

Employers: 'Keep Out!' Beware intruding in employee web sites

It's becoming a common problem: An employer discovers disparaging comments on an employee's Facebook, MySpace or personal blog. Maybe a post reveals internal company information.

Can the employer take disciplinary action? The answer, like the answer to many employment questions, is "it depends."

A series of new laws and evolving legal doctrines have placed limits on how far an employer can encroach on the private and off-site activities of its employees. This represents an important shift.

Off the clock, off limits?

To begin with, New York State has enacted a labor law that protects employees from discrimination based on their off-duty "political activities" (such as running for office or supporting a candidate and "lawful recreational activities.")

NY Labor Law Section 201-d, in effect, prevents an employee from being discharged because he participates in lawful leisure time activities—as long as they are not for compensation, and not at the workplace—such as sports, hobbies, "legal use of consumable products" (e.g., smoking, drinking) and membership in organizations.

Under this law, blogging and participating on social networking web sites such as Facebook or MySpace appears to be a protected leisure-time activity.

The law may prevent an employer from discharging employees who engage in blogging or social web sites generally. However, it does not prevent an employer from objecting to the content of a particular communication, for example, because it disparages the company or reveals confidential information.

You'll be better equipped to make

this distinction if you have implemented specific policies on the subject and have communicated them to your employees.

Illustrating this, news reports recently covered a story about an associate product manager hired by Google

What should you do if you discover disparaging comments on an employee's Facebook page?

who started a blog (on Google's own blogger service) to chronicle his experiences as a new employee. Google noticed criticism of the company on the blog, and discharged him only 11 days after he started working. The postings on the web site violated Google's written policies.

NLRA, discrimination statutes

Even in such clear circumstances, employers must proceed carefully. Depending upon the specific content of the blog or web site communication—for example, if it reflects a "protest" against labor policies or against alleged discrimination—the communication may be protected under other legal doctrines.

The National Labor Relations Act (NLRA) protects employee communications relating to union issues and labor disputes. But it also applies to nonunion communications where employees are acting "in concert" for their "mutual aid and protection."

In one reported case, an employer that fired a blogger for harshly criticizing management's policies on the web was held to have committed an unfair labor practice. Similarly, federal and state discrimination laws may protect online and other informal protests of alleged discriminatory

employment practices, if made in good faith.

Confidential information

Revealing company confidences on a blog or web site is a separate concern. While this misconduct may be subject to discipline, various statutes—such as state whistle-blower laws, Sarbanes-Oxley fraud-reporting protections and even medical patient confidentiality under HIPAA—can all potentially be implicated by this action, depending on the content of the communications at issue. In these situations, you should consult with your attorney.

Anonymous posts

Finally, anyone can make anonymous offensive blog and Internet posts. That makes it difficult to trace the writer. However, where the posts are clearly defamatory to the company, the threat of a legal action can persuade—or force—Internet service providers to either remove the offending messages or to help identify the person who posted them.

What employers should do

Blogging and social web sites have become a common source of communication for millions. As this wellspring of communication grows, consider formulating and communicating basic policies reminding employees that social web sites and blogs are a "public forum" that can affect their jobs.

Your policies should clarify that, even off the job, employees are considered emissaries and ambassadors of your organization. Remind them that, when communicating in a public forum such as a blog, social networking site or other Internet forum, they should:

- Strictly avoid revealing any confidential company information.
- Take care to avoid injuring or disparaging the company, its products or services.