Social Media Pitfalls for Employers

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Social networking sites such as Facebook, Twitter, LinkedIn, Google+, Pinterest, Tumblr or Flickr are everywhere, including the workplace. They can be found on employee smartphones, tablets and computers. While employers can benefit from their use, there are risks. Employers establishing social media policies for employees need to be aware of how the law views those policies.

WHEN IS SOCIAL NETWORKING A PROTECTED LABOR ACTIVITY?

The National Labor Relations Board (NLRB) is the federal agency responsible for enforcing the National Labor Relations Act. It has issued numerous decisions regarding employer social media policies. Policies that were determined to be overly broad or didn't clearly define what employees were permitted to include in social media postings were not upheld by the agency. The reason? The policies unlawfully "chilled" the use of the rights granted to employees under the Act.

Similarly, the NLRB found that disciplinary action taken by employers was unlawful in cases where employees were disciplined under excessively broad policies or for making comments in social media about workplace conditions.

WHAT ABOUT USING SOCIAL MEDIA FOR EMPLOYMENT DECISIONS?

Employers who use social media when researching applicants or when deciding to implement employment decisions must also consider Michigan's Internet Privacy Protection Act (IPPA).

IPPA prohibits employers from:

1. Requesting that an employee or an applicant "grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal Internet account" and

2. Discharging, disciplining, failing to hire, or otherwise penalizing an employee or applicant for failing to disclose or provide access to a personal Internet account.

WHAT EXCEPTIONS DOES IPPA ALLOW?

There are exceptions that permit an employer to:

- Request or require an employee to disclose log-in information for an electronic communication device paid for in whole or in part by the employer.
- Request or require an employee to disclose log-in information for "an account or service provided by the employer, obtained by virtue of the employee's employment relationship with the employer, or used for the employer's business purposes."
- Discipline or discharge an employee for transferring proprietary or confidential employer information to an employee's personal Internet account without authorization.
- Conduct an investigation or require an employee to cooperate in an investigation under certain limited circumstances.
- Implement or enforce a workplace Internet usage and/or monitoring policy.

WHAT ABOUT AN INDIVIDUAL'S RIGHT TO FREE SPEECH?

Court decisions have long distinguished between the rights of a private citizen and the rights of an employee. Social media, however, has blurred the lines between professional and personal life. Challenging an employment-related decision under the First Amendment is possible under certain conditions.

For example, public sector employees who challenge their discharge for a posting on Facebook, Twitter or other social media, must show (1) that their comments addressed a matter of public concern and (2) that free-speech interests outweigh the employer's efficiency interests.

If the employee can show that the comments made through social media involve a matter of public concern, then the court will decide whether the speech:

- Impairs discipline or harmony among co-workers.
- Has a detrimental impact on a close working relationship for which personal loyalty and confidence are necessary.
- Interferes with the normal operation of the employer's business.

The answer to those factors will determine the outcome.

Social media, which is now pervasive in our society, presents significant challenges to employers. Careful drafting of social media policies will avoid the pitfalls that can arise.

For more information, please contact a member of Foster Swift's Labor and Employment team.