The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2012
PHILADELPHIA, TUESDAY, MAY 7, 2013
An ALM Publication

# Social Media Law

## The Impact of Recent Social Media Developments on Employers

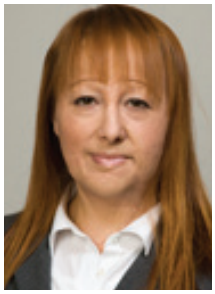
**BY ERIC J. SCHREINER AND LORENA E. AHUMADA**

The use of social media has expanded significantly in recent years. Indeed, one would be hard-pressed to identify a person under 65 who doesn't have a Facebook, LinkedIn or Twitter account that he or she logs into several times a week, if not each day. Given this, employers increasingly are faced with thorny issues related to employee use of social media both inside and outside of the workplace. Many employers have smartly instituted formal policies addressing employees' use of social media during the workday. Employers also have sought to monitor and limit their employees' and prospective employees' online communications both during and after work hours, to varying results. While it is undisputed that an employer may lawfully limit its employees' use of social media during the workday, the issues become more complicated when an employer seeks to monitor or even limit what employees and prospective employees say and do online and when an employer demands to see employees' and applicants' private online messages and posts. This article discusses some recent developments involving this intersection of social media and the workplace, including (1) recent decisions by the National Labor Relations Board addressing the validity of employer policies governing employees' use of social media and (2) legislation and proposed legislation prohibiting an employer from requiring applicants or employees to provide passwords to their personal social media accounts.

Employers should be aware that employment policies that limit or restrict what employees say or do online may run afoul of Section 7 of the National Labor Relations Act, which guarantees both union and nonunion employees the right to engage in "concerted activities" for their "mutual aid or protection." The NLRB has recently issued three decisions outlining some of these concerns. On September 7, 2012, the NLRB in Costco Wholesale and United Food and Commercial Workers Union, Local 371, Case 34-CA-012421, held that Costco's social media policy, which provided that employees could be disciplined for statements posted electronically that damaged the company or any person's reputation, violated the NLRA. The Costco policy stated that its employees' online statements "that damage the company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco employee agreement, may be subject to discipline, up to and including termination of employment." The NLRB held that the policy's broad prohibition of such statements by its employees encompassed communications protected by Section 7 of the NLRA, such as concerted communications protesting the employer's treatment of its employees, and that Costco employees therefore reasonably could conclude that the policy required them to refrain from engaging in such protected communications. The NLRB also noted that there was nothing in the Costco policy that suggested communications protected by Section 7 were excluded from the scope of the social media policy or that otherwise restricted application of the policy. Ultimately, the NLRB required Costco to rescind or modify its employee handbook to the extent that it prohibited employees from making statements online that damage the company or damage any person's reputation.

On September 28, 2012, the NLRB again considered an employer's workplace policy that implicated its employees' social media activities, with a similar result. In Karl Knauz Motors, Inc. d/b/a Knauz BMW and Robert Becker, Case 13-CA-04652, the NLRB found that while an employer's termination of an employee for a Facebook posting did not itself violate the NLRA, the employer's workplace policy that generally prohibited disrespectful conduct or use of language that injured the reputation of the employer did violate the NLRA. In this case, a BMW car salesman posted pictures of a sales event at his dealership on his personal Facebook page and included derogatory comments about his employer's event. That same day, the salesman also posted pictures and comments of an accident that occurred at a neighboring Land Rover dealership owned by his employer. Not long after these postings, the BMW dealership terminated this employee. While the employer asserted that the termination was based on the posting

ERIC SCHREINER



LORENA AHUMADA

**ERIC J. SCHREINER** *is a partner in Kleinhard Bell & Brecker's litigation department. He practices in the areas of commercial litigation, employment law and insurance coverage.*
**LORENA E. AHUMADA** *is an associate in the firm's litigation department. She practices in the areas of complex commercial litigation, employment litigation and counseling and insurance coverage.*

related to the accident at the Land Rover dealership, the salesman contended that his termination was based on both postings and that he was therefore unlawfully terminated because he engaged in protected concerted activities under the NLRA.

The administrative law judge first determined that the salesman's termination did not violate the NLRA because he was terminated only for his posting related to the accident at the Land Rover dealership, not the remarks about his own workplace, and this activity was not concerted or protected under the NLRA. The ALJ, however, also determined that certain provisions of the BMW dealership's employee handbook, including a policy that prohibited disrespectful conduct or use of language that injured the reputation of the employer, did violate Section 7 of the NLRA. The NLRB affirmed both ALJ rulings.

