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Social Media Law & Policy Report™

Social Media and Labor and Employment Law in 2015 and Beyond

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Over ninety-five percent of Fortune 500 companies actively use social media in some way, whether through LinkedIn, Twitter, Facebook or other social media methods.[1] Clearly, employees also use social media and, unfortunately, this use can sometimes seriously harm a company's reputation and business or create potential legal liability.

In March 2014, a Subway employee posted pictures on Instagram of her use of the Subway bread oven to dry her wet socks and gloves. As part of the anti-domestic abuse Twitter campaign #WhyIStayed, in September 2014, DiGiorno Pizza tweeted ''#WhyIStayed You had pizza'' and, after a swift backlash on Twitter, posted an apology stating that it did ''not read what the hashtag was about before posting.'' A customer sued Hertz for negligent supervision, training and retention based on a Hertz employee's alleged posting of racist comments about the customer on Facebook while using a Hertz computer, and in October 2014, a Hawaii court denied a motion to dismiss these claims, holding that the allegations state cognizable claims under Hawaii law.[2]

In addition to reputational harm and potential legal liability, there are various other ways that social media, employees and employment laws affected employers and their businesses in 2014 and are expected to continue to effect employers in 2015. The four most important areas are:

Social Media Account Ownership Law Will Continue to Develop

In 2011, 2012 and 2013, several court cases discussed who owns social media accounts and the information contained therein—the employee who developed or used them or the employer.[3] In 2014, several more courts weighed in, focusing on whether the information at issue was confidential and the terms of any existing agreements between the employer and employee concerning the social media account.

In August 2014, a Florida court considered whether Black Entertainment Television LLC (BET) had tortiously interfered with a former employee's: (a) Facebook fan page for the television series ''The Game'' by requesting Facebook to migrate the likes associated with this page from this page to a fan page BET had created; and (b) related Twitter account by having it disabled.[4] The court also considered whether these acts constituted conversion.

The court focused on the facts that BET and the employee had a letter agreement specifying that BET had administrative access to the Facebook page that allowed BET to update the page content as determined in its sole discretion, and after this agreement was signed, the employee demoted BET's administrative access to the Facebook page, preventing BET from being able to post content to the page. The court granted BET summary judgment on the former employee's tortious interference claims, stating that BET's actions in migrating the likes and disabling the Twitter account were motivated by the employee's revoking BET's full access to the Facebook page and BET's efforts to protect its intel-

[1] Nora Barnes et al., *2014 Fortune 500 and Social Media: LinkedIn Dominates As Use of Newer Tools Explodes*, UNIV. OF MASS. DARTMOUTH CTR. FOR MKTG. RESEARCH, *available at* http://www.umassd.edu/cmr/socialmediaresearch/2014fortune500andsocialmedia.

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[2] *Howard v. Hertz Corp.*, No. 1:13-cv-00645, 2014 BL 298938 (D. Hawaii Oct. 23, 2014).

[3] *See e.g.*, *PhoneDog v. Kravitz*, No. 3:11-cv-03474, 2011 BL 290583 (N.D. Cal. Nov. 8, 2011); *Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055 (D. Colo. 2012); *Eagle v. Morgan*, No. 2:11-cv-04303, 2013 BL 65986 (E.D. Pa. Mar. 12, 2013).

[4] *Mattocks v. Black Entm't Television LLC*, No. 0:13-cv-61582, 2014 BL 231994 (S.D. Fla. Aug. 20, 2014).

lectual property, not solely out of spite, as is required for a tortious interference claim under Florida law. The court also granted BET summary judgment on the former employee's conversion claim, stating that the employee could not show that she had an ownership interest in the likes on the Facebook page because, at any time, a user of the page could take away the like.

Also in 2014, a California court reviewed an employer's claims against an ex-employee who kept LinkedIn account information containing the employer's contacts that he obtained while employed with the employer .[5] The former employer alleged that the LinkedIn contact information constituted its trade secrets under California law, could not be seen by the ex-employee's LinkedIn contacts if certain security settings were used and could not be used by the ex-employee for his new, competing company. To the contrary, the ex-employee contended that the LinkedIn contacts were not trade secrets because the contacts were viewable by all of the individuals who were the ex-employee's LinkedIn contacts. However, the record before the court did not demonstrate the ex-employee's LinkedIn account's security settings, causing the court to be unable to assess if the information was generally viewable by the LinkedIn contacts and, consequently, the confidentiality of the LinkedIn account information at issue. Thus, the court denied the employer's request for summary judgment against the ex-employee on its misappropriation of trade secret claim.

