Social Media Law Update

by Jeffrey A. James and Laura L. Edwards

Social media in the workplace has been a "hot" issue for several years, and there are no signs of a slowdown for this controversial topic. In fact, recent National Labor Relations Board ("NLRB") decisions and the Washington State social media privacy bill show that employee use of social media is presenting more complicated issues than ever.

Recent Labor Law Developments. The NLRB is no stranger to social media issues. The NLRB continues to further clarify and refine its view of social media's role in the workplace through Acting General Counsel Reports, Advice Memoranda, and case decisions. Last month, in *In re Design Technology Group, LLC*, 359 NLRB No. 96 (April 19, 2013), the NLRB found that several employees engaged in protected concerted activity when they complained about their employer on Facebook, and that the employer violated the National Labor Relations Act ("NLRA") when it fired the employees in retaliation for their comments. In that case, the employer ran an upscale clothing store. Several employees complained to management that the office should close earlier so that the employees could avoid the perils of the store's allegedly unsafe location. After a heated exchange with management, the employees made several Facebook postings, one stating that the employee was going to bring a workers' rights book to work. A coworker saw the online exchange and showed it to the employer. Several days later, the employees involved were terminated. In response to the resulting unfair labor practice complaint, the NLRB concluded that the Facebook postings were protected concerted activity under the NLRA because the postings related to the workers' hours and safety (which are terms and conditions of employment) and that the purpose of their postings was for "mutual aid and protection." The NLRB also found that the employer failed to establish that it would have terminated the employees in the absence of their Facebook postings.

Just as with other employee conduct, however, social media activity will not be found to be protected when it expresses individuals' personal views about their employer that do not relate to the actual terms and conditions of their employment. For example, in *Karl Knauz Motors, Inc. d/b/a Knauz BMW*, 358 NLRB No. 164 (Sept. 28, 2012), an employee made several unflattering Facebook postings about his employer's marketing event. Later that same day, the employee made more Facebook postings making light of an accident that occurred at a different store also owned by his employer. The employer confronted the employee about the postings and terminated him. The NLRB determined that the employee was terminated based upon his comments about the accident at the employer's other store and not for his comments about his own workplace. Accordingly, the posts were simply "a lark," with no relation to the terms and conditions of his employment and termination for the postings did not violate the NLRA.

Social Media Legislation. In late April, both houses of the Washington State Legislature unanimously passed a social media privacy bill, S.B. 5211, which would prohibit employers from requesting access to employee or applicant (hereafter, "employee") social media accounts. Washington State is by no means a pioneer in this field—similar social media privacy legislation has already been approved in six other states and has been proposed in the federal legislature and in 20 state legislatures. The new legislation, if signed into law by Governor Jay Inslee, would add two new sections to the "Prohibited Practices" section of Washington's Labor Code, RCW 49.44. The legislation prohibits an employer from requesting: (1) login information for employee social networking accounts; (2) that the employee access social networking accounts in the employer's presence; (3) that the employee add any person to the list of contacts associated with the employee's social networking accounts; or (4) that the employee alter settings on social networking accounts that affect a third party's ability to view their contents. An employer may not take adverse action against an employee for refusing to perform any of these tasks. Pursuant to this legislation, employees would have one year from the date of an alleged violation to file a suit against their employer. Employees may recover injunctive or other equitable relief, actual damages, a penalty in the amount of five hundred dollars, and reasonable attorneys' fees and costs.

Notably, an employer may request that an employee share content from social networking accounts if the employer requests the content to make a factual determination in the course of conducting an investigation. However, the investigation must specifically concern the employee's activity on his or her social networking account and the purpose of the investigation must be to ensure compliance with applicable laws or to investigate an allegation of unauthorized transfer of an employer's proprietary information. Even under these circumstances, an employer may not require the employee to provide his or her login information. Further, the legislation does not apply to employer-provided social networks, intranet, or other platforms primarily intended to facilitate work-related communications. Further, if an employer inadvertently receives employee login information by virtue of an employer-provided program that monitors an employer's network, the employer may not use the information to access employee social networking accounts.

Social media law is showing rapid growth and change, particularly in the NLRB and the federal and state legislature. Employers should be aware that the NLRB is increasingly critical of social media policies and protective of employee rights regarding use of social media. Employers who wish to take disciplinary action based on social media activity must be cautious, particularly when postings appear to address work-related issues. Further, we strongly suspect that Governor Inslee will sign S.B. 5211 into law. Employers who have not already done so should review their policies now and cease any practice of requesting access to employee social networking accounts. If you would like additional assistance in reviewing your social media policy or practices, please contact Jeff James or Laura Edwards at (425) 454-4233.