

Social Networking...Aren't You My Friend?

The increasing utilization of internet social networking raises new issues for employee privacy. While the advancements in technology have allowed for effortless communication, all aspects of people's lives are exposed to unsuspecting visitors, including employers. Through social networks such as Facebook, MySpace, Weblogs, Twitter, and LinkedIn, employers have access to their employees' conduct and admissions, both on- and off-duty. While it is well-established that employers have the freedom to monitor employees' conduct during working hours, an emerging controversy in employment law is to what extent employers may regulate employees' activities during nonworking hours.

Currently 28 states and the District of Columbia have statutorily limited employers' rights to regulate their employees' off-duty conduct. The reach of these statutory protections varies by state, from: (1) the use of tobacco only; (2) the use of lawful products; or (3) any and all lawful activities. While Kentucky statutorily protects employees' use of tobacco, Kentucky's stance on other off-duty activity by employees, such as conduct contained on social networking sites, remains to be seen.

Case law and the employment-at-will doctrine generally favor the employer but off-duty use of social networking sites is, as yet, uncharted territory. Generally, courts faced with employee privacy cases balance the employee's privacy interest with the employer's interest in regulating its employees' conduct. Such a balancing act is highly fact-specific. Whether an employer may regulate its employees' off-duty conduct will certainly depend upon policies in place and employers' interests at risk.

Suggestions for Employers

There are three suggestions for an employer to consider in order to protect itself against liability for disciplining an employee's use of social networking sites. First, an employer should only regulate the off-duty activity if there are legitimate business reasons to do so. For example, are the employee's statements or conduct injurious to the company and its operations?

Second, an employer may limit employees' expectations of privacy by notifying employees of potential monitoring. The use of social networking sites should be addressed in the company's policies. For example, an employer should advise its employees that, if the employee's off-duty use of social networking sites breaches the employee's duty of loyalty to the company, the employer may take adverse action against the employee. Additionally, an employer may consider requiring the employee to consent to online monitoring as a precondition to hiring. If this consent is verified in writing, it will likely provide a strong defense for an employer who has terminated an employee for off-duty activity.

Finally, an employer should consider whether statements by employees on their terms and conditions of employment invoke protection for even non-union employees under the National Labor Relations Act for concerted activity. Social networking will be a hot bed of litigation until the issue is clearly addressed by statute or case law.