

MONITORING EMPLOYEE USE OF SOCIAL MEDIA

Social media is everywhere. Facebook, Twitter, Instagram and numerous other social media outlets continue to grow in popularity and use. It should come as no surprise to any employer that its employees increasingly are using social media both inside and outside of the workplace. Employee use of social media can raise a whole host of concerns for an employer, such as:

- Is an employee disclosing the employer's confidential and proprietary information through social media?
- Is an employee using social media to improperly harass other employees?
- Is an employee engaging in other conduct through social media that would warrant disciplinary action, including termination, by the employer?

Concerns like these raise a basic question -- Can an employer monitor an employee's social media activity?

The simple answer to this question is yes where the activity takes place using employer issued equipment or on an employer owned network. Similarly, an employer generally can access an employee's social media activity that otherwise is available to the general public. As discussed below, however, there are certain limits on an employer's ability to monitor employee's social media activity and to take disciplinary action based on information learned from monitoring an employee's social media activity.

As an initial matter, any employer who intends to monitor its employees' social media activity on employer issued equipment or employer owned networks should have policies in place that inform employees that they have no expectation of privacy for any social media activity (or any other communications) that is sent or received on employer-owned networks or using employer issued equipment and that all such communications and activity may be monitored. Such policies will help demonstrate that employees do not have a reasonable expectation of privacy in any activity they conduct on an employer's network or using an employer's equipment.

Even with such policies in place, however, an employer faces certain limitations. An employer should only use legal means to monitor an employee's social media activity (regardless of the equipment or network on which this activity takes place). For example, an employer can access an employee's social media accounts that are generally available to the public. However, an employer should never attempt to gain access to an employee's private social media account through the use of deceptive means, like using a false identity or by obtaining the employee's private password from a friend or co-worker.

Certain federal and state laws directly impact an employer's ability to monitor an employee's use of social media. For example, the federal Stored Communications Act

(the “SCA”) protects stored electronic communications that are configured to be private. Courts have found that social media activity, such as non-public Facebook posts, are protected under the SCA. Therefore, an employer potentially violates the SCA where it accesses an employee’s non-public Facebook posts without the employee’s authorization. Another example are the laws recently passed in a number of states that prohibit employers from requesting or requiring employees or prospective employees to disclose their usernames, passwords and other information used to access personal social media accounts, except under certain defined circumstances. New Jersey recently passed such a law, and it went into effect on December 1, 2013. Pennsylvania has not yet passed a similar law, but the recent trend among states is to implement these laws, and it would not be surprising if Pennsylvania follows this trend. An employer should be sure to check the law of the state in which it operates before requesting or demanding that an employee or prospective employee provide it with a username or password for a personal social media account.

Where an employer elects to monitor its employees’ social media activity, the employer also must proceed carefully if and when it uses the information it learned to discipline or terminate an employee. Terminating or disciplining an employee based on information that the employer learned through monitoring the employee’s social media activity potentially could be a violation of existing law. For example:

- The National Labor Relations Act (“NLRA”) protects the right of employees to engage in concerted activities, which includes communications related to the terms and conditions of their workplace. Therefore, an employer who learns that an employee is making derogatory posts about the employer on his or her Facebook page that are shared with other co-workers, and is considering terminating or disciplining the employee for these posts, needs to first consider whether the employee’s posts would be considered concerted activity protected by the NLRA.
- Some states have laws that prohibit employers from taking adverse employment action against employees for certain types of conduct that occurs outside of the workplace during non-work hours that is otherwise lawful. An employer who learns of such off-duty conduct through monitoring an employee’s social media activity and disciplines the employee based on this conduct may be subject to liability if a state law protects the employee from discipline for such off-duty conduct.

In addition, employers should recognize that monitoring an employee’s social media activity poses the risk that such monitoring may reveal information that the employer otherwise does not know about the employee’s legally protected status (i.e., race, religion, disability, marital status). An employer with such knowledge potentially is open to a discrimination claim where an employee challenges the employer’s legitimate employment action as being motivated by a discriminatory intent. An employer who learned this information from the employee’s social media activity has lost the ability to defend against the employee’s claim by asserting that it was not aware of the employee’s protected status.

The increasing use of social media by people everywhere undoubtedly will lead to an increased need by employers to monitor employees' use of this communication medium. Any employer who monitors its employees' use of social media should have clear policies in place governing employee use of social media and should proceed carefully so it does not unnecessarily open itself up to legal claims.

The lawyers at **Kleinbard Bell & Brecker LLP** can help you with any issues that may arise related to employee use of social media. Please contact Eric J. Schreiner, Practice Leader of Kleinbard's Employment Group, if we can be of any assistance.

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