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Article

Employee Privacy and Social Media in the Workplace—A Global Outlook

A Connecticut ambulance service company that allegedly discharged an employee because she criticized the company on Facebook has reached a settlement with the National Labor Relations Board (NLRB). In the settlement, the company agreed to revise its rules on Internet posting and not discharge or discipline its employees for discussing wages, hours and working conditions online. As a part of the settlement, the employee agreed to leave her employment with the ambulance company. The ground-breaking social media case reflects a growing area of concern around the world.

We discuss social media concerns as they relate to the laws in the United States, Germany, the United Kingdom, France, China and Hong Kong.

Background

The American Medical Response of Connecticut, Inc., (AMR) was conducting an investigation into customer complaints regarding an employee, Dawnmarie Souza. Souza was asked to respond to these complaints, but was denied access to a union representative when crafting this response.

On her Facebook page, Souza complained about the denial of her request for union assistance and made negative comments about her supervisor. According to AMR, the statements violated the company's Blogging and Internet Posting Policy, which stated: "Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers or competitors."

Souza was terminated and the NLRB filed a complaint against AMR. The NLRB argued that AMR's policy was overbroad because it prohibited employees from engaging in discussions regarding wages, hours and workplace conditions at work or with others outside of work that are protected by law under the National Labor Relations Act.

United States

The NLRB has begun to recognize the significance of social media. Although its action against AMR initially involved a traditional claim of denial of union representation, the NLRB's settlement goes further, entering the relatively new area of social media policy. In particular, the NLRB settlement takes the position that social media postings represent not just personal conversations, but can implicate workplace interests as well.

This is a wake-up call for both union and non-union employers. This proceeding is a timely reminder that all employers are at risk of prosecution by the NLRB, whether or not they have a unionized workplace. The National Labor Relations Board regularly takes action when employees complain that they have been prohibited from discussing salaries, complaining about working conditions or engaging in other protected activity, and will likely continue to do so.

The legal status of social media in the workplace is unsettled. The NLRB treated the employee's Facebook "wall" as an extension of the employee's living room. However, one may also argue that the Facebook wall is more similar to picketing than to a private conversation. There are limits to the content of protected speech in a picketing situation, and employees may be terminated for exceeding those limits. Over time, the NLRB will have to settle on limits for protection of speech about working conditions on the Internet.

The popularity and widespread use of social media sites is staggering. Facebook claims more than 500 million users, while Twitter and LinkedIn each claim more than 75 million. Even the Supreme Court, in 2010, commented on the "[r]apid changes in the dynamics of communications and information transmission."[1] Social media's explosive growth has raised new legal and policy questions for businesses in areas such as copyright, privacy and even employee relations. The law is currently struggling to catch up, but as social media use continues to grow, more decisions like this one will arise to answer some of the previously unsettled questions.

Social media continues to expand and the use of these sites creates unique challenges for companies because it blurs the line between personal use and professional use. Sites such as Facebook are accessible anywhere, whether from work computers or personal ones. In addition, a user's connections to other users through these sites will often capture both personal friends and workplace colleagues.

Importantly, while many consider their social media use to be personal rather than professional, the NLRB's involvement in this case shows that sorting out the difference between personal and professional can be very complicated. As the NLRB settlement shows, employers must be careful not to infringe an employee's rights while off the job, even where workplace issues are involved. Many states have statutes protecting employees from discrimination as a result of legal conduct while off the job, conduct that an employee's social media use could reveal to an employer.

Businesses must devise and implement carefully tailored policies to govern social media use and must continually revisit these policies in light of the growth and evolution of such site. As a condition of the settlement, AMR was required to alter its overly broad policy regarding employee communications, including communications that happen through social media. The NLRB settlement agreement underscores that blanket prohibitions on social media use can impermissibly restrict an employee's protected use of this technology, and suggests, instead, that a more nuanced approach is often necessary. Because of social media's increasing reach into the business sphere, companies can no longer choose to ignore the growing importance of social media.