Like in Costco, the NLRB (with one member of the three-member panel dissenting) held that the BMW dealership's policy prohibiting disrespectful conduct and language that injured the image or reputation of the employer was too broad, because employees reasonably could construe it to include communications protected by Section 7 of the NLRA, such as concerted communications objecting to working conditions. The NLRB noted again that there was nothing in the dealership's policy that suggested communications protected by Section 7 were excluded from the scope of the policy.

In Hispanics United of Buffalo, Case 03-CA-027872 (Dec. 14, 2012), the NLRB considered whether an employer's termination of five employees because of their Facebook postings violated the employees' Section 7 rights. The employees had posted on one of their Facebook pages various statements complaining about another co-worker's criticism of their job performance, which the co-worker complained to management was harassment and bullying. Stating that although the terminated employees' mode of communication about workplace concerns was "novel," the NLRB found that these online statements amounted to protected concerted activity and that the employer violated the NLRA by terminating the employees as a result of that activity.

While the recent decisions in Costco, Karl Knauz Motors and Hispanics United provide some guidance with respect to the enforceability of provisions in employee handbooks that specifically govern social media activity, or that are applied to social media activity, these rulings themselves have been called into question by the recent holding of the U.S. Court of Appeals for the District of Columbia that the appointments of three board members of the NLRB on January 4, 2012, were constitutionally invalid. In Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), the court found that the invalid appointments left the NLRB without its required quorum of three members during 2012, potentially rendering all of the NLRB's 2012 decisions subject to challenge. The NLRB recently announced that it intends to file a petition for certiorari with the U.S. Supreme Court for review of this decision.

As the NLRB cases demonstrate, many employers are reviewing their employees' public online activities to determine if workplace policies are being violated. Other employers also seek out such public online information about job applicants to get a better picture of the candidate. But what about an employee or applicant's private online postings and communications? Can an employer demand that an employee or applicant provide his or her passwords to these private social media accounts? Until recently, the answer was generally yes, because there were no specific restrictions on an employer's ability to request passwords to its employees' and applicants' personal Internet accounts, including email, Facebook and Twitter accounts, or on an employer's ability to discipline an employee or reject an applicant who refused to do so.

In 2012, however, several states moved to restrict such access to employees' and applicants' online passwords. On May 2, 2012, Maryland became the first state to enact legislation prohibiting employers from requesting or requiring employees or applicants to disclose online passwords. Since then, three other states, California, Illinois and Michigan, have passed similar legislation restricting an employer's ability to demand online passwords (other states, including New Jersey, have also passed legislation prohibiting academic institutions from requesting such information from students and applicants). The legislatures in many other states, including Pennsylvania, also introduced bills in 2012 and this year prohibiting employer access to online account passwords. Also, this past February in Philadelphia, Councilman Bill Greenlee introduced a similar bill to ban employers in the city from demanding online passwords.

While these bills have yet to become law, the trend appears to be heading toward proscribing such employer access to private employee and applicant online accounts.

Moreover, although employers in many states, including New Jersey and Pennsylvania, can still demand employees' and applicants' online passwords, the better question is whether they should. While it might seem like a good idea to know just what employees and applicants are saying and doing online, e.g., when an employee calls in sick but then posts real-time pictures from his chair on the beach or when an applicant posts on Facebook that she lied through her teeth at an interview, employers should be cautious about learning facts online — whether posted privately or publicly — that may implicate their duties under other federal, state or local laws. For example, if an employer learns from an employee's personal online musings that the employee has a disability, is pregnant, is celebrating his 50th birthday when the employer believed him to be much younger, has a genetic disorder, or belongs to a certain religion, an employer's legitimate employment action may now be construed as discriminatory given the employer's newly acquired knowledge about the employee. Knowledge under these circumstances may not be the best course for an employer.

The restrictions and demands that an employer permissibly can place on an employee or applicant's use of social media is an area of the law that will continue to develop. The increased use of social media undoubtedly will lead to more challenges by employees of both specific employer policies that govern the use of social media and the application of general workplace policies by employers to social media activity. Employers need to tread carefully in this new social media environment.

Reprinted with permission from the May 7, 2013 edition of THE LEGAL INTELLIGENCER © 2013 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 347-227-3382, reprints@alm.com or visit www.almreprints.com. # 201-05-13-07