SOCIAL MEDIA AND EMPLOYMENT LAW UPDATE
by RYAN K. HEW, ATTORNEY AT LAW (@RKHEWESQ)

PREPARED FOR SOCIAL MEDIA CLUB OF HAWAII'S

Social Media "Boot Camp" for Hawaii Recruiting, Staffing & Human Resources Professionals

Friday, February 22, 2013

LEGAL DISCLAIMER: The information provided here is meant to be general information, and should not be taken as specific legal advice that pertains to any particular situation. The reader should not base any decisions on the information here to act or refrain from acting regarding a legal problem. If you believe you have a legal problem please seek legal advice from a licensed attorney in the relevant jurisdiction.

Legislative Updates

Summary: Generally, speaking states are moving to prohibit employers from asking for usernames, passwords, and access to an employee's or potential employee's personal social networking account. The argument goes that they need access to the personal accounts as a way to protect proprietary information, trade secrets, to comply with federal or trade association regulations, or to prevent an employer of being exposed to legal liability (due diligence). The countervailing argument is that the personal account has nothing to do with one's application to a job or doing the job, and is an invasion of privacy. Thus far, it seems privacy advocates are carrying the day as four states last year, Illinois, Maryland, Michigan, and the latest California have adopted laws that prevent employers from accessing personal social media accounts of employees or potential employees. Hawaii's 2013 legislative session has two bills fashioned after California's.

Federal: Representative Eliot Engel of New York has recently introduced H.R. 537, the 'Social Networking Online Protection Act' (SNOPA). The bill if enacted would prohibit employers from requiring/requesting that the employee or applicant provide the employer their user name, password, or other means for accessing the employee/applicant's private email account on any social networking website; OR discharge, discipline, discriminate in employment or promotion, or take adverse action against them for refusing/declining to provide a user name, password, or access OR if the employee/applicant files a complaint under the Act (basically asserting their right to sue to protect themselves). Finally, it gives the US Secretary of Labor to assess a civil penalty of up to $10,000 for violations and stopping the violating actions. Further, US district courts can give relief to the affected person through employment, reinstatement, promotion, and the payment of lost wages and benefits.

State: During this 2013 Hawaii Legislative session, two bills, HB713 and SB207, work for the most part, very similar to the Federal law, and the language is based mostly on California's recently adopted law. I will focus on HB713 as I have worked with this bill in particular. The current incarnation of HB713, is an HD2 that was passed out of the House Judiciary Committee, yesterday (2/21) and basically uses broad language to

prohibit an employer from asking an employee or potential employee their user name, password, or trying to get access to their personal social networking account. Currently, the HD2 would have the Hawaii Civil Rights Commission investigate a claim, and would operate similarly to any other investigation that the Commission already does for other issues under its authority. Prior variations had DLIR handle the investigation.

Bottom line: This issue is not going away, and it is clear that as time goes on it is more likely than not employers will be denied access to personal social media accounts. However, this still does not prevent workplace investigations and other necessary steps when there may be a violation, and the social media account is involved. For example, situations where there is workers' compensation fraud or the wrongful transmission of trade secrets. The best situation for employers is still likely that workers use their personal devices and personal time to do their personal social networking, and not on company time, company devices, and company email accounts. As always check with attorney or HR specialist on policies and procedures.

NLRB Rulings

Summary: The National Labor Relations Board (NLRB) continues to apply the National Labor Relations Act (NLRA) to situations where the employer has taken adverse actions against employees due to postings on social media sites. Further, it has frowned on overly broad social media policies by companies trying to regulate employees' social media behaviors. However, a recent DC Court ruling has stated that President Obama's recess appointments to the NLRB were invalid. However, this should not be taken as a sign that employers can ignore the recent rulings on social media policies and firings.

In *Hispanics United Buffalo*, the NLRB held that the termination of five employees due to their Facebook posts, where the company claimed harassment by the five on another employee, violated the NLRA. The posts and comments were deemed as a discussion of job performance, and dealt with the preparation of co-workers to defend against allegations of poor work. The comments were prompted when one threatened to complain to the boss that others were not working hard enough, which in turn prompted these comments: "My fellow co-workers, how do you feel?" "Try doing my job. I have five programs," "What the hell, we don't have a life as is," as well as other expletive-laden responses. The NLRB ruled this was "concerted activity" for "mutual aid."

However, in *The Arizona Star Daily* situation, a reporter that had posted Twitter comments stating that "What?!?!?! No overnight homicide. ... You're slacking, Tucson." Another began, "You stay homicidal, Tucson." was not protected as those comments were offensive, and not concerted activity, nor about working conditions. Similarly, an Illinois bartender fired for posting on his Facebook that he was unhappy about not receiving a raise in five years and calling customers "rednecks" and that he hoped they chocked on glass as they drove home also did not meet protective-worthy status.

NLRB on Social Media Policies: Wal-Mart's social media policy, after working with the NLRB, received praise, where it prohibits "inappropriate postings that may include

discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct." Contrast that with the finding that General Motor's policy was unlawful for instructing that, "offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline." The NLRB felt it proscribed a broad spectrum of communications that would included protected criticisms of the employer's labor policies or treatment of employees. Similarly, Costco struck out on an overly broad blanket prohibition against employees' posting things that "damage the company" or "any person's reputation."

While, it is hard to draw any clear distinctions, it does seem clear that employers should adopt social media policies that are specific rather than impose across-the-board prohibitions; the NLRB seems to take into account chilling effects on speech in concert by workers through social media platforms, especially where working conditions are touched upon. However, a worker's general gripes and disparaging comments about customers or groups of people will less likely be protected under the NLRA.

Overall Reminders: Recent court cases have indicated that a series of emails can be taken together as a contract. Therefore, when engaging in employment activities, such as using LinkedIn, recruiters or HR persons should be careful not to make a written offer.

Also social networking is becoming a part of people's everyday Internet interaction. By now it is clear that information is permanent when published on the web, as many people can screen capture, take a picture with their mobile device, etc . . . so companies should take great care when using social media as delivery system for information.

While this is a concern for marketing and PR, HR should remember it has the responsibility of dealing with the pieces of terminating, disciplining, and investigating the marketer or executive who creates the firestorm on social media. Therefore, all decision-makers in a company need to understand social media policy.

Ryan K. Hew is a transactional and compliance attorney that works with small, local businesses and startups in Hawaii. His practice focuses on business entity formation, independent contractor and consultant agreements, licensing and permitting, and legislative and administrative processes.

You can reach out to him via LinkedIn (linkedin.com/in/hawaiiesquire), Facebook (facebook.com/rkhewesq), Twitter (@RKHewesq), and email at: ryankhew@hawaiiesquire.com or visit his website at www.hawaiiesquire.com.