

Monitoring and Regulating Employee Conduct in the Age of Social Media Web Sites

By Scott A. Freedman and Jessica A. Barajas

Technology should rightly be considered a double-edged sword for employers. On one hand, the Internet provides an employer with a seemingly limitless amount of information regarding current and potential employees at his or her fingertips. On the other hand, the enhanced ability to investigate an employee's background and conduct has created a legal minefield for employers: Should employers monitor or regulate employee use of the Internet and social media Web sites? What sorts of policies can employers create? These issues have come into the spotlight due to some recent potentially precedent-setting cases.

In October 2006, Robert Half released a survey on employer social networking policies. Fifty-four percent responded that their policy completely prohibited access to social media sites. Nineteen percent allowed access for business purposes only. Sixteen percent permitted access for limited personal use. Ten percent permitted access for any type of personal use and one percent did not know if they had a policy. In a survey earlier this year, Robert Half asked, "As social networking has become more of a business tool, how have you had to re-evaluate your IT policies surrounding its use by employees in your company?" Twenty-three percent stated they were now stricter about personal use of the Internet, while 10 percent were more lenient. Fifty-five percent responded that there was no change.

These two surveys illustrate how important it is for employers to create policies that address employee use of social media. Before examining what employers can do to regulate employees' conduct on social media sites, it is important to examine their ability to regulate employee conduct during non-working hours.

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California Labor Code Sections 96(k) and 98.6 have caused some concern for California employers in recent years because they appear to place limits on the "at will" nature of employment. Section 98.6 states that "no person shall discharge an employee or in any manner discriminate against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96." Section 96(k) states that the California Labor Commissioner may assert "claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employers premises," on behalf of employees. These two sections appear to limit an employer's ability to terminate an employee for conduct occurring outside the workplace during non-working hours. However, two cases interpreting these sections serve to alleviate some of these concerns.

In *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal.App.4th 525, an employee was terminated for dating a subordinate. The employee sued alleging he was wrongfully terminated and his privacy rights and rights under 96(k) were violated. He asserted that his relationship with his subordinate was lawful and conducted during non-working hours away from the workplace. The court summarily adjudicated the case, concluding that 96(k) did not actually provide employees with substantive rights. Instead, it merely established a procedure by which the Labor Commissioner could assert, on behalf of employees, recognized constitutional rights.

The court explained that 96(k) was not an original source of employee rights, but provided a supplemental procedure for asserting employee claims for which a legal basis already exists elsewhere in the law. Employees may already pursue wrongful termination claims based on constitutional rights violations. Section 96(k) simply allowed the Labor Commission to also act on behalf of employees to vindicate existing public policies. The court went on to say that in order to be successful, the employee would have had to assert recognized constitutional rights. Since he could not make this showing, his wrongful termination claim could not be established.

The court further examined 96(k) a year later in *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72 when it considered a situation where an employee claimed she was fired because of her membership in an investment group. The plaintiff alleged that her termination was a violation of her First Amendment rights under the U.S. Constitution and a violation of her rights under 96(k) and 98.6. The court reasoned that common law cause of action like wrongful termination "cannot be broader than the...statute on which it depends." Therefore, the plaintiff must allege that the termination occurred because he or she asserted a recognized constitutional right.

Unfortunately, for the employee in *Grinzi*, the complaint only alleged her rights under the First Amendment, which only prevents the government from interfering with an individual's free speech rights but says nothing about private employers' interference with free speech rights. Since this involved a private employer, the court found that the plaintiff was not terminated for exercising a recognized constitutional right as described in 96(k). It stated that neither 96(k) nor 98.6 supported a public policy against a private employer's termination of an employee for lawful conduct otherwise unprotected by the Labor Code during non-working hours and off the employer's premises. The court avoided having to consider whether a private employer can be liable for wrongful discharge based on the California Constitution's free speech guarantee.

While the *Barbee* and *Grinzi* opinions provide some relief to private employers, it is still important for employers to remain cautious when disciplining employees for lawful conduct outside of work. If the Labor



Code or even the state constitution protects such conduct, employers could still be subject to liability. An example of this is the recent decision of the National Labor Relations Board (NLRB) to champion an employee who was discharged for criticizing her supervisor on Facebook.

In November 2010, the NLRB issued an unfair labor practice complaint against American Medical Response of Connecticut alleging that a fired employee's Facebook comments were protected free speech under federal labor laws. The employer had asked medical technician Dawnmarie Souza to prepare an investigative report after several patients complained about her work. Souza was upset by this and posted on her Facebook page, "Looks like I'm getting some time off. Love how the company allows a 17 to be a supervisor." The "17" is the company's code for a psychiatric patient. Other co-workers responded to her original post and in subsequent posts, Souza called her supervisor two explicatives. She was fired soon after.

The NLRB's complaint alleged that American Medical Response violated Section 8(a)(1) of the National Labor Relations Act, which states that employers may not "interfere with, restrain, or coerce employees in the exercise of" certain protected rights. These rights include the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The NLRB investigated and found that Souza's Facebook postings constituted protected activity. According to the NLRB's acting general counsel, Lafe Solomon, Souza's Facebook postings were the equivalent of "water cooler" discussions. Solomon further observed that employees have the right to talk to each other about conditions at work. He further stated that while this is a case of first impression, he expects similar issues in the future.

The NLRB also found that the company's blogging and Internet posting policy contained illegal provisions that prohibited employees from making disparaging remarks when discussing the company or supervisors, and prohibited employees from depicting the company in any way over the Internet without company permission. It felt that such policies had a "chilling effect" on employees' rights to engage in protected concerted activity such as Souza's. The NLRB hearing on this case will be later this month.

In a previous opinion, the NLRB provided guidelines regarding what sorts of policies have a "chilling effect" on protected activity. The NLRB will consider four issues: whether the policy explicitly restricts protected activity; whether, from the context of the policy, employees would reasonably construe the policy as prohibiting protected activity; whether the policy has been used to discipline employees who have engaged in protected activity; and whether the policy was promulgated in response to concerted or protected activity. Employers would be wise to heed these guidelines in formulating their own social media policies.

In light of the recent class action lawsuits and the NLRB case, employers should review their employee handbook and policies regarding employee use of social media at work and during non-working hours. Employers also need to ensure their social media policies do not have a chilling effect on employee rights.



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