Chapter 9


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ABSTRACT

Business professionals take full advantage of micro-blogs and other social media platforms as powerful tools in recruiting and screening job candidates. In addition businesses aggressively monitor employees’ social media use, both inside and outside the workplace, as employees actively use these platforms to both discuss work experiences and perform work duties. These monitoring practices seem warranted as the Equal Employment Opportunity Commission recognizes hiring practices, harassment, and off-duty conduct as the top three areas of conflict in the workplace. Much litigation and literature in this area focuses largely on employees’ privacy rights; this chapter will take a more encompassing view and assert that having a strong corporate-wide social media policy in place can help strike an equitable balance between an employee’s expectation of privacy and an employer’s legitimate business interests in selecting ideal job candidates, managing its brand image, protecting the company’s proprietary interests and assuring a harassment free workplace.

INTRODUCTION

This chapter is intended neither as a comprehensive treatise on every conceivable legal implication of utilizing micro-blogs or other social media platforms in the workplace, nor as legal advice. Rather the objective here is to offer an understanding of the most salient legal issues that arise when leveraging micro-blogs and other social media platforms to manage human capital primarily in the private sector work setting, though there are some implications here for the public sector as well. Many social media

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platforms have a micro-blogging component, therefore this chapter will use the term social media generally, and micro-blogging when there is a need to reference a specific platform like Twitter. It is important to note that while many of the case law decisions mentioned in this chapter involve activity on social media platforms that are not considered micro-blogs, these decisions are often applicable to various micro-blogging platforms. While much of the social media litigation is resolved through the application of traditional legal principles, this chapter examines the specific state and federal laws enacted to address the legal issues arising from the use of social media primarily in the private sector workplace. In examining the most significant legal issues that implicate the rights of the employee under the labor and employment law, this chapter will shed light on the responsibilities of the employer to protect proprietary information, manage its brand and assure a safe work environment for its employees. Readers will come away with an understanding of how courts balance the competing interests of employees and employers within a legal framework that struggles to keep up with advances in technology in a particularly difficult climate where the lines between personal and professional are often blurred.

BACKGROUND

Business and marketing executives use social networks, including blogs and micro-blogs for marketing purposes. In fact, employees often use their personal devices and/or their personal social media networks as part of their official work duties. More than 80% of employed adults use some kind of personally owned electronic device for work-related functions (Miller-Merrell, 2012). In November 2014, the Federal Trade Commission (FTC) settled the first lawsuit against an advertising companying for tweeting information without disclosing its business ties to that company as is required by the Federal Trade Act. According to the lawsuit documents, the advertising company asked its employees to tweet about its client’s (Sony) products, without disclosing its association with Sony. As a result, the employee’s tweets were considered “false and misleading” (Tyler, 2014).

Business and marketing executives also use social media for recruiting purposes. Employees actively use their personal social media networks to discuss their workplace experiences and sometimes to perform their work duties making the lines between their personal and the professional lives, at times, difficult to discern. Each of these scenarios is fraught with legal consequences. The Equal Employment Opportunity Commission (EEOC), the governmental agency responsible for enforcing employment discrimination law in the United States cites hiring practices, harassment and off-duty conduct as the top three areas of conflict in the workplace related to social media use (Trottman, 2014). Accordingly, this chapter will discuss these three areas beginning with a discussion of the legal implications of social networking in business hiring practices including recruitment and screening. It will follow with a discussion of employee monitoring and therein address an employee’s expectation of privacy, harassment, off-duty conduct, and the improper divulgence of company information.

Much of the literature focuses on the rights of employees, specifically their privacy rights, their rights to join with co-workers to improve their wage and working conditions as guaranteed by the National Labor Relations Act (NLRB), and their desire for “off-duty” conduct to have very limited regulation by their employer. Very little of the literature provides a balanced presentation of the employer’s legitimate interest in monitoring employees’ use of social media platforms both in and out of the workplace as this is often perceived as an encroachment on the privacy and freedoms of employees. This chapter attempts to negotiate and articulate the difficult balance that must be maintained between employees’