

I N S I D E T H E M I N D S

Complying with Employment Regulations

*Leading Lawyers on Analyzing Legislation
and Adapting to the Changing State of
Employment Law*

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ASPATORE

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Changing Employment
Policies on Using Social
Media and Other Emerging
Workplace Issues

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Regulating an Employee's Use of Social Media outside the Workplace

I believe that one of the upcoming trends in employment law will be the regulation of the use of social media, inside and outside of the workplace. Employers are currently struggling with several issues regarding what the law says they can and cannot do with respect to regulating their employees' activities after working hours.

A key case in this area is one in which the National Labor Relations Board (NLRB), for the first time, became involved in non-union activity. In this recent case, a woman was allegedly fired for posting nasty comments about her supervisor on her Facebook blog page; she worked for an ambulance company that she referred to as "Code 17," a medical term for a psychiatric patient. A co-worker who shared the employee's Facebook blog notified the supervisor about those posted comments. The supervisor then brought the matter up to the company's human resources (HR) department, which fired the employee.

The NLRB ultimately got involved in this case because, under current regulations, the NLRB can get involved in any type of case against an employee if it feels that a company's policies explicitly infringe against an employee's protected activity. Although the NLRB usually gets involved in union activity, I believe that it is currently trying to become more like the Equal Employment Opportunity Commission (EEOC) in terms of protecting the rights of all employees. Essentially, in this realm of budget cuts, it is trying to make itself more relevant by taking part in this type of landmark case.

A key argument in this case is that the employee's remarks were taken out of context, and people should be allowed to say whatever they want to say on Facebook, Twitter, or their blog when they are not at work. Some would say that such postings are similar to water-cooler conversation; provided the employee is not disclosing proprietary information, such postings should be allowed. The NLRB has also argued that if the employee is trying to better her working conditions by complaining about a supervisor, she cannot be fired, as that is considered protected activity.

The Impact of Changing Employment Laws

Most companies have strict regulations to the effect that an employee is not allowed to disseminate any information regarding the company's business outside of work.

However, posting personal opinions online is another matter. In the aforementioned case, the NLRB stated that a company should not fire an employee for that reason. Many employers are wondering what will happen if the NLRB starts enforcing regulations very similar to those issued by the EEOC, which have been dormant for more than twenty years, or if it starts filing lawsuits regarding what you can and cannot do with respect to discrimination or failure to accommodate an employee's needs. Individual states have typically legislated themselves with respect to these regulations, but now the NLRB seems to be saying that all employers need to comply with the law in this area, and it is broadening the scope of this law to include the use of social media when considering whether a company is denying the rights of its employees.

The case involving the ambulance company employee recently settled, so there will not be any formal decisions made in this area until the next test case emerges. Essentially, the employee who was fired for posting negative comments about her boss on Facebook was reinstated and received monetary compensation, and the company was forced to revise its policy and make it less restrictive as to what employees can and cannot do on their own time. Most important, a company must ensure that its rules do not improperly restrict employees from discussing their working conditions with co-workers.

The NLRB believes that federal regulations with respect to employment policies have not kept up with current technology, such as the use of social media. In any case, many companies were shocked by the outcome of this case because they have the same types of employment policies—i.e., an employee is not allowed to say bad things about the people they work with—and they have not updated their employee handbooks to deal with issues regarding the use of social media. Therefore, many employers are dealing with difficult situations with respect to what their employees can and cannot do outside the workplace.

The current environment in terms of the law in this area is still highly unsettled, and I believe that it will embolden the NLRB to go after more employers in the future. This trend may be especially troubling in states such as California, which has a law stating that wrongful termination in violation of public policy entitles employees to not only damages, but also possibly punitive damages. It remains to be seen whether new legislation will be enacted to empower the NLRB to assume more such cases. In the interim, however, companies are increasingly realizing that they have to deal with these issues as soon as possible.

Updating Employment Manuals

Many employers that typically update their employee manuals yearly will look at the most recent EEOC regulations to see whether there are any new laws on disability accommodations or age-related discrimination issues, or any new regulations regarding the Family and Medical Leave Act (FMLA). However, these days companies must also consider a brand-new area—the use of social media by employees, both inside and outside the workplace.

