Responding to Criticism on the Web

Employers seeking to respond to workers’ negative comments posted on the Internet should be careful not to violate the blogger’s rights under state and federal laws. And with the number of blogs increasing daily, employers should consider adopting the sample social networking policy in this month’s Legal Clinic.

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In today's society, Internet communication is essential for running a successful business. However, when used by employees as a means to comment on their coworkers and colleagues, Internet communication can cause employers serious harm.

Unfortunately, the law has been slow to evolve in addressing the many employee challenges associated with social networking. Many lawyers, HR professionals, and even some employees are confused about how to respond to negative comments online.

The purpose of this column is to provide some guidance.

Question: What options does an employer have for responding to negative comments made about the company or criticism of employees by a blog, Web page, or other means?

Answer: Employees have long dealt with problems associated with employees voicing criticism to others. Clearly an employee’s criticisms can damage a company’s competitive advantage, reputation, recruitment, and retention efforts. However, the law is not as clear as one might assume. It is possible for employees to use the Internet to cause additional harm to either intentionally or unintentionally disclosing confidential employer information or trade secrets through their negative communications.

Add to this the fact that, when disseminated over the Internet via a blog or chat room, negative employee comments can be extremely damaging because they can be viewed by millions of people, the Internet is vast, and are very difficult, if not impossible, to retract.

Given this reality, it is unfortunate that the law in this area is not yet well-developed. Nevertheless, it is critical that employers refrain from reacting in a manner that would violate employees’ rights to free speech.

This is because, depending on the issues addressed in the blogs, and where, when and how the comments were published, a state and federal laws may protect employees from adverse employment action in response to the blogs.

Taking action without properly evaluating important practical and legal issues will leave employers vulnerable to claims of discrimination, wrongful discharge and retaliation brought by affected employees under state statutes, labor relations laws and whistleblower protection laws.

Protection Under State Statutes

Statutes in states such as New York, Colorado and North Dakota prohibit employers from taking adverse employment actions against employees for engaging in lawful activity such as blogging.

New York: N.Y. Lab. Law § 201-d(5)(v). Employers in New York cannot take any adverse action against an employee on account of the employee’s engagement in legal recreational activities if the employee engages in the activities outside of working hours, off of the employer’s premises, without the knowledge or need of the employer (N.Y. Lab. Law § 201-d(2)).

Recreational activities are defined under New York law as “any lawful activity, for which the employee is not compensated, and which is generally regarded by the employee as being of a recreational nature.” The policy in New York does not prevent an employer from taking adverse action against an employee for her work outside of working hours on the employer’s premises.

Colorado: Colo. Rev. Stat. § 24-34-405.25. In Colorado, it is an unlawful employment practice to fire an employee for engaging in a lawful activity that takes place off the employer’s premises during non-working hours, if the activity engaged in is a bona fide occupational requirement or is reasonably related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or the activity engaged in is an activity of a political nature with any responsibility to the employer or the appearance of such a conflict of interest. Colo. Rev. Stat. § 24-34-405.25(c)(1). At least one Colorado court has found that one of the bona fide occupational requirement encompassed within the scope of the Colorado statute is an implied duty of loyalty, with regard to public communications, that employees owe to their employer.

In finding for the employee, the court opined that the employee’s comments did not disqualify the employee and the statute as a whole from “libelous slanderous public utterances against the business reputation of the employer’s business.” At 2435. Therefore, in Colorado, the employee is engaging in an activity that is a political nature, with any responsibility to the employer or the appearance of such a conflict of interest.

North Dakota: N.D. Cent. Code § 14.02-02-02. North Dakota extends the protection against discrimination to employees by protecting, without exception, all lawful off-duty activity. In North Dakota, employees may take adverse action against an employee or applicant on account of the employee’s or applicant’s “participation in lawful off-duty activity of the employee’s or applicant’s own choosing during non-working hours” which is not in direct conflict with the essential business-related interests of the employer.” N.D. Cent. Code § 14.02-02.

Protection Under Federal Law

The National Labor Relations Act — 29 U.S.C. § 157. Many nonunion employees are under the mistaken impression that their employers are not represented by a labor union, they need not be concerned with the NLRA. Virtually all of the rights afforded to union members by the NLRA also extend to nonunion workers, including, for example, the rights to strike and picket.

While employees are permitted to lay out policies as to what employees may blog about in direct relation to work, employers cannot impose policies that have the effect of restraining employees from the right to engage in “legitimate expression.” For example, an employee’s express or implied right to engage in “legitimate expression” includes the right to blog about his own experiences with the employer.

