection for anonymous posters. In McIntyre v. Ohio Elections Commission, 514 U.S. 334, 342 (1995), the United States Supreme Court recognized a qualified First Amendment right to anonymous speech: "[e]xpressing oneself anonymously is grounded within our constitution and historical tradition … ." Yet, "[p]rotection of anonymous speech is not absolute." New Jersey's State Constitution also affords protection to persons' rights to free speech, including on-line postings.

If an employer discovers that someone who it suspects is an employee is leaking company trade secrets, confidential information or otherwise engaging in anonymous Internet speech that is illegal or damages the company's brand or reputation, then the company has certain remedial options. For example, if an employee is posting information from a work computer, then the employer can use its technology to discover the source of information. When the employee posts information anonymously from outside of work, however, the employer's ability to discover the poster will depend upon its ability to prove a prima facie case of a legal claim and the necessity for the disclosure of the anonymous defendant's identity. Without a viable legal claim, employers will not be able to compel Internet service providers to reveal a poster's anonymous identity.

In Immunomedics, Inc. v. Doe et al., 342 N.J. Super. 160 (2001), the court required Yahoo! to disclose the identity of the purported employee using the screen name "moonshine_fr" as the company met its burden of proving that the defendant employee had breached her confidentiality agreement and breached her common-law duty of loyalty by posting confidential and proprietary information on the Internet.

However, in Dendrite Int'l Inc. v. Doe, 342 N.J. Super. 134 (2001), the court upheld the trial court's denial of discovery, holding that the company had failed to establish any harm (an essential element of defamation) in connection with the anonymous poster's allegedly defamatory statements. Dendrite claimed it was harmed by the defamatory statements in that its stock price may have declined. Yet, the evidence demonstrated that over the seven days of the anonymous posts, the net stock price went up.

The Immunomedics decision highlights the need to have policies and procedures prohibiting Internet disclosures of confidential information and prohibiting employees from expressing damaging opinions or information about their employer, superiors, or co-workers.

Whether an employer decides to sanction blogs or not, it should develop and implement a blogging policy outlining the company's position. The policy should advise employees of the risks while outlining things to avoid, e.g. violating securities laws, disclosing the company's intellectual property, disclosing any other employee's personal information, disclosing confidential information, discussing work-related legal procedures and controversies, using other company's copyrighted materials, making false statements about competitors, and protecting the professional image of the corporation.

Additionally, companies should make sure their anti-harassment, anti-discrimination and anti-retaliation policies cover Web 2.0 activities and indicate that employees have no expectation of privacy in the use of the Company's technology, either at work or outside of work. While the new social media poses challenges, risks and potential liabilities, well-prepared employers can manage them and provide an enhanced workplace environment for their employees. ■