



Source: Electronic Commerce & Law Report: All Issues > 2009 > 11/18/2009 > News > User-Generated Content: Workplace Monitoring of Social Media, Web Use Raises Unsettled Privacy Questions

User-Generated Content

Workplace Monitoring of Social Media, Web Use Raises Unsettled Privacy Questions

Workers' increasing use of social media such as Facebook and MySpace—both in and out of the workplace—could create liability for employers that choose to monitor or participate in that use, a panel of attorneys said Nov. 5.

The workplace law practitioners speaking at the American Bar Association Section of Labor and Employment Law's annual conference cautioned that there is little settled law on the issue of social media monitoring.

"The fact that we are having this discussion means all of us are dealing with these issues. Employers who fail to adopt appropriate policies are exposing themselves to a terrible risk," Daniel P. Westman, a management attorney with Morrison & Foerster in McLean, Va., emphasized.

"Companies should adopt policies about social media and personal [electronic] technology, as appropriate for the nature of the business, and train employees about corporate expectations."

Focus on Employee Consent

Cases involving employers' accessing workers' e-mail and social media accounts often turn on whether the employee gave his or her consent for the access and whether the employer had a "legitimate purpose" for the access, said Lewis Maltby, president of the National Workrights Institute, in Princeton, N.J.

Maltby said a recent example is *Stengart v. Loving Care Agency Inc.*, 973 A.2d 390 (N.J. Super Ct. App. Div. 2009), in which a New Jersey appeals court ruled in July that a company that was sued by a former employee alleging sexual harassment and constructive discharge was not entitled to read and copy e-mails the employee exchanged with her attorneys through her personal e-mail account while using a company computer. The case is currently before the New Jersey Supreme Court.

"These facts [in *Stengart*] are so compelling. If the plaintiff doesn't win this case, I might as well retire and go home. Unfortunately, this case might turn on the question of the employee's consent to the access and [that] the employer had given a vague notice [of the company's e-mail policy] to the employee," Maltby said.

Maltby said that courts typically are reluctant to infer employee consent to such monitoring of their e-mail and other social media, but he remained cautious about predicting how courts will analyze cases involving social media.

"There is so little law in this area that you have to go beyond what the law says and determine what is fair," Maltby said.

Management attorney Westman said that practitioners should also be alert to ethical issues that may arise in such cases and noted that the employer's attorney in *Stengart* had been involved in the decision to read the employee's e-mails.

Westman noted that some jurisdictions apply a "cat's paw" theory of liability under which an attorney might be held liable for the employer's actions. "As a practitioner, review ethical rulings in applicable jurisdictions before reviewing privileged ... communications."

Separate Personal, Private Lives

Westman said that workers should consider separating their "personal and professional digital lives."

Employees should be proactive about protecting their privacy, Westman said. "Employees should consider separating their personal and professional digital lives, using company-issued devices for business, and personally owned devices for personal matters. Privacy may outweigh convenience."

Maltby concurred, saying he tells workers to use their personal electronic devices—as opposed to their employer's—to send and receive communications they may wish to keep private.

Eric L. Barnum, a management attorney with Schiff Hardin in Atlanta, said that boundaries between workers' personal and professional lives are also paramount for employers.

Barnum said that he regularly advises his clients against fraternizing with co-workers via social media. "I am advising all of my clients against 'friending' co-workers. I tell them there are plenty of fish in the sea and you shouldn't be fishing off of the company pier."

Union Has Worker Tracking Concerns

Unions involved in collective bargaining negotiations should be prepared to address employers' monitoring of workers, in and out of the workplace, through electronic monitoring using devices like global positioning systems, according to James A. McCall, International Brotherhood of Teamsters special counsel.

"An important issue for collective bargaining is going to be striking the balance between employers' legitimate use of invasive technology and their illegitimate uses of that technology," McCall said.

McCall said that lack of federal and state regulation on the use of tracking devices such as GPS for monitoring workers has resulted in a dramatic increase in such monitoring and that intrusive use of such technology "will likely make privacy issues in the workplace one of the dominant issues of the twenty-first century."

"We are recommending that unions have a clause in the contract that allows unions and employers to negotiate acceptable uses for emerging [tracking] technology," McCall said.

McCall said such a clause should include notice to workers of the monitoring, access to the information obtained through such monitoring, and a provision that the technology be equipped with an on-off switch to protect workers who take company equipment home with them.

"This approach will allow us to strike a balance between employers' legitimate use of invasive technology and employees' right to workplace privacy," McCall said.

Management attorney Barnum, however, said worker fears about such monitoring are groundless. "I cannot imagine my employer clients having an interest in knowing where their employees go to church or what doctors they use. My clients use [monitoring] technology because they are concerned about costs, about liability for bad driving, about productivity."

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