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Social media continued its rise as a significant factor in almost every aspect of the employer-employee relationship, the authors write. They review key employment law developments in 2013 that involved social media, and they predict what companies are likely to see in the coming year.

This article is part of a Bloomberg BNA *Social Media Law & Policy Report* series on social media developments in 2014 in selected industries and practice areas.

Labor and Employment Law and Social Media: 2013 in Review and a Look Ahead to 2014

BY KAREN C. DENNEY AND ALEX STEVENS

Last year was full of social media milestones. Twitter's initial public offering made headlines with an almost $25 billion valuation. Beyoncé fans learned of a surprise album via a single Instagram post, and took it upon themselves to tweet about it 1.2 million times in a single day. And, perhaps most importantly, the Oxford English Dictionary now has an entry for ''selfie.'' The year was no different for labor and employment law, as social media continued its rise as a significant factor in almost every aspect of the employer-employee relationship. What trends did we see in 2013, and what do they mean for 2014? Read on.

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The National Labor Relations Board Will Continue to Focus on Social Media

The National Labor Relations Board headed into 2013 on the heels of its widely publicized *Hispanics United* ruling that an employer unlawfully terminated employees for their Facebook activities,[1] as well as its headline-generating advice memoranda regarding social media cases.[2] Although no single NLRB decision or publication garnered this much publicity in 2013, the Board continued to refine its approach to these cases, especially with respect to confidential information and employee complaints.

The Board's overall focus on social media cases did not change in 2013. The Board continues to examine cases for possible violations of employee rights under Section 7 of the National Labor Relations Act, which gives employees the right to ''engage in . . . concerted activities for purposes of collective bargaining or other

[1] *Hispanics United of Buffalo Inc.*, 359 N.L.R.B. No. 37 (Dec. 14, 2012) (*see related article*).

[2] *See, e.g.*, NLRB, Report of the Acting General Counsel Concerning Social Media Cases (May 30, 2012), *available at* http://op.bna.com/dlrcases.nsf/r?Open=ldue-8utm4y.

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mutual aid and protection.''[3] The Board views social media as a means for employees to exercise this right, whether or not they belong to a union. To protect these rights, the Board has continued to prosecute employers for promulgating overly broad restrictions of employees' Section 7 rights, as well as for taking adverse actions against employees who engage in protected ''concerted activities'' using social media.

Several of the Board's 2013 decisions focused on employer efforts to protect confidential information, including personnel records, from online publication. In *Target Corp.*, for example, the Board examined an information security policy that prohibited employees from disclosing confidential information on social media, among other places.[4] The policy defined ''confidential information'' as ''non-public company information,'' which included ''team member personnel records.'' The Board found this policy to be an overly broad restriction on employees' Section 7 rights because it restricted their ability to discuss their wages and benefits with their colleagues. Accordingly, the Board ordered the company to amend its policies and post a companywide notice to this effect.

Earlier in 2013, the Board reached a similar conclusion in *DirecTV*.[5] The employer in this case prohibited employees from ''blog[ging], enter[ing] chat rooms, post[ing] public website messages, or otherwise disclos[ing] company information . . . not already disclosed in a public record.'' Like the policy at issue in *Target Corp.*, the policy in *DirecTV* defined ''company information'' to include ''employee records,'' which were not further defined. The Board found that employees might reasonably construe this policy to prohibit discussion of wages and other terms and conditions of employment, and therefore held that the policy was unlawful.

The Board will likely continue to construe potentially overbroad policy language against employers in 2014. As a result, employers must continue to be wary of broad prohibitions on disclosing ''confidential'' or ''company'' information, or ''employee records.'' Rather, a carefully crafted policy with specific examples delimiting its scope is essential to balance the need to protect truly confidential information with the need to avoid charges of restricting employees' Section 7 rights.

The Board also focused on employee social media conduct in 2013, with mixed results for employers. In one pro-employer case, the Board released an advice memorandum in *Skinsmart Dermatology* finding that an employer had not violated the NLRA by discharging an employee for her Facebook messages.[6] The employee in *Skinsmart* posted a Facebook message to her coworkers regarding a conversation with her supervisor in which she told the supervisor to ''back the freak off.'' Her other posts used obscene language to complain about her supervisors, and stated ''FIRE ME . . . Make my day.'' After learning of this post, the employer fired the employee, who filed an unfair labor practice charge. The Board's memorandum concluded that the employer had not violated the law because the employee's conduct was not ''concerted'' and therefore not protected by the NLRA. Importantly, the memorandum noted that the employee's actions expressed an ''individual gripe,'' rather than ''shared concerns.''

