CLIENT ALERT

Monitoring Employee Blogs: Unanticipated Costs And Risks

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With the advent of the internet and the proliferation of personal computer use, many individuals now keep on-line web journals or logs ("blogs") that chronicle all aspects of their lives, including, at times, their working lives. When it comes to blogging, it is difficult for employers to draw lines between protecting their legitimate interests and respecting employees' expression of personal opinions. It is not always obvious what to do when confronted with an employee who paints an unflattering portrait of his employer or reveals company-confidential information in a blog. Options range from a hands-off, do-nothing approach to discharge of the employee who posted the offensive material. Because any employer response to blogging can have both legal and workplace implications, employers should consider carefully what action to take.

For their part, employees often assume that their employers will never read their blogs, which may be why they feel free to criticize their employers openly. Blogs exist in the public forum, however, and there is no guarantee that an employer will not run across an employee's blog. Jessica Cutler, a former Senate staffer and blogger, recalls that she could have password-protected her blog but did not because she assumed only her friends would read it. She was fired from her job when her blog, which chronicled her sexual escapades with various men, including Congressional staffers, became front-page news after another popular blog posted a link to hers.

Heather Armstrong likewise learned the hard way that employers are not blind to blogs. Someone sent an email to the vice president of the web design firm where she worked directing him to her blog, in which she complained about her supervisors using offensive pseudonyms. She was terminated shortly thereafter. It was her blog, www.dooce.com, that gave rise to the term "dooced," which is web jargon for being fired because of the content of one's website.

Given the popularity of blogging, an employer may be tempted to search the web or hire an outside company, such as eWatch, to monitor employees' activities. Before embarking on this course, employers should understand the potential legal consequences. First, certain states, intent on protecting the privacy of its citizens, have enacted or proposed laws that prohibit employers from disciplining employees for lawful off-duty conduct, which may include smoking, consuming alcohol, and blogging. *E.g.*, N.Y. Lab. Law § 201-d(2) (prohibiting termination of an employee because of " legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property") ; Col. Rev. Stat. § 24-34-402.5 (prohibiting termination of an employee " due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours") . While these statutes generally contain an exception for conduct that conflicts with the interests of the employer, employers who monitor blogs and discipline employees for blog content that is work-related, but created during non-working time without use of company resources, may still face litigation or liability.

Blog monitoring may also run afoul of the National Labor Relations Act's and Railway Labor Act's prohibitions on employee surveillance. Whether in the midst of a union organizing campaign or simply in instances of other protected employee activity, employers run afoul of these provisions when they monitor, or even create the impression among other employees that they are surveilling employee conduct. *See Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 884 (9th Cir. 2002) (employer could be

found liable for unlawful surveillance when it accessed an employee's password protected website under false pretenses) (citing *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995)).

When an employer learns of the contents of a blog and fires the responsible employee, litigation may well ensue, as Delta Airlines recently learned. Delta fired flight attendant Ellen Simonetti after she posted "inappropriate" photos of herself posing in her uniform on Delta airplanes on her blog. The self-named "Queen of the Sky" responded by filing a charge with the EEOC and later a federal lawsuit, alleging that Delta discriminated against her based on her gender, since male flight attendants who posted similar photos were not terminated. She also alleged that Delta retaliated against her for publicizing her support for a union organizing campaign on her blog. The EEOC issued a right to sue letter, but the litigation has been stayed pending Delta's emergence from bankruptcy.

A discrimination lawsuit is just one of the many potential consequences that discharging an employee for blogging may trigger. Depending on the contents of the employee's blog, an employer may also run afoul of federal or state whistle blowing provisions by disciplining the blog's author. *See, e.g.*, Cal. Labor Code §§ 1102.5-1102.9, 1106; 18 U.S.C. § 1514A. Additionally, an employer who disciplines an employee for complaining about pay or other working conditions in his blog – protected concerted activity under the National Labor Relations Act – may be found to violate the statute's retaliation and interference with protected rights provisions. *See Meyers Industries (II)*, 281 NLRB 882, 886-887 (1986) (employee engages in protected concerted activity when he "at any relevant time or in any manner join[s] forces with any other employee, or by his activities intend[s] to enlist the support of other employees in a common endeavor.").

Lawsuits and threatened NLRB charges are not the only risks confronting blog-monitoring employers. Blog monitoring may also threaten employee morale by creating a "Big Brother" is watching atmosphere in the workplace. Employers also run the risk of discovering offensive information about their most valued employees that does not pertain to their jobs, but nonetheless creates a what-to-do conundrum.

In short, the proliferation of blogging and its publication of employee likes, dislikes and peccadillos across the web provides employers with greater access than ever to a wide range of information about their most and least valued employees. The question of whether to actually tap into such information and what to do with the information once it is in hand, raises thorny legal and human resource challenges for employers.

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