An Illinois court also considered an employee's claims against her ex-employer related to social media accounts in 2014.[6] While the employee, who was the employer's media marketing director, was in the hospital recuperating from an accident, the employer accessed a Twitter account and made posts to this account to promote the employer's interior design business. In the posts, the employer made clear that it was not the employee posting, but rather that a guest blogger was writing the posts. The employee claimed that this use of the Twitter account caused her emotional distress and brought Lanham Act and Stored Communications Act claims. Notably, no agreement existed specifying to whom the account belonged, with the employee claiming that the account was her personal account and the employer contending that the account at issue was created at the direction of the employer and for the employer. Thus, the court found that fact issues existed concerning whether the employer had authorization to access the Twitter account and refused to dismiss the Stored Communications Act claim, but it dismissed the Lanham Act claim because the employee failed to present any evidence of financial injury caused by the use of the Twitter account.

Like the previous cases in 2011, 2012 and 2013 discussing social media account and information ownership, these cases make clear that employers should define these ownership interests in written agreements with employees. The agreements should specify who owns the accounts and the information contained in the accounts, the security settings to be used within these accounts to ensure the protection of any confidential information contained in such accounts and who can access and use the accounts, including when that access right is revoked (e.g. when employment ends). Additionally, as this area of the law continues to develop, employers should update these agreements, their business social media use policies and any applicable provisions of noncompetition agreements[7] to protect their investment in social media.

The NLRB Will Continue to Focus on Social Media Cases and May Expand Employees' Rights to Use Social Media in the Workplace

In February 2014, the NLRB's General Counsel Robert Griffin issued a memorandum to the NLRB's regional directors, officers-in-charge and resident officers instructing them to submit certain high-profile and complex matters to the NLRB's Division of Advice.[8] Social media cases were conspicuously absent from this list, suggesting that the NLRB now considers social media cases to be part of the ''vast majority of cases [that] can be processed without guidance from [the NLRB's] headquarters.''[9] As this omission of social media cases from the high-profile matters list made clear, it was no longer news in 2014 that the NLRB routinely scrutinizes social media policies and other cases presenting social media issues.

As in previous years, the NLRB's focus on social media in 2014 was aimed at combating 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 mutual aid and protection.''[10] As employees continue to use social media to exercise this right, the NLRB has focused on striking down overly broad restrictions of employees' Section 7 rights in workplace policies, as well as holding against employers that take adverse actions against employees who engage in protected ''concerted activities'' using social media.

In a welcome decision for employers, the NLRB's decision in *World Color (USA) Corp.* emphasized the common-sense notion that employee social media conduct is not necessarily protected by the NLRA, even if it relates to a labor union or criticizes an employer.[11] In *World Color*, a unionized employee's Facebook posts contained unspecified criticisms of his employer and discussed the employee's union. The employee was Facebook friends with several coworkers, including a supervisor. The employee was later reassigned to a different position, and a supervisor suggested that the reassignment may not have related to the employer's production needs, asking the employee ''if he did not

[5] *Cellular Accessories for Less, Inc. v. Trinitas LLC*, No. 2:12-cv-06736, 2014 BL 256746 (C.D. Cal. Sept. 16, 2014).

[6] *Maremont v. Susan Fredman Design Grp., Ltd.*, No. 1:10-cv-07811, 2014 BL 57226 (E.D. Ill. Mar. 3, 2014).

[7] *See BTS, USA, Inc. v. Exec. Perspectives, LLC*, No. X10CV116010685, 2014 BL 340588 (Conn. Super. Ct. Oct. 16, 2014) (finding that an employee did not violate a noncompetition agreement by posting his new job on LinkedIn and inviting others to his new employer's website when the agreement and the company's policies did not specify any social media restrictions).

[8] Richard F. Griffin Jr., Mandatory Submissions to Advice, No. GC 14-01 (Feb. 25, 2014), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d45815e44c6.

[9] *Id.*

[10] *See* 29 U.S.C. § 157.

[11] 360 N.L.R.B. No. 37 (Feb. 12, 2014), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d45815ab487.

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think that management knew about his Facebook posts.'' However, the NLRB found that because the record did not establish that the employee's Facebook posts were protected concerted activities, the supervisor's statements did not unlawfully restrain the employee in the exercise of his rights under the NLRA. Notably, the NLRB's general counsel, who is responsible for prosecuting violations of the NLRA, failed to provide a printout of the Facebook posts in question, or to introduce other evidence showing that the posts ''concerned terms and conditions of employment'' or ''were intended for, or in response to, [the employee's] coworkers.''