Germany

Employees' rights and obligations in relation to social media are a hot topic under German employment law jurisdiction. The question whether an employee may be dismissed for criticizing or offending his or her employer on a social network platform has not yet been the subject of a decision of the Federal German Labor Court (*Bundesarbeitsgericht*) yet, but the question has been discussed frequently by legal scholars and other experts. Due to the absence of explicit jurisprudence, this problem is solved by following general principles.

Based on the secondary contractual obligations that are a part of every employment agreement (e.g., the duty of good faith), each employee is obliged to avoid damaging his/her employer. Furthermore, the employer's rights and interests may not be violated by an employee. These obligations apply also in the employee's free time.

An employee's disparaging statements about an employer are deemed a breach of the employee's contractual obligations even if they were posted on the employee's private Facebook page.

However, not every breach of contractual duties automatically justifies a dismissal. Instead, the breach needs to be weighed against the employee's constitutional right of freedom of opinion, and the employer's dismissal of the employee will be declared valid only where the mutual trust between the parties is destroyed to an extent that the employer cannot continue the employment relationship.

In performing this analysis, the scope of the public accessibility to the platform on which the statement was posted has to be taken into account. In the case of Facebook, the worldwide accessibility to this platform could weaken the employee's legal position significantly, depending on the privacy settings the employee has chosen. Thus, the decision of whether an employee's offending statement can justify dismissal by the employer is always made on a case-by-case basis. However, what is clear is that the private social media pages of an employee can affect the employment relationship under German law.

United Kingdom

In the United Kingdom, there are circumstances in which a dismissal arising from an employee's use of social media sites can be lawful. Unlike in the United States, discussing working conditions is not protected in the United Kingdom. However, an employee who has one or more years' continuous service with an employer has a statutory right not to be "unfairly dismissed."

There is limited case law on whether a dismissal arising from an employee's use of social media sites is likely to be "fair," although this is likely to change given the increasing use by employees of social media sites to comment on and address work-related issues.

For an employer's dismissal of an employee who has posted disparaging comments about his or her colleagues (including superiors) to be considered fair, the employer would have to be able to show that the decision to dismiss was a reasonable response under the circumstances.

Depending on the seriousness of the employee's misconduct, a lesser sanction than dismissal may be appropriate, such as a formal warning. In determining whether or not the dismissal was "fair," a court would most likely take into account the following factors:

- The nature of the information posted by the employee (e.g., the confidentiality of the information);
- The actual or potential harm to the business; and
- Whether any such conduct has been clearly prohibited by the employee's contract or a company policy (e.g., a breach of the company's anti-harassment policy).

Overall, while the US decision is unlikely to have a direct legal impact in the United Kingdom, it is undoubtedly a taste of what is to come, since cases on social networking by employees, and the use of information about employees gleaned by employers from social networking sites, will be increasingly common.

France

In 2010, two decisions were delivered by French courts concerning the limits to the freedom of speech of employees through Facebook. The first was by the Court of Appeal of Reims, on June 9, 2010; the second was by the Labor Court of Boulogne Billancourt, on November 19, 2010.

The June decision concerned a journalist who, during work hours and while on the company's premises, wrote on the Facebook wall of one of his colleagues: "Our chief, he really is an autistic, isn't he? Don't you know any specialized center where he could be cured? Moreover, can stupidity be cured?" The employee was sanctioned by his employer for injurious and defamatory talk.

In the lawsuit, the employee argued that Facebook constitutes a private space and that by sanctioning him, his employer had violated his right to privacy and freedom of speech. The court disagreed, finding no privacy violation because

anyone could have access to the Facebook wall and read the posted messages. According to the court, "[a] violation of private correspondence requires that the exchanged written communication could not be read by someone who is not one of the addressees." The court reproached the employee for having posted a message on the wall of a colleague without considering that this colleague could have had hundreds of "friends" or may not have had limited the access to his profile and wall.

However, the court canceled the sanction notified by the employer because no names were mentioned in the message and because, in a professional environment, it was not clear to whom the term "chief" referred. In fact, even the employer wondered if the term referred to a colleague or a member of the management. The court stated that there definitively was an ambiguity over the identity of the person targeted by the message so the reproached behavior could not be sanctioned as defamatory.

