Employment and Labor Law

ALERT

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With Internet "Blogging" on the Rise, Does Your Business Have An Employee Blogging Policy?

Social web sites, such as MySpace.com, Facebook.com, Friendster.com, and personal web logs, popularly known as "blogs," allow anyone with a computer to publish statements and post content on the Internet. Those who participate in social web sites and those who author blogs sometimes identify themselves as an employee of a particular company and may discuss their jobs, co-workers, or the company's products or services.

When an employee identifies him or herself as an employee of a company and posts content online – whether it is opinion, hyperlinks to other web sites, photographic images, or video content – it can affect the employer in a number of ways. Four primary concerns for employers are: (1) disclosure of the company's confidential or proprietary information or trade secrets; (2) liability for defamation, invasion of privacy, or copyright infringement; (3) violations of securities laws if the company is, or is about to become, publicly traded; and (4) harm to the company's reputation.

To manage these concerns, companies should consider establishing employee blogging policies, either by amending existing Internet use policies or by creating separate policies to cover employee blogging.

One reason to establish a specific employee blogging policy is to provide advance notice to employees that certain activities may result in disciplinary action, including termination. Having such a policy in place is useful to an employer who needs to discipline or terminate an employee for blogging-related activities, in the event the employee responds with litigation.

Employers should also be aware of federal and state laws that may protect an employee from disciplinary action for blogging. The National Labor Relations Act, for example, protects some employee activities, such as efforts to organize a union or a discussion about a labor dispute at the company. The NLRA protects unionized and non-unionized employees, although such protection is limited and might not extend to an employee's blogging activities that are found to be disloyal or that disparage the company or its customers.

Whistle-blower statutes may also protect employee blogging postings. The Sarbanes-Oxley Act protects employees of publicly traded companies who report securities violations, although an employee must first report the unlawful conduct to a supervisor or federal regulatory or enforcement agency. Several states also have laws that protect employees' off-duty activities, which might include blogging. For example, both New York and California law prohibits an employer from discriminating against or firing an employee for participation in lawful off-duty activities. See N.Y. LAB. LAW § 201d(2)(a)(c), (3)(a); CAL. LAB. CODE § 96k. And federal and state employment laws that prohibit retaliatory action against an employee who opposes any unlawful discriminatory practice could potentially protect statements made in an employee blog.

If an employer establishes a blogging policy, it should be enforced consistently. At least one lawsuit has arisen from an employee who claimed that her termination because of

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content on her personal blog was a form of gender discrimination because male employees with similar blogs were not disciplined.

An employee blogging policy can either consist of rules to be strictly enforced and/or suggested best practices. Rules should address company confidential information and trade secrets; liability for defamation, copyright infringement, violation of the right to privacy, and the use of disclosures; use of company trademarks and logos; disclosure of insider information; and prohibitions on disparaging statements about the company, its management and employees, and its customers.

Best practices generally describe tips for effective blogging and may help prevent blogging that offends (or libels) someone else.

Although each blogging policy should be tailored to a company's particular business and culture, the following provides some examples of language for an employee blogging policy:

Remind employees that they are not allowed to disclose confidential, proprietary or trade secret information, and that they are not allowed to use company logos, trademarks or other intellectual property without prior permission.

- Remind employees not to disclose certain information if the company is publicly traded such as revenue, future plans, share price, product launches, etc.
- Require employee bloggers to use a disclaimer if they identify the company, co-workers, products or services, or customers.
- Tell employees that disparaging comments about the company, its employees, products or services, or customers will result in disciplinary action.
- Tell employees that they are subject to discipline and possibly termination for violating the company's blogging policy.
- Educate employees about liability for defamation and invasion of the right to privacy; tell them they can be personally liable for statements they make.
- Tell employees not to post content that is copyrighted by someone else or includes trademarks owned by someone else.
- Suggest that employee bloggers proofread all of their postings and refrain from making personal attacks.
- Develop a policy to address the event that an employee blogger receives an inquiry from the press.

Employee blogging may have serious implications for your business. With very little case law in this area, employers need to carefully consider developing employee policies on blogging activities and should educate employees on the issue. If you would like further assistance in developing or evaluating your company's employee blogging policies, please contact a member of Loeb & Loeb's Employment and Labor Group.

For more information on the content of this alert, please contact Michael P. Zweig, *Co-Chair*, Employment and Labor Group at 212.407.4960 or at mzweig@loeb.com, or Michelle La Mar, *Co-Chair*, Employment and Labor Group at 310.282.2133 or at mlamar@loeb.com.

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