Although the NLRB's holding in *World Color* may be limited to such cases where the social media activity in question is either unavailable or not produced, it is a helpful development for employers grappling with social media issues. The NLRB's decision in *Richmond District Neighborhood Center* was similarly helpful in its recognition that employees can lose the protection of the NLRA by engaging in objectively egregious conduct demonstrating an intent to undermine an employer's business expectations through acts of insubordination.[12] In *Richmond District Neighborhood Center*, two employees of an after-school program, one of whom had recently been demoted, engaged in a Facebook conversation regarding their unwillingness to cooperate with their employer in the future. For example, one of the employees stated that they should ''[l]et [the employer] do the numbers, and we'll take advantage . . . [l]et's f—- it up,'' while the other said that ''when [the employer] started [losing] kids i aint helpn HAHA.'' The employer discharged both employees. The NLRB upheld these discharges, finding that ''[t]he magnitude and detail of insubordinate acts advocated in the posts reasonably gave [the employer] concern that [the discharged employees] would act on their plans, a risk a reasonable employer would refuse to take.''

However, employers had less to celebrate after the NLRB issued its decision in *Three D, LLC*, which held that the mere act of pushing the like button on a Facebook post can constitute protected concerted activity under the NLRA.[13] In *Triple Play*, an employee's Facebook post complained that her former employer ''can't even do the tax paperwork correctly!!! Now I OWE money . . . Wtf!!!!'' After several other employees responded on Facebook that they also owed additional taxes, allegedly as a result of the employer's mistakes in preparing certain paperwork, another employee who still worked for the employer selected the like option under the original Facebook post and was later terminated for disloyal conduct. The NLRB found this discharge to be unlawful, holding that the employee's Facebook like was protected concerted activity under the NLRA because it ''effectively endorsed'' and ''expressed agreement'' with the original post, which related to terms and conditions of employment. As this case demonstrates, the NLRB will continue to assess all surrounding facts and circumstances when scrutinizing social media-related discharges.

The NLRB also will continue to focus on social media cases in 2015 and refine its analysis of these social media issues. It may also expand employees' rights to use social media in the workplace. In December 2014, the NLRB issued its long-awaited decision in *Purple Communications*, holding that employees who are provided access to an employer's e-mail systems have a presumptive right to use those e-mail systems for union organizing and other protected concerted activity during their nonworking time.[14] This decision minimized employer's property rights with respect to the e-mail systems, causing dissenting NLRB member Harry I. Johnson III to observe that the NLRB majority's reasoning might also apply to other employer-owned communication media, such as electronic bulletin boards and intranets. Whether this newfound emphasis on employee's Section 7 rights to use an employer's electronic resources to engage in protected activity will expand into an employer's social media resources remains to be seen, and employers should continue to monitor this area throughout 2015.

Courts and Attorneys Will Become Increasingly Familiar With Social Media Discovery Disputes

As 2014 made clear, social media content continues to be a hot-button issue in discovery disputes, and with good reason. In many types of litigation, social media can provide valuable insight into a party's activities, communications and state of mind. Given this potential wealth of information, it is no surprise that courts continued to grapple with social media discovery throughout 2014. They will likely do the same in 2015, in an increasingly sophisticated manner.

Unlike cases from even a few years ago, 2014's noteworthy case law addressing social media discovery spent little time analyzing whether social media content is discoverable as a general proposition, or whether its unique nature required a new analytical framework. Rather, as the court stated in *Ogden v. All-State Career School*, ''it is the nature of the claims and defenses and not merely the form of medium that define the bounds of relevancy.''[15] For this reason, the court continued, ''courts have declined to permit far-roving discovery into social media accounts where the inquest does not meet the basic tenants of [Federal Rule of Civil Procedure 26].'' In *Ogden*, for example, the court applied this principle to limit the defendant's social media discovery requests to those relating to the workplace conduct underlying the plaintiff's sexual harassment claims or his emotional state of mind during and after the plaintiff's employment.

The *Ogden* court was not alone in pushing back against overbroad social media discovery requests in 2014.[16] However, some courts continued to recognize

[12] 361 NLRB No. 74 (Oct. 28, 2014), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d458194a215.

[13] 361 NLRB No. 31 (Aug. 22, 2014), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4581862ac8.

[14] 361 NLRB No. 126.

[15] 299 F.R.D. 446 (W.D. Pa. Apr. 23, 2014).