Although *Skinsmart* was a pro-employer result, another case, *New York Party Shuttle LLC*, demonstrated that the line between unprotected ''individual gripes'' and protected concerted activity can be difficult to draw.[7] The employee in this case had previously sent e-mails to his coworkers discussing working conditions and the benefits of unionization. Later, he posted to a private Facebook page called NYC Tour Guides complaining that his employer had stopped scheduling him for work after he began agitating for a union. The postings also complained that his paychecks sometimes bounced and alleged that the employer's buses were unsafe. The employer considered these postings to be libelous and defamatory and fired the employee. Despite the fact that none of the employees' coworkers had seen his Facebook activity, the Board found that this termination was unlawful because the employee's postings were protected as the logical outgrowth and continuation of the employee's concerted activity.

The Board will almost certainly continue to take on cases involving employee social media use in 2014 and will likely continue to issue highly fact-specific decisions that do not lend themselves to general rules. However, it is clear that even if an employee's postings do not initially appear to be protected, employers should conduct a thorough and defensible investigation to get the full picture before proceeding.

FTC Guidance Will Continue to Answer Some Questions, While Raising Others

The NLRB was not the only federal agency to address social media issues in 2013. The Federal Trade Commission (FTC) continued to update its guidance for online advertisements to account for increased social media use of advertisers, as well as the proliferation of the mobile advertising market. In March 2013, the FTC updated its ''Dot Com Disclosures,'' a document initially released in 2000. With these guidelines, the FTC confirmed that companies using ''space constrained ads, such as on some social media platforms, must still provide disclosures necessary to prevent an ad from being deceptive.''[8] This guidance provided some examples to illustrate how such advertisements might comply with the law by stating ''Ad'' or ''Sponsored'' before a message. However, the updated guidance did not address how employers might make sure that employee social media use remains lawful when employees post or create social media content on mobile devices.

This lack of guidance is of particular concern for employers seeking to avoid trouble with the FTC. As the FTC states in the updated Dot Com Disclosures, the Federal Trade Commission Act's ''prohibition on 'unfair

[3] 29 U.S.C. § 157

[4] *Target Corp.*, 359 N.L.R.B. No. 103 (Apr. 26, 2013) (*see related article*).

[5] *DirecTV U.S.*, 359 N.L.R.B. No. 54 (Jan. 25, 2013).

[6] *Tasker Healthcare Group d/b/a Skinsmart Dermatology*, No. 04-CA-094222, Advice Memorandum (May 8, 2013), available at http://op.bna.com/dlrcases.nsf/r?Open=ldue-97wq8j (*see related article*).

[7] *New York Party Shuttle LLC*, 359 N.L.R.B. No. 112 (May 2, 2013).

[8] Press Release, FTC, FTC Staff Revises Online Advertising Disclosure Guidelines (March 12, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/03/ftc-staff-revises-online-advertising-disclosure-guidelines.

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or deceptive acts or practices' broadly covers advertising claims, marketing and promotional activities, and sales practices in general.''[9] The FTC has made clear in the past that this coverage extends to social media product endorsements that involve ''material connections'' between the endorser and the seller of the endorsed product, and that such ''material connections'' must be disclosed. The FTC has also explained that this might include employee discussions of their employer's products or services on a social media site because ''knowledge of [the] poster's employment likely would affect the weight or credibility of her endorsement.''[10]

The FTC's updated Dot Com Disclosures acknowledge that ''new issues arise almost as fast as technology develops,'' but provide no guidance for employers seeking to ensure that their employees keep themselves (and their companies) out of trouble when posting to social media. Employers should continue to monitor this issue for further developments in 2014, and proceed with caution in the meantime.

More Laws Will Be Enacted Prohibiting Employers from Requesting Social Media Passwords

Employers frequently receive information about their employees' use of social media, such as learning that an employee on Family Medical Leave Act leave recovering from foot surgery was posting pictures on Facebook of the employee rock climbing. Yet, social media account privacy settings may prevent employers from being able to easily access and print employee social media information to investigate and preserve such information (*e.g.* print the rock climbing pictures). Can an employer ask the employee for the employee's social media account password? The answer to this question depends on the state in which the employee lives and works.

In 2012, the media highlighted some employers' practice of requesting social media passwords from applicants or asking applicants to log into social media accounts and allow the employer to view the social media information as a partial method of conducting background checks. In general, the public viewed this practice with disfavor, and privacy advocates and politicians took action to prevent employers from seeking nonpublic social media information from applicants and employees.

