

CLIENT ALERT

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Blogs Present New Pitfalls For Employers

Personal Web logs, also known as “blogs”, have become increasingly common in the United States. With an estimate of more than 8 million blogs in the country, employers who wish to protect their interests in this very public forum face unique challenges, especially as much of the conduct occurs off site and after working hours. Indeed, a recent rash of high-profile employment disputes arising from blog postings suggests that employers should evaluate their existing technology policies and, where necessary, implement new policies and strategies to adequately safeguard their interests.

Blogging

Blogging is the expression of opinion in an online journal known as a Web log or blog. The blog provides a forum for the random musings of the author or blogger. Some blogs are devoted solely to business or politics while others are purely personal. Very often, the personal blogs focus on the discussion of bloggers’ day to day activities, including their jobs and their colleagues. Blogging may occur during the workday on company computers or it may occur after hours on the employee’s personal computer.

Typical Blogging Problems

Blogging creates numerous problems for employers. Employees are able to express their gripes about their employers, bosses or co-workers on a forum that is available to millions of people. Such comments can poison the blogger’s relationships at work and negatively impact the employer’s business relations and profitability.

Even more damaging, employees can disclose proprietary business information in

this very public forum. For example, Apple Computers recently sued the operators of three Internet sites for posting or linking to information that the company considers proprietary. While the sites do not appear to be run by Apple employees, the source of the alleged proprietary information is unclear.

Blogs can also expose employers to liability if they are used to post harassing, discriminatory, offensive, menacing or threatening messages. Finally, blogging decreases productivity if employees are updating the blog during working hours or reading new entries on the blog during work time.

Recent Employment Cases

Recently, a number of employment disputes related to blogging have received considerable attention. Jessica Cutler, a staff assistant for U.S. Sen. Mark DeWine, was terminated, purportedly because details of her sex life and “the peccadilloes of the men she said were her six current sexual partners, including a married Bush administration official who met her in hotel rooms and gave her envelopes of cash; a senator’s staff member who helped hire her, then later bedded her; and another man who liked to spank and be spanked which she had posted on her personal blog, were carried in a popular Internet gossip column.

Ellen Simonetti, a flight attendant at Delta Airlines was terminated for posting on her blog, known as “Queen of the Sky,” provocative pictures of herself in her uniform on an empty Delta plane. The airline deemed the pictures “inappropriate” and a misuse of her uniform. Simonetti filed a Charge with the United States Equal Employment Opportunity Commission alleging gender discrimination in that the airline allowed male employees to post pictures of themselves in their uniforms on

other Websites. She also started an on-line petition demanding that employers advise employees of their blog policies.

A blogger at the Durham Herald-Sun, Rachel Mosteller, was terminated for posting negative comments about the paper's employee morale program on her blog during work time on her company computer, even though she wrote under a pseudonym and did not identify her employer or any co-workers by name. Specifically, she posted "I really hate my place of employment," referred to the "stupid little awards" that people were receiving merely "FOR DOING THEIR JOB." Mosteller was terminated the next day. Claiming that she was "still in shock," Mosteller explained "[c]onsidering I treated the blog as a smoke break, I don't think of it as a problem."

An Atlanta blogger, who goes by the pseudonym Karsh, ultimately quit his job in connection with his blogging. Karsh's supervisors discovered his blog in which he wrote about unnamed fellow employees. In recounting his boss's instruction to apologize for what he had posted, he referred to his boss as "Skeletor" and "Wednesday Addams." Thereafter, he was told to dismantle his blog, and threatened with a demotion. He resigned instead.

Yet another blogger, Michael Hanscon, a Xerox employee working at Microsoft, was banned from Microsoft after posting on his blog a picture of a shipment of Apple computers being delivered at Microsoft's Washington headquarters. Hanscon posted the picture on his own time from his own computer.

Blogging Policies

Employers need to respond to this sharp rise in blogging. Currently,

most technology policies only address the use of company-owned equipment during work time. Employers now need to consider amending their policies to combat behavior that may occur outside of work time and off the employer's premises.

Initially, employers should review their existing acceptable use policies to ensure that they minimize the use of company equipment for non-business-related purposes and that they make it clear that they are not responsible for protecting employees' privacy or for maintaining the confidentiality of any personal business conducted on company equipment.

Technology neutral policies should be amended or implemented to prohibit written communications by employees about their employer, superiors, or co-workers in a public forum that could damage the company or the individuals or bring them into disrepute. Employers should be careful, however, not to prohibit employees for discussing terms and conditions of employment that could be deemed protected concerted activity as this discipline would violate the National Labor Relations Act. For example, if an employee posts a message on his blog that he is unhappy with his salary and that he and his co-workers deserve increased wages and should fight for them, discipline would be impermissible.

Employers should also review and modify their existing anti-harassment and anti-discrimination policies to address blogging. Under these policies, it should be a violation to harass or discriminate against an employee on a blog to the same extent it is impermissible to do so in the workplace. It is essential that employers make employees aware of these new or revised policies so that employees

cannot claim ignorance and the employer can effectively discipline violators.

Finally, technology policies should be carefully drafted and regularly updated and employee education should be ongoing. In addition, it is critical that technology policies exist side-by-side with strong confidentiality agreements which make it crystal clear that confidential information may not be posted online without express authorization.

Conclusion

Employers need to address this ever-growing form of communication. It is clear that blogging is on the rise and is going to continue to grow. Just as employers had to address the Internet and electronic mail in the workplace, it is now necessary to address blogs. Therefore, employers should evaluate existing policies and should amend them or adopt new technology-neutral policies to address blogs and to prohibit written employee communications in a public forum that could damage the company itself or the blogger's co-workers.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

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