

2016 HOSPITALITY LAW CONFERENCE

FEBRUARY 22-24, 2016,

Responding To An Employee's Social Media Comments About
the Workplace: Avoiding Pitfalls and Implementing Best
Practices at Your Business

Presented by:

Kalley R. Aman of Buchalter Nemer



PRESENTERS



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Kalley R. Aman is a Shareholder in the Firm's Labor and Employment and Litigation Practice Groups and Chair of the Firm's Hospitality, Restaurant, Food and Beverage Group. Ms. Aman specializes in employment litigation and counseling, business litigation, unfair competition and trade secrets cases, and complex and class actions. She practices in state and federal courts across the country, and before state and federal agencies, including the Equal Employment Opportunity Commission, the United States Department of Labor, the Department of Fair Employment & Housing, and the Division of Labor Standards Enforcement.

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RISE OF SOCIAL MEDIA

- Twitter has over 550 million users
- Linked In has more than 2.1 million groups
- Facebook has 1.11 billion active users



SOCIAL MEDIA: ISSUES FOR EMPLOYERS

- **Access to employees' personal social media**
- **Regulating what employees say about the company**
- **Ownership disputes**



ACCESS TO EMPLOYEE SOCIAL MEDIA

Computer Fraud and Abuse Act (CFAA) – enacted 1986

- Prohibits intentionally accessing and obtaining information from a protected computer without authorization or exceeding authorized access – applies to federal computers and financial institutions

Stored Communications Act (SCA) - enacted 1986

- Protects privacy of internet communications
- Prohibits intentionally accessing without authorization a facility through which an electronic communication service is provided or exceeding authorization
- Protects electronic communications transmitted via an electronic communication service that are in electronic storage and not public



ACCESSING EMPLOYEE SOCIAL MEDIA

Social Media Privacy Statutes

- A growing number of states have these:
 - Arkansas, California, Colorado, Illinois, Maryland, Michigan, Nevada, New Jersey, New Mexico, Oregon, Utah, Washington

California Labor Code § 980 (effective 1/1/13)

- Employer shall not require *or request* employee or applicant to:
 1. Disclose username or password for the purpose of accessing personal social media
 2. Access personal social media in employer's presence
 3. Divulge any personal social media
- Exception: personal social media reasonably believed to be relevant to investigation of allegations of employee misconduct or violation of law
- OK to get username / password to access *employer-issued* device



ACCESS TO EMPLOYEE SOCIAL MEDIA: PRIVACY RIGHTS

Ehling v. Monmouth-Ocean Hasp. Service (New Jersey 2013)

- Non-public Facebook wall posts are protected communications under SCA
- No violation of SCA because a co-worker that employee “friended” had authorized access to her wall, voluntarily took screenshots and gave them to employee's manager

Pure Power Boot Camp v. Warrior Fitness Boot Camp (New York 2010)

- Company violated SCA by accessing employee's personal emails directly from Hotmail and Gmail accounts
- Court rejected argument that authorization was implied because employee had logged in from work computer to those accounts in the past



ACCESS TO EMPLOYEE SOCIAL MEDIA: PRIVACY RIGHTS

Risks of Reviewing Employee Social Media

- Learn personal details about employee, e.g.: sexual orientation, medical, religion, age, national origin or some other protected information
- Risk employee will claim that employment decisions based on personal information, and not on job-related criteria



ACCESSING EMPLOYEE SOCIAL MEDIA

Pietrylo v. Hillstone Restaurant Group (D. N.J. 2009)

- Employee alleged she felt coerced or pressured to give her employer log-in info to access her MySpace chat group
- Court upheld jury verdict that employer violated SCA and awarded compensatory and punitive damages
- *Pietrylo* suggests that there can be potential liability even in absence of social media privacy statute, although in this case there was not



REGULATING EMPLOYEE SOCIAL MEDIA AS CONVERTED ACTIVITY

Section 7 of the National Labor Relations Act

- “Employees shall have the right ... *to engage in other concerted activities* for the purpose of collective bargaining *or other mutual aid or protection*”

California Labor Code § 232.5

- No employer may require an employee to refrain from disclosing info about working conditions
- Employer cannot discharge, discipline or otherwise discriminate against employee for disclosing
- Exceptions: proprietary info, trade secrets, info subject to legal privilege



SOCIAL MEDIA AS CONCERTED ACTIVITY

NLRB Rulings: Concerted Activity Using Social Media

Purple Communications, Inc. and Communications Workers of America, AFL-CIO
(December 11, 2014):

- Previously, email communication between employees exercising Section 7 rights could lawfully be banned by an employer so long as employer did not discriminate against union activity. (Guard Publ. Co. v. NLRB)
- In *Purple Communications*, the NLRB altered its position; employees who have access to the company's email are allowed to use it for concerted activity during non-working time



SOCIAL MEDIA AS CONCERTED ACTIVITY

NLRB Rulings: Concerted Activity Using Social Media

Design Technology Group d/b/a/ Bettie Page Clothing (2013):

- Employees complained to supervisor about working late in unsafe neighborhood, subsequent FB posts complained about management's refusal to address their concerns and consulting book on rights of workers to determine if company was violating labor laws
- NLRB ruled FB posts were protected concerted activity, were conversations for mutual aid and protection



SOCIAL MEDIA AS CONCERTED ACTIVITY

NLRB Rulings: Concerted Activity Using Social Media

Tasker Healthcare Group d/b/a/ Skinsmart Dermatology (2013)

- Employee in private chat on FB vented about being told something by supervisor, said "FIRE ME ... Make my day"
- NLRB ruled termination did not violate NLRA, not concerted activity, did not involve shared employee concerns over terms and conditions of employment
- Mere griping, solely on employee's own behalf, that does not look forward to any action at all is not protected



SOCIAL MEDIA OWNERSHIP DISPUTES

Who Owns a Social Media Account?

Phone Dog v. Kravitz (2012)

- Twitter account @phonedog_noah, 17,000 followers
- Employee left and changed name to @noahkravitz
- Company sued, dispute over who owned the account and login information; lawsuit eventually settled

Issues Raised:

- Customer lists as trade secrets
- Login information as a trade secret
- Underscores importance of clear social media policies and clarifying this issue in employment contracts, confidentiality agreements, etc.



SOCIAL MEDIA POLICY

Employers Should Have A Written Social Media Policy Policy :

- No discrimination, harassment or abusive conduct on social media
- No disclosure of trade secrets/confidential proprietary information on social media
- No use of personal social media during working hours
- No requests by management for access to employee personal social media accounts
- Avoid friend requests from managers to employees



Questions?

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