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Social Media Savvy for General Counsel

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An assistant manager posts this on his Facebook page: "I was in a strategy meeting yesterday, and I can't believe there are this many stupid people in one place." What is management's right to discipline the employee for this posting? Can his boss require him to remove it? What are the legal implications of counseling him concerning that posting?

Social media has complicated the management of employees and their relationships with co-workers, raising a host of legal issues for in-house counsel. The array of ways in which employees can communicate electronically has increased geometrically. Now, employers face managing employee communications via Twitter, Facebook, Instagram and LinkedIn. To this dynamic, add the availability of affordable personal computing devices that allow employees to communicate with others every minute of the day and night, including while at work.

Further, the line between work-related and personal communication has blurred, as professional employees utilize social media and related electronic communications for networking and communicating with prospective customers, vendors and industry associations. A significant amount of this work-related electronic communication takes place on the employee's personal devices, outside of normal work hours.

There are a variety of reasons why general counsel should care about electronic communications by employees at their companies, ranging from concerns about discrimination, to loss of confidential information, to employee privacy rights.

One key issue involves discrimination and harassment. Protecting the company from legal liability requires the legal department to take steps to prevent communications among employees that violate the laws prohibiting sexual harassment and discrimination in the workplace. Examples can include a manager who texts inappropriate messages to a subordinate or co-workers who post racially discriminatory comments about others in their workplace. Almost every single sexual harassment case these days includes some form of electronic communication, such as sexually explicit messages or photos.

Additionally, in-house counsel must protect the company's trade secrets and other important information. Employers have an interest in ensuring that employees do not electronically communicate confidential or proprietary company information to third parties. Prohibited conduct typically includes workers emailing client information to others in the industry or posting company financial information on their Facebook pages. A 2009 American Management Association/ePolicy survey found that 14 percent of employees admitted to emailing confidential or proprietary information about their employer, its people, products and services to outside parties. Another 14 percent admitted to sending third parties potentially embarrassing or confidential company emails that were intended strictly for viewing within the company.

In-house counsel also should be concerned about the impact of employee communications on company culture. Employees commonly use electronic media to voice their gripes about supervisors and co-workers, something that can undermine management authority or harm a business' culture. Simply put, social media is not the appropriate vehicle for employee complaints. An employee criticizing a manager on a Facebook page for the world to see undermines that manager's authority if the company does not address the post. The legal department should encourage employees to utilize the company's open-door policies, which allow workers to

express their concerns in a professional and private setting, giving management the ability to address that concern expeditiously and effectively.

Just because messaging takes place after hours or outside of work does not prevent management from taking action with respect to that communication. The legal and cultural implications of messaging about other workers or management make it incumbent on employers to be aware of such communications, even those made outside of work. Simply put, the company still can be liable for employee conduct outside the workplace that violates the employment laws. For example, just because a manager texts a sexually explicit message to a subordinate on the weekend does not exempt that manager from discipline for that conduct.

Although courts around the country have issued divided decisions on the extent to which conduct outside of work can form the basis for a discrimination or harassment suit, why take the risk? Lawyers should consider their responses to this same scenario in an offline setting: What would the legal department advise if a manager called a subordinate during the weekend and made sexually suggestive comments to her? That manager still would be subject to discipline under the company's anti-harassment policy. The electronic age is no different.

Privacy and Free Speech

What is the employee's privacy right in social media? Employees certainly have a privacy interest in their personal electronic communications, as well as their private Facebook postings. Employers cannot, and should not, intrude upon those boundaries by asking employees for access to their personal devices or their Facebook passwords.

Nonetheless, this privacy interest has limits. Facebook is a public forum. Any given Facebook member routinely can have 200 plus "friends" who can access his or her page. Further, once the Facebook user posts message like a status update, that message can be sent to an infinite number of people, destroying any private nature it might have had. Think of it this way: If an employee sends a sexually explicit message to a co-worker who then, in turn, reports that message to management, that communication, once disclosed, loses any designation as private.

What happened to free speech? Employees occasionally contend that they have a First Amendment right to say and do whatever they want, particularly outside of the workplace. That's not so, and the legal department can help dispel this misconception. Once an employee chooses to work for a private employer rather than a governmental entity or municipality, First Amendment rights with respect to communications about the workplace go away. That is also called at-will employment.

Given all these considerations, what should general counsel have their companies do? It's imperative to implement a social networking policy that covers employee communications, whether made on company issued electronic equipment or on personal or company time.

This policy should state that the company expects employees, in their electronic communications, to abide by its policy against harassment and discrimination, as well as its policy relating to civil treatment of co-workers and appropriate workplace communication.

This policy also should require employees to respect the company's confidential and proprietary information in their electronic communications.

State in the policy that the company is not attempting to monitor private employee communications that are done on the employee's own time and/or on their own equipment; however, if a co-worker apprises management of such a communication, and it impacts company culture or exposes the company to legal liability, human resources will respond to that communication, if necessary.

Some employers vigilantly monitor communications among their employees to avoid the pitfalls associated with inappropriate communications. It is important for in-house counsel to know that, while the National Labor Relations Board (NLRB) has been quick to file suit against employers in such cases, no court has yet to rule on the NLRB's interpretation of the National Labor Relations Act with respect to electronic communications of employees of private employers. In the meantime, general counsel should remind employees and managers that the convenience of electronic communication carries with it an increased level of responsibility.

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