Most companies have a policy in their employee handbooks to the effect that the handbook's contents are proprietary, and the employer is entitled to change its workplace policies at any time. In reality, however, most employee handbooks are at least ten years old, and most do not contain any policies on the use of e-mails or what employees do on their computers. In fact, many companies need to update their employment policies to include policies on not only computer use, but also the use of cell phones and texting, and the rules have to be quite explicit on these additional areas. Any company that issues cell phones, PDAs, BlackBerry devices, or home computers to their employees should include a rule in their employee handbooks stipulating that the company reserves the right to inspect these devices at any time.

Changing Concepts of Attorney-Client Privilege in Employment Law

Many companies have general policies on attorney-client privilege, but they need to update them to include their employees' use of the new social media and computer use in general. The importance of such policies is evidenced in a recent California case concerning a company's right to

regulate its employees and the possibility that it may be taking away their right to privacy in doing so. The US Supreme Court has ruled that an employee has a reasonable expectation of privacy, but what if an employee handbook clearly states that the employer has the right to access all of an employee's e-mails and Internet keystrokes?

In a recent California appellate decision involving a case for harassment, an employee was using her employer's computer to send e-mails to her lawyer about how bad the company was. When her case went to trial, plaintiff counsel filed a motion to exclude the e-mails that she sent to her lawyer based on the concept of attorney-client privilege. This was the first case of its kind in California, and the court ultimately ruled that in this situation, the concept of attorney-client privilege is waived. As long as a company's employment policy states that the employer is allowed to look at any of its employees' e-mails, attorney-client privilege is waived with respect to the contents of those e-mails, and there is no reasonable expectation of privacy on the part of the employee.

Liability for a Supervisor's Use of Social Media

Consequently, employers are dealing with several emerging trends in this area. First, under existing employment laws and regulations, an employer cannot simply fire an employee for saying bad things about his or her company. At the same time, companies have the right to access an employee's e-mails at work and utilize those e-mails in their case actions. There is also an emerging area of employment law regarding social media, and it is important for employers to know that they are strictly liable for the acts of their supervisors in relation to the use of such media.

Many of today's supervisors are young people who grew up in the social media world of Facebook, Twitter, and blogs. Unfortunately, the use of such media on the part of supervisors and other employees can lead to problems in the workplace. For example, let us say that you are a supervisor who has "friended" five people on Facebook who are in your work group, one of whom reads some comments on your Facebook page that he considers racist or sexist. Although these comments were not made in the workplace, it could be claimed that they create a hostile work environment, as the employee who reads the comments may feel differently about his

supervisor as a result. Consequently, the employee may decide to sue his employer for creating a hostile work environment due to the sexual or racist remarks the supervisor made on Facebook.

In fact, a company is liable for the actions of its supervisors, but many companies have not yet come to terms with that concept in relation to their supervisors' use of social media. It is easy to understand rules and regulations on activities in the workplace. However, the advent of social media has led to the application of such rules outside of the workplace, anytime an employee has access to his or her supervisor's Facebook, blogs, or texts. Therefore, companies need to adapt their supervisor training practices and revise their employee handbooks to the effect that sexual or racial harassment can now include anything that another employee or subordinate can read. Simply stated, it is necessary to train supervisors that their behavior remains actionable beyond the office.

A supervisor should know that she cannot take an employee out for drinks and start making sexual comments or advances to that employee, but she should also know that she cannot make sexist or racist comments in the context of social media, particularly if other employees have access to her Facebook page. In fact, I now advise my employer clients that they need to start coming up with policies to inform their supervisors that they have to "de-friend" any co-workers who currently have access to their Facebook pages if they want to protect themselves from litigation.

You have to teach this new generation of supervisors and employees the parameters and limitations they must abide by in this area. Most young people feel that "anything goes" when it comes to their Internet use; they simply do not think twice about using all of the social media available. But in some cases, their use of social media can be harmful to a company.