The November decision concerned a "conversation" that occurred between three colleagues on the Facebook wall of one of them, that was conducted outside of work and not during working hours. During this discussion, two employees explained to the third about how to join the "nefarious club": "make fun of Ms. X [their immediate superior] all day long and without her noticing and then make her life unbearable for several months."

One of the employees involved in this discussion was in charge of recruiting for the company. Due to her job functions, she was terminated for gross misconduct constituted by "rebellious incitement against the hierarchy and denigrating of the company."

According to the court, one of the main concerns was that the conversation occurred on a Facebook wall that was accessible to "friends" and "friends of friends" resulting in access that exceeded the private space. Accordingly, the court ruled that the employer had not violated the employee's right to a private life. Additionally, the court decided that by taking part in this conversation, the employee had misused her freedom of speech and compromised the company's image. The "smileys" and onomatopoeias, supposed to emphasize that it was a humorous conversation were of no use, according to the court, when the employee clearly "supported the denigrating comments and encouraged rebellion against the hierarchy." For these reasons, the court decided that the employee's behavior constituted a gross misconduct and that the dismissal was justified.

In addition to these two cases, on February 2, 2011, the French Supreme Court ruled that employees who use their professional email accounts to denigrate their management can incur disciplinary sanctions, including dismissal for gross misconduct. The Supreme Court stated that as long as the employer had legally accessed the content of the emails, the employer was not violating any employee's right to a private life.

People's Republic of China

While some social media sites are not as popular in China as they are elsewhere in the world—e.g., Facebook, Twitter and LinkedIn—others, including MSN, QQ and Yahoo are gaining in popularity. Indeed, it is not uncommon that employees in China use these services to communicate with other people during or outside working hours.

The PRC labor and employment law regime offers no clear guidance as to how to use social media at work. Numerous questions remain unanswered, for example, whether an employer may monitor employee online activities, including online conversation, and if so, what methods the employer can use, and whether employee could discuss workplace activities with others or post comments (including negative comments) about their employer, supervisor or colleagues on the social media sites. However, it is generally agreed that allowing employees to use online social media tools in the workplace

brings the risk of disclosing the company's confidential information, provides opportunity for outside persons to access company intranet and distracts employees from performing their job duties.

It is therefore important for employers in China to formulate appropriate policies regarding employee use of the company's electronic resources (including a social media policy). Such policies should make clear the scope of an employee's permissible online activities (e.g., whether an employee is allowed to use personal email or instant messaging).

The employer's policy on monitoring its employees' online activities should also be made quite clear. In order for such a policy not to be overly broad—thus risking challenge as infringing employee privacy—reasonable restrictions should be placed on the relevant provisions. For some industries, such as banking, where confidentiality is particularly important, the company may consider utilizing software to prevents employees' access to personal email, social media or other on-line programs.

In order to provide the employer with valid recourse to take disciplinary actions against the employee when the employee breaches the relevant policy, employers should specify the consequences for breach of the policy: e.g., summary dismissal or written warning. As a significant step, the formulated policy must go through the democratic consultation procedures as required under PRC law and be made public to all the employees in order for them to be applicable.

Hong Kong

There is no dedicated law that governs the interaction between social media and the employment relationship in Hong Kong. Instead, existing employment law would be applied to the social media context.

In this regard, an employee has the following statutory rights under Hong Kong law: (i) to be a member or officer of a registered trade union, (ii) to take part in the activities of the trade union and (iii) to associate with other persons for the purpose of forming or applying for the registration of a trade union. Any employer that prevents, deters or performs any act calculated to prevent or deter an employee from exercising such rights, or terminates the contract of employment, penalizes or discriminates against an employee who exercises such right will be guilty of an offense. So, for example, if an employer discriminates against an employee because the employee has taken part in a trade union activity, even if done on Facebook or some other social media site, then the employer will have committed an offense. Moreover, if the employee's employment has been terminated by reason of exercising one of the protected rights mentioned above, the employee may bring a claim for unreasonable dismissal and, among other penalties, seek compensation of up to HK$150,000.

However, so far as we are aware, there have not been any significant employment law cases in Hong Kong involving social media.

Endnote

[1] *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).