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5 Lingering Questions Employers Have About Social Media

By **Ben James**

Law360, New York (January 27, 2014, 10:58 AM ET) -- The explosive growth in workers' use of social media platforms such as Twitter, LinkedIn and Facebook has both courts and businesses playing catch-up, grappling with questions about how to apply outdated legal precedent to an online revolution.

While companies have human resources teams and attorneys that are well-versed in the entrenched principles of employment law, the proliferation of social media and other new technology has changed the game and forced employers to confront situations they previously wouldn't have envisioned.

That leaves businesses struggling to come up with the right approach to novel problems — such as one employee "liking" a co-worker's Facebook screed that disparages their supervisor — despite a lack of guidance from courts, which themselves lack experience dealing with cutting-edge issues posed by recent technological advances, said Marcia Goodman, an attorney with Mayer Brown LLP.

"Companies and their legal advisers do the best they can to do the right things, but the courts are also puzzled," Goodman said. "I think it's very much a process of trial and error, both on the part of employers, as well as courts and agencies."

Here are five questions, arising from the intersection of social media and the workplace, employers say they'll be keeping an eye on as the new year progresses:

When Are Objectionable Posts Protected?

The National Labor Relations Board has become a political lighting rod in recent years, a fact evinced by the firestorm over the agency's 2011 Boeing complaint and the pending Noel Canning case at the U.S. Supreme Court.

But in addition to targeting the aerospace giant and pushing ahead with allegedly invalid recess appointees, the agency has also raised eyebrows by deciding that the National Labor Relations Act's protections cover worker social media comments deemed insulting and unacceptable by employers.

"The parameters of when an employer can take action against a worker over social media activity are not yet clear," Goodman said.

One of the criticisms of the NLRB's handling of complaints over objectionable social media activity has been that the agency is applying the same standards to cyberspace that it uses for traditional contexts

such as the proverbial water-cooler chat, despite the fact that a social media post can reach a much wider audience.

“It seems to me that in all the social media cases to date, the far-reaching impact of media on the Internet has not been taken sufficiently into account,” said Marshall Babson, a Seyfarth Shaw LLP partner and former NLRB member. “I'm not faulting this particular board; I'm just saying the agency hasn't confronted this issue yet.”

Some lawyers wonder if the NLRB will craft a new standard for deciding when a statement is so egregious that it loses the NLRA's protection that specifically addresses the unique characteristics of social media, or whether the agency will merely apply the rules developed for traditional avenues of communication to social media.

According to Babson, it's anyone's guess.

“I don't know whether anyone can say with any certainty whether the board will do it, but I certainly think that it should,” he said.

How Will Courts Treat Social Media Discovery Bids?

Courts overseeing employment disputes are generally receptive to the idea that social media may contain some information relevant to a given case, Goodman said.

But there's a push-and-pull that often occurs in such lawsuits where an employer seeks information from a worker's social media accounts, with the defense bar pushing for social media content to be viewed like any other outside-of-work activity and employee advocates fighting broad bids for the production of social media, she added.

But while courts may be open to some efforts to dig into plaintiffs' social media posts, they have also shown a willingness to stop employers from going on “fishing expeditions” and a sensitivity to plaintiffs' privacy concerns, Mayer Brown's Lori Zahalka noted.

“We haven't seen a ton of cases coming through the courts related to this, so I think it's still a little bit of an open area about what the parameters are going to be,” Goodman said.

Foley & Lardner LLP's Mark Neuberger said there was a “gray area” when it comes to what social media content is discoverable and noted that employees can bolster their case for privacy if they take steps to shield such content. He drew an analogy to shouting on a street corner as opposed to having a conversation behind closed doors.

“By closing the door on the Internet, you make a better argument that this is a private conversation,” Neuberger said.

When Must Employers Retain Social Media Content?

While there might be some uncertainty about when employers may access a plaintiffs' social media in discovery, employers may also be confused about whether they have to retain or disclose social media content because of a litigation hold or regulatory reasons.

“You have the courts expecting, on the preservation side, social media be treated as if it were any type of document, but on the other side, in terms of protection, you're seeing the courts being a little more protective of the individual's privacy interest,” Zahalka said.

Satisfying an employer's obligations to search for and hold onto content can be even trickier in light of the proliferation of personal electronics and employers adopting bring-your-own-device — or BYOD — policies in the workplace, said Kris Meade, co-head of Crowell & Moring LLP's labor and employment practice.

“In the old days, it was a battle over your email, and now courts are increasingly saying the obligations extend to those devices as well,” Meade noted.

In addition to general preservation obligations, regulators may also require records of communications, Goodman said, citing the securities industry as an example and noting that broker-dealers have to retain communications, including communications via social media, for years.

Who Owns a Work-Related Social Media Account?

The distinction between the personal and professional can get blurry when an employee connects with job contacts and co-workers on a site such as LinkedIn, and that lack of clarity can lead to disputes about the ownership of a particular account.

While it may be uncertain how courts will rule on disputes over accounts with a personal and professional mixture, directing workers from the outset of employment to use social media as a professional tool for the company's benefit — and being clear that it's really the company's account — can stave off ambiguity.

“If the employer believes it's theirs, tell people it's theirs and get it in writing,” Neuberger said of work-related social media accounts. “When it's being done in the name of the organization, it's incumbent on the organization to create the proper paper trail. You have to bring that under the ambit of work made for hire.”

But establishing ownership of work-based accounts won't entirely solve employers' problems. For one thing, it's likely that people's professional identities will bleed through into their personal social media accounts, Zahalka noted.

"How effectively can you prohibit people from using other noncompany social media accounts in a way that relates to your business?” she said.

When Does Social Media Activity Violate Restrictive Covenants?

Proscriptions on departing workers trying to lure away their ex-employer's clients, or convince fellow workers to jump ship along with them, are common components of post-employment restrictive covenants. When social media is involved, whether those types of provisions have been violated can be less than clear.

Updating a LinkedIn profile to reflect a new job — which triggers a notification to one's LinkedIn contacts — was found by a Massachusetts state court last year not to be solicitation that would violate a noncompete.

Although the former employer who lodged that case lost its bid for a preliminary injunction, there are likely to be developments going forward in similar cases that test the boundaries of what former workers can do to promote themselves on social media without running afoul of restrictive covenants, Zahalka said.

In addition, employers are likely to start including specific proscriptions aimed at social media in their noncompete and nonsolicitation pacts, and how those will fare if challenged is uncertain.

“You may see employers start to try and tailor their covenants to address this problem by being very specific about solicitation,” Zahalka said. “How courts are going to treat that is an open question.”

Anyone who wants to assess if a particular communication via social media runs afoul of a restrictive covenant should focus what the message says and it is trying to accomplish, said Cliff Atlas, leader of Jackson Lewis PC's noncompetes and protection against unfair competition practice.

“One needs to get past the electronic nature of the communication, and get to the substance, because that's going to give you an answer as to whether it's going to violate the agreement,” he said.

--Editing by Jeremy Barker and Chris Yates.