A more traditional case in this area involved two co-workers who were friends, and then one of the friends became a supervisor. Eventually, the friends had a falling out, and the friend who was the subordinate began experiencing work issues. She ultimately accused her former friend and supervisor of being involved in harassing her and getting her terminated. She filed a retaliation case against her employer, citing the actions of her supervisor. Because of such cases, attorneys and companies need to think

about reevaluating their employment policies with respect to supervisor behavior.

Pre-Employment Screening

Another changing and important employment law area has to do with pre-employment screening. Generally, the law has provided that an employer can ask a new employee to sign a waiver allowing the employer to check the new hire's credit report for any type of criminal record. Employers who utilize such screening techniques typically argue that as long as the employee signs a waiver stating consenting to the screening process, the employer is entitled to perform these background checks. Existing employment regulations protect an employee's right to privacy, but many employers believe that as long as they have obtained the consent of the employee to a background check as a condition of employment, they have not violated the law.

However, over the past few months, a number of class action lawsuits have emerged regarding this issue. One such suit involved the University of Miami's practices with respect to conducting background checks. The plaintiffs alleged that the university's background checks discriminate against African Americans and Latinos, as minorities tend to have the most credit issues. This lawsuit was based on the Title 7 disproportionate effect argument: African Americans and Latinos have been disproportionately affected by the university's background check policy because they typically have the worst credit records, and having a bad credit record does not necessarily predict employment performance. Therefore, the university was found to be discriminating based on race with respect to its pre-employment applications and screening methods. A similar class action lawsuit was filed against a company that was performing criminal history checks.

Again, many employers believe they can perform such screenings with impunity, as long as they have obtained the employee's consent. However, if it is found that your screening methods are disproportionately affecting a minority group, you cannot do so. Therefore, I am counseling my clients that if they perform such background checks, they may face litigation, and it remains to be seen what trends and laws will emerge in this area.

To avoid such litigation, it is important for an employer to ensure that something in relation to the employee's job description will allow it to screen the employee with a credit check. For example, if you are hiring someone to work in your accounting or bookkeeping department, or if the person will be handling money, you may have a better argument for conducting a credit check screening. However, if you conduct a credit check on an applicant for a receptionist job, you probably do not have a good argument for doing so.

It is important for companies to follow the guidelines on the EEOC website regarding what types of tests employers can administer, including pre-employment tests, security tests, and other selection procedures. Most important, you must be able to rationalize any particular test you conduct by ensuring that any pre-employment screening will have some bearing on the job description. If it does not and you do not follow the proper EEOC hiring procedures, you open yourself up to class action lawsuits.

Adapting to Changing Employment Laws and Regulations

As employment regulations and procedures that were once commonly accepted continue to change, it is increasingly important for employers to understand the new regulations in this area, including the new NLRB policies and what they attempt to do for employees. It is also important to understand that class action lawsuits are a new possibility in this area, and companies have to take steps to reduce their exposure.

Most companies understand the concept of wage and hour exemptions and the definitions of a professional with respect to being entitled to overtime pay, but now it is important to consider these new and peripheral issues. A new group of employment law areas will affect every industry and company, small or large, again, because they will open up major exposure to litigation for many employers, particularly if the next round of lawsuits in this area is successful. These lawsuits are just starting to wind their way through the system; therefore, it may be years before we see final decisions in these areas, depending on the law the appellate courts provide to give companies full guidance in their employment practices.

In the interim, employment lawyers need to help their clients navigate through these new minefields of rules and regulations regarding what they can and cannot do and notify them of all of the potential problems they may be facing down the road. For example, I offer my clients specific advice on what I believe companies should do regarding their handbook policies, which is contained in Appendix G. I also offer information for other attorneys to provide to their clients on what they should include in their employment policies until these issues are resolved—which may be several years from now.

Key Takeaways

- Advise your employer clients to start implementing policies preventing supervisors from giving co-workers access to their Facebook pages.
- Clients who perform background checks that disproportionately affect minority groups may be facing litigation, even if they obtain employee consent.
- Employment lawyers must be proactive to help their clients understand and comply with the new rules and regulations.

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