[16] *See, e.g.*, *Pecile v. Titan Capital Grp.*, LLC, 979 N.Y.S.2d 303 (N.Y. App. Div. 2014) (''Regarding defendants' demand for access to plaintiffs' social media sites, they have failed to offer any proper basis for the disclosure, relying only on vague and generalized assertions that the information might contradict or conflict with plaintiffs' claims of emotional distress.''); *Palma v. Metro PCS Wireless, Inc.*, No. 8:13-cv-00698 (M.D. Fla. Apr. 29, 2014) (refusing to enforce request for social media information containing statements about the case, job duties or hours worked in Fair Labor Standards Act collective action case, stating that ''[w]hether or not an opt-in Plaintiff made a

the potential relevance of limited requests that were likely to lead to the discovery of admissible evidence, such as allowing discovery of social media information related to a plaintiff's emotions and mental state when that plaintiff is alleging emotional damages.[17]

As these cases make clear, courts and attorneys are becoming increasingly familiar with social media evidence and increasingly comfortable applying established legal principles to this new medium. We expect this trend to continue in 2015, which will likely give rise to additional case law further fleshing out related concepts concerning preservation of social media evidence. For example, in September 2014, the Pennsylvania Bar Association issued an advisory opinion concluding that attorneys may advise clients to increase security restrictions on their social media accounts without violating Section 3.4a of the Pennsylvania Rules of Professional Conduct, which prohibits attorneys from ''unlawfully obstruct[ing] another party's access to evidence, or unlawfully . . . conceal[ing] a document or other material having potential evidentiary value.''[18] The opinion further concluded that attorneys could permissibly advise clients to delete information from their social media accounts, ''provided the conduct does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information in the event that it is discoverable or becomes relevant to the client's matter.'' As some observers have noted, this opinion raises questions regarding what constitutes ''appropriate action'' to preserve social media information where it is moved or deleted from a client's social media account, and how parties may do so without spoliating evidence. This year will likely bring further analysis of these and other sophisticated discovery issues as they relate to social media.

More States Will Prohibit Employers From Requesting Social Media Passwords and Information

Many employers use social media information to vet applicants for job positions and as a manner of conducting investigations into policy violations or other workplace offenses (e.g. looking for photos posted of an employee drinking before driving a company vehicle). In 2012, states began passing laws prohibiting employers from requesting social media passwords or account access from employees and applicants. In 2012, four states—California, Illinois, Maryland and Michigan[19]—passed such laws, followed by eight more states—Arkansas, Colorado, Nevada, New Jersey, New Mexico, Oregon, Utah and Washington[20]—in 2013.

In 2014, six more states—Louisiana, New Hampshire, Oklahoma, Rhode Island, Tennessee and Wisconsin[21]—were added to the ranks of states with laws prohibiting employers from requesting social media account and password information from employees and applicants, bringing the number of states with social media laws directed at employers to 18. Additionally, 19 other states introduced, but failed to pass, similar laws in 2014.[22] Thus, it is expected that at least some of these states will consider and pass versions of these laws in 2015. Although many of these laws contain exceptions—such as allowing employers to request password information for employer-provided devices or seeking social media information related to a workplace investigation—employers must be cognizant of such restrictions and be sure that any social media or electronic password information sought falls within the exceptions to such laws before acting.

Like posts about socks in bread ovens, misguided Twitter tweets by employees and claims brought because of an employee's use of social media, there is no doubt that developments in social media and labor and employment law will occur in 2015. Employers must continue to monitor these developments, taking advantage of social media to better their business positions while protecting against the potential risks the use of social media presents from various legal fronts.

Facebook post during work hours or about work has no bearing on total hours worked or whether their job position qualifies for an exemption under the FLSA.'').

[17] *See D.O.H. v. Lake Cent. Sch. Corp.*, No. 2:11-cv-00430, 2014 BL 343522 (N.D. Ind. Jan. 15, 2014) (holding that plaintiff's allegations of bullying and harassment entitled defendants to discovery of social media data related to plaintiff's emotions and mental state).

[18] Pa. Bar Ass'n, Ethical Obligations for Attorneys Using Social Media, No. 2014-300 (2014).

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

[20] *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.

[21] *See* Louisiana H.B. 340; New Hampshire H.B. 1407; Oklahoma H.B. 2372; Rhode Island H.B. 2014; Tennessee S.B. 1808; Wisconsin S.B. 223.

[22] *See* Connecticut S.B. 317; Florida H.B. 527; Georgia H.B. 117; Hawaii H.B. 713; Indiana H.B. 1420; Iowa H.F. 272; Kansas H.B. 2092; Massachusetts S.B. 2270; Minnesota H.F. 293; Mississippi S.B. 2250; Missouri H.B. 1834; Nebraska L.B. 58; New York A.B. 443; North Carolina H.B. 846; Ohio H.B. 424; Pennsylvania H.B. 1130; West Virginia H.B. 2966; Wisconsin A.B. 218; Wyoming S.B. 81.

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