California, Illinois, Maryland and Michigan[11] passed legislation in 2012 prohibiting employers in those states from requesting social media information from applicants and employees through soliciting passwords or requiring applicants or employees to log into social media accounts. This trend continued in 2013, with Arkansas, Colorado, Nevada, New Jersey, New Mexico, Oregon, Utah and Washington[12] passing similar laws. More than 20 other state legislatures also introduced, but did not pass, similar laws in 2013.[13] Although many of these enacted laws contain exceptions, such as specifying that they do not apply to social media accounts established for the performance of work for the employer or that social media passwords may be requested for investigations of alleged employer policy or law violations, employers with employees or applicants in these states must be familiar with these enacted laws and their exceptions before determining what action they may take concerning to applicant and employee social media password information.

Additionally, the Password Protection Act of 2013 was introduced in the House of Representatives last year.[14] If passed, this act would make it a crime for an employer to seek social media passwords to access information not stored on the employer's computer or retaliate against an employee or applicant for refusing to provide a password. Although it is not likely that this bill will pass, some of the social media password laws that were introduced at the state level, but did not pass, in 2013[15] are expected to be enacted into law in 2014. Thus, employers in these states should track these laws' progress. Whether or not these laws are enacted in 2014, employers should continue to be aware that attempts to access social media passwords from applicants and employees is, generally, not a publicly favored practice. In most cases, this is a practice that employers should consider ending.

Employee Social Media Use Will Intertwine with Existing Employment Law

Employees continue to use social media in ever-exceedingly creative ways. For example, in 2013, an employee resigned by submitting an interpretive dance video to Kanye West's ''Gone'' to her employer through YouTube. As the traditional forms of communication between employees and employers continue to evolve, courts are faced with applying existing employment law to these new forms of communication.

In 2013, at least two federal circuit courts considered employee social media use in the context of the general right of public employees to exercise free speech without being retaliated against based on that speech. In September 2013, the U.S. Court of Appeals for the Fourth Circuit determined whether sheriff department employees' ''liking'' the sheriff's political opponent's campaign page was a form of First Amendment protected speech.[16] The Court equated liking a Facebook

[9] FTC, .com Disclosures: How to Make Effective Disclosures in Digital Advertising (2013), *available at* http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf.

[10] 16 C.F.R. § 255.5 (Example 8).

[11] *See* California A.B. 1844; Illinois H.B. 3782; Maryland H.B. 964; Michigan H.B. 5223.

[12] *See* Arkansas H.B. 1901; Colorado H.B. 1046; Nevada A.B. 181; New Jersey A.B. 2878; New Mexico S.B. 371; Oregon H.B. 2654; Utah H.B. 100; Washington S.B. 5211.

[13] *See* Arizona S.B. 1411; Connecticut H.B. 5690; Florida S.B. 198; Georgia H.B. 117 and 149; Hawaii H.B. 713 and S.B. 207; Iowa H.F. 127 and 272; Kansas H.B. 2092 and S.B. 53; Louisiana H.B. 314; Maine H.B. 838; Massachusetts H.B. 1707 and S.B. 852; Minnesota H.F. 293 and 611 and S.F. 484 and 596; Mississippi H.B. 165; Missouri H.B. 286, 706 and 1020 and S.B. 164; Montana S.B. 195; Nebraska L.B. 58; New Hampshire H.B. 379 and 414; New York A.B. 443 and S.B. 1701 and 2434; North Carolina H.B. 846; North Dakota H.B. 1455; Ohio S.B. 45; Pennsylvania H.B. 1130; Rhoda Island H.B. 5255 and S.B. 493; Texas H.B. 318 and S.B. 118; West Virginia H.B. 2966; Wisconsin A.B. 218 and S.B. 223.

[14] *See* H.R. 2077.

[15] *See* the list of proposed legislation, *supra* at 13.

[16] *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013) (*see related article*).

campaign page to displaying a political yard sign, which has previously been determined to be protected speech, and held that Facebook likes are a form of First Amendment protected speech. Consequently, for public employers, liking something on Facebook, depending on the item liked, may now be something for which an employee may not be disciplined or terminated.

Additionally, in October 2013, the U.S. Court of Appeals for the Eleventh Circuit considered a police department employee's claim that her public employer retaliated against her by not giving her a promotion after she made a Facebook post criticizing a coworker's actions in an investigation.[17] The court, once again applying existing free speech law, stated that maintaining good working relationships among employees was a legitimate government interest and held that the employee's free speech interest did not outweigh the employer's interest in maintaining good working relationships, denying the employee's free speech retaliation claim.

Courts also analyzed private employee social media use in 2013. In November 2013, the U.S. Court of Appeals for the Tenth Circuit reviewed an employee's claim that a Facebook post was a sexual harassment complaint and that her employer terminated her employment in retaliation for this post.[18] The Facebook post stated that her supervisor needed to keep his hands to himself, but, when questioned about the post prior to bringing the lawsuit, the employee stated that the supervisor touching her was not sexual harassment. The employee also repeatedly denied making a sexual harassment complaint and initially denied authoring the post. The court noted that the Facebook post did not comply with the employer's reporting mechanism and did not provide notice to her employer of sexual harassment. The court added that the employee had denied authoring the post and held that the Facebook post fell short of being a sexual harassment complaint upon which the employee might base a retaliation claim.