Additionally, public laws on blogging about the employer will likely be viewed as an unreasonable restraint to self-organization in violation of the NLRA. See In re Vista Annex, Inc., 312 F.3d 1048 (9th Cir. 2002); cert. denied, 537 U.S. 939 (2002); American on-Line, Inc., 136 NLRB 224 (1962); and In re Vista Annex, Inc., 312 F.3d 1048 (9th Cir. 2002).

Preliminary Protection under Wiretapping Laws

If the employee’s negative comments concern the employee’s reasonably held belief that the company is engaging in illegal activity, the employee may also be protected under wiretapping protection laws.

Federal law protects employees of public (or private) employers from employer retaliation for reporting what the employee reasonably believes to be a violation of federal laws or regulations. The federal laws or regulations would likely include the federal securities laws, the federal securities laws, the securities laws, and the securities laws.

In short, however, whether this protection extends to include employees who make similarly reports indirectly, via Internet chat rooms or blogs instead of directly to law enforcement authorities, supervisors, investigators, etc., is likely. However, that is a fact. The employee may also be entitled to a waiver for the elements of the prior speech interpretation.

Nonetheless, some states have enacted private sector whistleblower protections that are unrelated to employees from taking adverse employment actions against employees for publicizing what the employee believes to be the company’s illegal activities. See, e.g., New Jersey Corporation of Employees Protection Act, N.J.S.A. § 34:27-26 et seq.; Delaware Whistleblower Protection Act, 18 Del. Code Ann. § 2702 et seq.
Because many factors must be considered when faced with employees who post negative comments about their employers on the Internet, choosing the right course of action is quite difficult.

Before taking any adverse action, however, employers should carefully consider whether their actions may be legally protected. Their employers response can result in claims of unfair termination, discrimination, retaliation, and/or violations of State and Federal laws, thereby undermining the damage caused by the blogger’s posting and, in many cases, causing more damage to the employer than caused by the original posting in the first place.

That said, this does not mean that employers must sit idly while employees launch cyber-wars against their companies. Employers should take preventative steps by developing comprehensive, legally compliant policies (see below) that place employees on notice of what behaviors are inappropriate to blog about (see too the archive of blog postings regarding comments, etc.). And, that blogging should not be done through company property or on company time.

For these employees that have already been hit with damaging comments posted on the Internet by employees, partnering with a reputable public relations expert and legal counsel to craft and disseminate an appropriate response is an option.

The response should be professional, cautious and address the issues raised, and provide contact information for a knowledgeable company representative well-versed to address questions related to the issues raised by the blogger’s statements.

Often, damage can be reduced significantly or even avoided altogether by simply disseminating accurate information on the issue that is the subject of the negative comments, and by avoiding an airing within the company for the public and employees to ask questions and voice concerns.

Question: I need a social networking policy. Can you offer some advice on what such a policy should include and provide a sample policy?

Answer: Guidelines for the appropriate use of social networking tools should be an integral part of every employee’s electronic communications policy. We advise firms from the discharge case that employee blogging can result in the dissemination of proprietary information and result in negative reputations.

However, if left unchecked, blogging and other forms of social networking can result in the following: additional problems:

- Reduced employee productivity

- Damage to company property (i.e., expensive computer systems)
- U.S. Securities and Exchange Commission violation (an employee may violate the “quiet period” before an initial public offering by blogging about it)
- Laws of potential patents (if an employee blogger describes a product or service in development over a year before a potential application is made, the employer may lose patent rights)
- Legal liability for both the employer and the employee for harassment, defamation and libel
- Unemployment issues

With these considerations in mind, enabling and enforcing a comprehensive policy that provides guidelines for the appropriate usage of social media in the workplace is a requirement for all conscientious employers. Once enacted, such a policy can help employees begin the process of creating and maintaining a positive workplace.

A well-researched and effective social networking policy should do the following:
- Tell employees to exercise good judgment and common sense in all electronic communications;
- Ensure that employees do not post defamatory or threatening comments on the Internet;
- Ensure that employees do not disclose confidential information;
- Ensure that employees do not reveal private information about others;
- Ensure that employees do not make disparaging comments about competitors;
- Ensure that employees do not respond to negative content on the Internet;
- Ensure that employees do not participate in a discussion forum unless they have been trained in the appropriate use of the Internet;
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