

Social Media Issues Infiltrating the Workplace

Q: What are some social media sites impacting employers today?

A: Facebook, LinkedIn and Twitter are a few of the social media sites utilized by employers and employees today. Studies indicate that the use of social media sites by employers has risen significantly in the last few years with between 45% to 75% of employers now using such sites. All indications are that increased utilization of such sites will continue.

Q: For what purposes are employers accessing social media sites?

A: Employers are reviewing sites such as LinkedIn to do background checks on prospective employees. Additionally, employers are accessing the media sites when possible to monitor conduct and comments of current employees. Finally, employers are using social media sites for recruiting purposes.

Q: What are the legal ramifications of employers using media sites to research prospective employees?

A: Reviewing media sites as part of the recruitment process may create some exposure to employers because there may be information on the media site which identifies the prospective employee as being in a protected class, i.e. age, religion, disability or marital status. Obviously, employers are not permitted to inquire pre-hire whether a candidate is in a protected class. If an employer accesses social media and learns of this information, it may open the door for the prospective employee to claim that they were not hired as a result of such information.

Q: Can employers regulate what an employee posts on the Internet if the posting occurs while the employee is off duty?

A: There are many factors to consider in determining whether an employer can lawfully take action against an employee for comments made on social media sites. Where the information is located, what the information is, the type of employer and whether the site was open to the public are all the factors to be considered. Generally, if the media site is available to anyone over the Internet, there is no expectation of privacy by the employee. It should be noted, however, if an employee posts information relating to the terms and conditions of their employment, it is considered "concerted activity" and is protected, whether or not the media site is available to the public. An effective policy by the employer is critical if the employer chooses to take disciplinary action.

Q: Are there any state or federal laws which come into play with the use of social media by employers?

A: The National Labor Relations Act may come into play even with non-union employers if the employer takes disciplinary action against the employee for comments by the employee concerning the terms and conditions of employment. Any comments by an employee on a media site pertaining to the complaints about wages or work conditions or attempting to unionize would be protected. The National Labor Relations Board has recently filed complaints against employers who took disciplinary action against employees for online statements which amounted to this protected, concerted activity. Additionally, the Federal Stored Communications Act prohibits an employer from intentionally accessing social media sites without prior authorization. Obviously, there is an exception if the information is readily available to the public rather than only by password or invitation. There are multiple cases where employers have been found to be in violation of the Stored Communications Act for accessing private account information. The Fair Credit Reporting Act, Sarbanes-Oxley, as well as the First and Fourth Amendments may also come into play depending on whether the employer is public or a governmental agency. Although there are no Ohio statutes specifically addressing this issue, an employee would potentially have an invasion of privacy claim against an employer for wrongful intrusion into private activities in the event the employer infringed upon private information for which the employee took reasonable steps to maintain restricted access.

Q: What can an employer do to protect itself?

A: Employers should have a very detailed written policy pertaining to social media. The policy should be included in the Internet/Computer Usage Policy and specifically address that the sharing of passwords and viewing e-mails of co-workers is prohibited. The policy would also describe potential discipline for

misuse of social networking sites relating to employment, advise employees that there is to be no blogging or personal Internet usage or visiting social media sites while working, and finally, alert employees that there is no expectation of privacy with company owned computers. All employees should be required to sign an acknowledgment that they have read and understand the policy. Employers should also take care that their social media policies are not overly broad. As part of a recent settlement agreement, the National Labor Relations Board required an employer to amend a social media policy that improperly restricted employees' participation in protected, concerted activity online. Thus, these policies must not include broad prohibitions on employees' social media activities.