From the General Counsel's Desk

SOCIAL MEDIA: THE RULES OF THE ONLINE GAME, PART 2

By David J. Lynam

Social media—everything from e-mail and blogs to Facebook, LinkedIn, and text messaging—has become a part of most people's daily lives and a part of their personal identity. The constant access we have to these outlets can blur the line between work life and personal life. Prior to the advent of social media, employees conducted themselves in a certain fashion while at the office and were free to act how they wished while off the clock. Through social media, however, employers now have access to their employees' social lives and employees have access to their personal lives while at work. In this, the second and final part of this series, we explain what employees should know about the line between their work lives and personal lives in the context of social media and also address the recent U.S. National Labor Relations Board's "Report on Guidelines for Social Media," which was issued in an attempt to clarify that line.

Employees' Online Privacy

Perhaps the most problematic social media issue you face as an employee is that your online presence is primarily public, and your employer can view it at his or her leisure. In fact, your present or future employer has every right to view any information you decide to make public through the use of social media. It is helpful and smart to occasionally "Google yourself" (i.e., run a search for your name) to ensure that available information about you is not something your employer would dislike or be harmed by. Although states such as Illinois and New York have enacted protective statutes, employers in most states have the right to terminate your employment if your online presence reflects poorly on the company. Notwithstanding these realities, many employees consider their off-duty social life, whether online or not, to be private, raising the following question: What does the employer have a right to access and what is crossing the line?

The first rule an employee must understand is that the employer may access and review anything accessed using the employer's computer or other office equipment. For example, while it is illegal for your employer to sign in as you and have constant access to your personal communications, if you have used personal e-mail or personal profiles at work your employer may read anything that was accessed at that time. Your employer may monitor these activities to ensure that your productivity has not been hindered by personal use of electronics. Employers also may monitor such social media activities to investigate potential violations of company policies, such as the leaking of confidential information.

While these rules only apply to an employee's use of the employer's equipment, the employer also has the right to limit personal electronic equipment use while at work. In fact, the employer may even single out certain employees and create specific strict guidelines when those employees' work has suffered as a result of personal electronic use. Essentially, employees should realize that employers have extensive rights to monitor and regulate employees' on-the-job social media activities.

Most employers have policies in place for social networking and personal communications at work. Be sure to read and understand your employer's policy and get to know what rights you have and what has been limited. Unfortunately, policies can never cover every possible scenario, and sometimes you will have to make judgment calls. As a general rule, it is best to think of all on-the-clock online interactions as real life, in-person interactions. Personal texts and e-mails at work should be treated the same as having the conversations out loud while at work: If you would not make the comment to the supervisor, coworker, or client's face, then you should not post it. In addition, if you would feel uncomfortable spending a half hour of personal time on the phone during work hours, then you should not spend a half hour sending personal e-mails or Facebook messages or making blog or Twitter posts. While every employer has different standards, your employer is allowed to take your personal social networking into consideration when evaluating your performance.

Online Relationships with Your Employer

Whether using the employer's e-mail or letterhead, "liking or friending" the employer on Facebook, or "following" your company's Twitter, you also must consider your online relationships with your employer, as these interactions are packed with potential issues.

Your online conversations with your employer—whether it is the employer tweeting about you or you writing a comment on the company's Facebook wall—all have potential consequences. While you do have some rights in the unlikely event your employer makes comments about you online, recognize that they also have rights to restrict what you say about them.

Finally, any time you use your work e-mail, you are acting on behalf of your employer, who becomes liable for anything you say within those e-mails. In turn, employers have the right to make you liable to them for any improper use of their business e-mail or online business persona. It is therefore best practice to refrain from using your work e-mail for any personal purpose. If it is absolutely necessary to use work e-mail for any personal purpose, include a clear disclaimer that your communication is not on behalf of the company.

Venting about Work

For as long as people have worked, people have complained about work. Employers and employees both realize that the majority of complaints about work are simply meant to be venting. In fact, most employers would take no offense if you go home to call a friend and say, "My boss has been unusually tough on me lately," "My retirement plan is to die at my desk," "Another day, another dollar," etc. Very little harm could come from such a comment, and there is even some good in allowing employees to get such complaints off their chest. However, imagine making the same comment on a Facebook page or a blog, open for your employer's clients and the entire world to view. It is easy to see how this usually harmless comment can suddenly cause serious issues for the employer's reputation.

The above scenario sets the scene for the conflict between employees' rights to discuss working conditions and an employer's right to protect itself from damaging claims. This situation is yet another where the line used to be quite clear: An employee discussing working conditions with another employee has long been protected by the National Labor Relations Act. With social media, however, that employee's discussion looks much different than a water cooler chat, as it now may be published in the public domain. These differences have been addressed, though not exhaustively, by recent decisions of the courts and the National Labor Relations Board, which attempt to set forth the rights of both employees and employers in the social media context.

National Labor Relations Board Report

The National Labor Relations Board (NLRB) is an independent government agency that functions in part to prevent and remedy unfair labor practices under the National Labor Relations Act. While it usually deals with union/employer relationships, the NLRB has recently utilized its authority to address social media issues involving employees and employers. For example, in response to the situation above, U.S. courts and the NLRB have determined that online discussions of working conditions must be protected the same as in-person conversations. However, employees cannot discuss absolutely anything about work with anyone on any forum they may choose. For example, while a group of employees discussing a working condition via a private Facebook group or a group e-mail would be protected, a single employee posting complaints about working conditions as their Facebook status is not. This is a fine line for both employees and employers, and it will take time for the NLRB to catch up and better define guidelines for both parties.

In January 2012, the NLRB released a report documenting 14 cases from the last year in an effort to better illustrate lawful versus unlawful conduct in social media. In the overwhelming majority of cases, the NLRB found that the employers' social media policies were overly broad and in violation of the employees' rights. Nevertheless, such findings did not always prevent an employee's termination, so an employee should be cautious in relying on an argument that their employer's social media policies are overly broad. (You can dowload the report at nlrb.gov, under Reports & Policies, Operations-Management Memos.)

Based on the NLRB's report, it appears that the courts are trying to use several established principles to find a new rule for social media posts. For example, if an employee posts something about work on Facebook, the court will likely consider it to be a public statement. As a public statement, a Facebook post is protected speech so long as it is not a "disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income."

As the law regarding employees' rights to use social media continues to develop, a brighter line is being drawn. As an employee, it is important to keep up with the developments and know your rights.

Conclusion

Although the line between personal and work life has been blurred due to the use of social media and electronic communication, it is important for employees to remember that a line does still exist and the rules of conduct change depending on which side of the line you are on. It is best to use all of the available online privacy tools to your advantage to keep your private life private and your work and public life in line with your employer's standards. In the end, though, the best advice may still be the saying "If you don't have anything nice to say, don't say anything at all."

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