News for School Law Clients

FYI

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Regulation of the Use of Social Media in Employment Decisions

The use of social media is burgeoning, causing employers to consider not only how to use it as an effective workplace tool, but also how and whether employee social media can be regulated.

It is estimated that, as of January 2014, close to ninety percent of adults went on-line and almost three-quarters of those users frequented social media sites, such as Facebook. Surveys reflect that almost ninety percent of American companies use social networking for business purposes and nearly half monitor the use of social networking by employees at work.

Several developments in the law relating to an employer's ability to regulate employee social media use in employment decisions are worth noting. This FYI will discuss restrictions on the use of social media in employment decisions arising from statutory regulation, labor laws, and the First Amendment.

Statutory Regulation

In Wisconsin, employers, including school districts, are prohibited by a new state statute from requesting that an employee or applicant for employment disclose to the employer their user name, password, or other security information. The statute permits employers to obtain such information with respect to any device or account furnished by the employer; to view, access, or use information that is available to the public; and to require an employee to allow employer observation of an employee's personal internet account, if the employer has reason to believe that employment-related misconduct has occurred in that account. This statute was discussed in more detail in the April, 2014 FYI titled "New Law Restricts District Rights To Employee and Student Personal Internet Accounts."

Concerted Activity

The National Labor Relations Act ("Act") does not apply directly to Wisconsin school districts, but the provisions of the Act which impact social media are similar to those state law provisions which govern school districts in Wisconsin. Decisions under the Act can be persuasive in the interpretation of the parallel Wisconsin "concerted activity" statutory provisions. Under Section 7 of the Act, employees have the right to organize for the purpose of collective bargaining and for purposes of "engaging in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Any employer action which interferes with these Section 7 rights violates the Act.

The most significant protection afforded employees has been with respect to "concerted activity." Employee conduct is "concerted," and thus protected by Section 7, if it is engaged in by at least one other employee, or on behalf of a group of employees, i.e., if one employee is acting alone in the attempt to initiate group action on an issue of terms and conditions of employment. For example, discussion among staff members critical of district compensation policies are protected communications since they fall within the scope of concerted activity.

In the last several years, the National Labor Relations Board ("NLRB") has taken an active enforcement posture of the "concerted activity" clause, particularly as it relates to employee use of social media. Employee communications in social media are provided the same protection as other employee communications. Thus, an employer who does not approve of an employee communication on social media sites that constitutes "concerted activity" cannot take an adverse employment action against the employees who were engaged in that communication. The "concerted activity" clause, however, does not protect an employee who engages in social media communications which complain about the quality of services or product of the employer or which constitute individual gripes against the employer or supervisor.

Social Media Policies

Employer policies that could chill or curb concerted activity have been found to be overbroad and unenforceable by the NLRB. This has been particularly true of social media policies. While the Wisconsin Employment Relations Commission, which enforces the Wisconsin "concerted activity" statutory provisions, has not similarly addressed district policies under these provisions, the federal stance toward policies which impact concerted activity merits consideration by districts in the creation or maintenance of social media policies.

In general, the NLRB has found the following policy provisions to be unenforceable:

- Policies that forbid employees from discussing pay or benefits, including such policies that prohibit an employee from disclosing "confidential," "sensitive," or "non-public" information because that broad prohibition could be interpreted by an employee to include compensation or benefit information;
- Policies that prohibit employees from making "negative," "critical" or "disparaging" remarks about the employer, or that forbid remarks that could "harm the employer's reputation";
- Policies that prohibit "unprofessional," "disrespectful," or "inappropriate" communications; and,
- Policies that prohibit an employee from identifying the employee as an employee of the employer.

The following policies have met with NLRB approval:

- Policies that prohibit the use of social media on work time or when using company equipment or networks;
- Policies that prohibit employees from using or disclosing proprietary information;
- Policies that prohibit comments about coworkers, supervisors, or the employer that are obscene, threatening, intimidating, harassing, or a violation of the employers' workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class status or characteristic.

First Amendment

In addition to the protections afforded employee communications on social media under the NLRA "concerted activity" clause, such communications by district employees may fall within the protection of the First Amendment. For example, the fact that an employee "liked" a Facebook comment was found to be protected speech under the circumstances in one court case. To determine whether social media communications are protected speech, the analysis given other types of speech applies:

- Was the speech made as part of the employee's official duties?
- Was the speech on a matter of public concern?
- Are the district's interests in promoting the efficiency of public service sufficient to outweigh the employee's free speech interests?

In the social medial context, much of the litigation involving the First Amendment has centered on whether social media speech is a matter of public concern. For example, Facebook posts related to the termination of employees after a political election have been found to be of public concern, while the airing of private grievances has not been characterized as a public concern. Employment action founded upon employee speech, including social media communications, may impact an employee's First Amendment rights and must be assessed with that risk prior to implementation.

Check-Up List

Given these potential restrictions on the use of social media by school districts in the employment context, we have developed the following Check-Up List for you to review and determine whether your district's policies, handbook provisions, and practices conform to the legal principles set forth in this FYI.

[ ] YES	[ ] NO	[ ] UNKNOWN	Have the District's employment application procedures been updated to reflect the new statutory prohibition on requesting that applicants for employment disclose their private account user name, password, or other security information?
[ ] YES	[ ] NO	[ ] UNKNOWN	Has the District's Acceptable Use Policy governing technology been updated to specifically reflect the permissible inquiries of employees with respect to employee use of both privately-owned and district technology?
[ ] YES	[ ] NO	[ ] UNKNOWN	Could your District policies and handbook provisions be interpreted as restricting or interfering with the right of employees to use social media for protected concerted activity?
[ ] YES	[ ] NO	[ ] UNKNOWN	Could your District policies and handbook provisions with respect to employees' use of social media be construed to impact their First Amendment rights?
[ ] YES	[ ] NO	[ ] UNKNOWN	Do District policies and handbook provisions prohibit employee use of social media for purposes which may be legitimately regulated?
[ ] YES	[ ] NO	[ ] UNKNOWN	Has the District's Acceptable Use Policy governing technology been reviewed, generally, to reflect the breadth of capabilities of the technology in the District and the appropriate regulation of employee utilization of such expanded scope?
[ ] YES	[ ] NO	[ ] UNKNOWN	Most importantly, does the District's Acceptable Use Policy governing technology make absolutely clear that there is no expectation of privacy by any user of the District's technology, including employees, and that the District shall have the unilateral right to access all accounts and history of every user at the sole discretion of the District?

Feel free to follow-up with any Boardman & Clark LLP School Law Attorney regarding any of the items on the Check-Up List.

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