



What Should/Can An Employer Do About Inappropriate Employee Social Networking Communications?

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What should an employer do if it discovers an employee's complaints of sexual harassment on Facebook? What if an employee is divulging the company's proprietary information on his personal blog site? How should management react to an employee's MySpace page created for purposes of union organizing of the workforce? Can an employer discipline an employee who "tweets" disparaging comments about management?

It's a fact – more and more employees are using social networking sites such as Facebook, MySpace, Twitter and personal "blog" sites to communicate (and often-times complain about) work-related issues. Additionally, it is now standard for employers to encourage their employees to use social networking sites to establish networks and market the company and its products. Consequently, employers must be aware of the potential pitfalls associated with using, implementing and monitoring social network sites on the internet.

Pitfall # 1 – Ignoring Online Comments About The Workplace Posted "After Hours."

Although employers are not required to monitor their employees' use of social networking sites and blogs, an employer should never ignore inappropriate online comments related to the workplace once aware of them. Social networking sites do not change the usual "rules of engagement" related to discipline and discharge. It is still clear that an employer may discipline an employee for posting defamatory, threatening or harassing comments about the employer or another co-worker online – even if such comments are made "after hours." Indeed, employers face serious risks if they do not discipline such behavior, absent any clear protections under state and/or federal law or pursuant to a collective bargaining agreement. For instance, if an employer discovers or has knowledge that an employee is making sexual explicit comments about another co-worker on a blog or a social networking site, the employer has a *duty* to respond to the harrasing conduct.

On the other hand, employers should be aware that negative or disparaging comments by employees about the employer could actually be *protected* under state whistleblower laws or the National Labor Relations Act. The


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potential liabilities arising from problematic workplace “chatter” are serious and employers must address them, but it is imperative to prepare policies and establish procedures for discipline and discharge in such cases with advice of legal counsel.

Pitfall #2 – Basing Adverse Employment Decisions Exclusively On Social Networking Posts.

It has become commonplace for employers to conduct “due diligence” research regarding potential candidates using social networking sites. Be careful. Social networking sites are loaded with photographs and comments that may disclose a potential candidate’s race, national origin, age, disability or sexual preference. An employer who uses these sites to investigate potential employees must use extreme caution to base any adverse hiring decision on legitimate, non-discriminatory reasons and to document such hiring criteria. This same advice extends to adverse employment decisions related to an employer’s current employees as well.

Pitfall # 3 – Accessing Password Protected Information Without Proper Authorization.

Because social networking sites are generally contained on a public network, it is okay to access an employee’s password-protected social networking site without authorization, right? Even better, if you guess an employee’s password and enter the site, it’s perfectly lawful, right? *Wrong* – it is a crime under state and federal law to access an employee’s private social networking site or private email account without authorization. Minnesota Statute 626A.26 punishes unlawful access to electronically stored information. Significantly, any employer charged with unauthorized access to a social networking site or an employee’s personal email account pursuant to Minnesota law could be punished with a maximum fine of \$5,000, or sentenced to maximum imprisonment for six months, or both.

Many employers simply ignore the potential ramifications that social networking sites and blogs may have in the workplace, but procrastination is risky! Employers should implement a social networking and blogging policy sooner, rather than later. These policies should clearly identify the employer’s expectations related to an employee’s use of social networking sites, and related use of the employer’s time and equipment, and

unauthorized use of employer time and equipment. All social networking policies should include, at a minimum, the following:

- Provide notice that employees must abide by the “code of conduct” and other policies as established in the company’s employee handbook when posting comments on social networking sites.
- Prohibit or limit access to social networking sites and blogs while “on the clock.”
- Prohibit employees from representing the employer or implying that they are a spokesperson for the company unless expressly authorized to do so by the owner or board of directors.
- Draft a policy that coincides with the requirements of the National Labor Relations Act provisions protecting concerted activity and with state whistleblowing laws and other state laws that may prohibit employers from retaliating against employees for legal, “after hours” conduct.

For further information about social networking and blogging issues affecting the workplace, or if you would like to discuss implementing or updating a social networking, electronic media and blogging policy or a comprehensive employee handbook, please contact the author of this *LawFax*, or any attorney at our firm at (952) 896-1700.

Are Your Employee Handbook And Employment Documents Protecting Your Firm Or Putting You At Risk?

If your Company’s employee policy handbook, hiring and discipline materials, drug and alcohol testing policies, or other critical labor or employment documents or policies are more than 2 years old (or non-existent), your Company is at risk.

Call us at 952.896.1700 (or fax 952.896.1704) if you are interested in a review of your materials and information on our cost-effective “fixed fee” program to customize and update these materials for your Company.

The cost is \$975.00 for handbook and employment materials (with 2 hours customizing time included) and \$475.00 for drug and alcohol testing policy and materials (with 1 hour customizing time included). If Seaton, Beck & Peters has previously prepared a handbook for you, we are offering to update your handbook with the latest additions for \$375.00.