In February 2013, the U.S. District Court for the Northern District of West Virginia considered an employee's Americans with Disabilities Act discrimination claim based on her termination and the employee's stated reason for the termination that the employee was posting on Facebook while driving an ambulance.[19] However, the employer delayed terminating the employee until almost a month after the Facebook post and after the employee took leave for a hip condition, causing the court to question whether the employee's termination was based on the Facebook post while driving or the employee's taking of leave related to the employee's disability. As a result, the court denied the employer's motion to dismiss the lawsuit. Once again, this case demonstrates that if an employer is going to discipline an employee for social media use that violates company policies, the employer should consult with counsel and then act swiftly.

As more litigation related to employee social media use reaches the appeal or summary motion stages in 2014, employers can expect to see more opinions applying existing employment law to employee social media use and employers' related actions.

The Law Concerning Ownership of Social Media Accounts Will Continue to Develop

Most employers are active on social media in some manner. Companies use Facebook pages for product awareness and promotions, LinkedIn accounts to attempt to connect salespersons with potential customers and a variety of other social media avenues to promote their goods and services. In 2011 and 2012, several court cases discussed who owns these social media accounts—the employee who developed or used them or the employer.[20] In general, these courts focused on whether social media information might be protected as company confidential information or a trade secret and rejected employee arguments that social media information might never be confidential or constitute a trade secret.

In 2013, the U.S. District Court for the Eastern District of Pennsylvania saw a two-year dispute over the ownership of a LinkedIn account to conclusion.[21] In this case, the president of the company used the LinkedIn account during her employment with the company, and the company used this same account for a two-week period after the president's termination of employment. In December 2011, the court determined that the LinkedIn account connections were not trade secrets because the account connections information was generally known in the business community or easily ascertainable from public information. Interestingly, the court also noted that the company's development and maintenance of the connections and the content on the LinkedIn account at the expense, and for the benefit, of the company might support a misappropriation claim against the ex-president. However, in March 2013, the court denied the company's misappropriation claim, focusing on the facts that: (a) no company policy existed requiring employees to use LinkedIn or dictating the contents of an employee's LinkedIn account; (b) the company did not pay for its employees' LinkedIn accounts; and (c) the company did not show that the contacts list developed through the LinkedIn account was developed and built through the company's investment of time and money.

Not surprisingly, the ex-president also brought several claims against the company based on the company's use of the LinkedIn account during the two-week period after her employment was terminated. The court held that this use by the company violated Pennsylvania state laws related to the use of another person's name or likeness, invasion of privacy and misappropriation of publicity, but also held that the company did not commit identity theft, conversion or tortiously interfere with any contract. However, the ex-president failed to present sufficient evidence that the company's use of the LinkedIn account for this time period actually monetarily damaged her in any way, and so the company was not required to pay the ex-president any damages based on its use of the account.

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[17] *Gresham v. City of Atlanta*, No. 12-12968 (11th Cir. Oct. 17, 2013) (*see related article*).

[18] *Debord v. Mercy Health Sys. of Kansas, Inc.*, No. 12-3072 (10th Cir. Nov. 26, 2013) (*see related article*).

[19] *Brown v. Tri-State Ambulance, Inc.*, No. 5:12-CV-5 (N.D. W. Va. Feb. 19, 2013) (*see related article*).

[20] *See e.g., PhoneDog v. Kravitz*, No. C 11-03474 MEJ (N.D. Cal. Nov. 8, 2011); *Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055 (D. Colo. 2012).

[21] *Eagle v. Morgan*, No. 11-4303 (E.D. Pa. Mar. 12, 2013).

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This case sends a clear message to employers—if employers want to assert ownership rights to social media accounts and related information, they need to define this relationship with its employees. Employers should promulgate agreements and policies stating that it owns these accounts and all related information and specifying the content and use of such accounts. Employers should also pay for such accounts and track the time and money spent on them. Furthermore, as this a newly developing area of the law, each new case can greatly impact future court determinations concerning social media account ownership. Thus, employers must also keep an eye out for new cases in 2014 and be sure to take any other steps noted in these cases to protect their investment in social media.

Employers can expect to see additional social media milestones in 2014. By staying up with these trends in employment and social media law, employers can use social media to their advantage and, hopefully, avoid becoming the unwanted target of a YouTube video gone viral or whatever the new, hot form of social media will be in the coming year.