HUSCH BLACKWELL

Rehabilitation and Transition Conference

SOCIAL MEDIA FOR EMPLOYERS

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Tom, a member of Husch Blackwell's Healthcare, Life Sciences & Education team, brings a decades-long passion for solving clients' problems to his practice, which spans traditional labor law and all aspects of employment counseling and law.

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SOCIAL MEDIA

- 1/3 of the workforce in the United States uses social media for at least an hour a day at work

- 1/4 of American workers would not take a job if their access to social media at work was cut off

SOCIAL MEDIA CHALLENGES

- Security
- Legal issues associated with terms of service
- Privacy
- Records management
- Acceptable use

SOCIAL MEDIA CHALLENGES (CONT.)

- In 2009, the Federal Trade Commission issued a guidance requiring bloggers and celebrities to disclose "material connections" when endorsing products, and it has brought enforcement actions against noncompliant companies.

SOCIAL MEDIA CHALLENGES (CONT.)

- The Food and Drug Administration warned Novartis about violating its rules on misleading advertising by allowing consumers on Facebook to “share” testimonials about certain medications without also disclosing the risks.

SOCIAL MEDIA CHALLENGES (CONT.)

- The Securities and Exchange Commission also issued a report on social media after the chief executive officer of Netflix posted on his private Facebook page that the company's website had streamed 1 billion hours of content—a statistic that had previously been undisclosed to other shareholders.

RECRUITING AND SCREENING TOOL

- Useful tool or source of information that an employer cannot use during the hiring process?

RECRUITING AND SCREENING TOOL (CONT.)

- Using Social Media to screen candidates potentially implicates several laws:
  - The Fair Credit Reporting Act;
  - Title VII of the Civil Rights Act;
  - The Americans with Disabilities Act of 1990 (ADA);
  - Age Discrimination in Employment Act of 1967 (ADEA); and
  - The Wisconsin Fair Employment Act.
    - Use or nonuse of lawful products off the employer's premises during nonworking hours is a protected class!

BEST PRACTICES

- The decision maker should not be involved in a review of social media.
- Treat all applicants consistently.
- Keep records of the decision making process, including printouts of all social media sites viewed.
- Establish internal guidelines on social media during the hiring process.

SOCIAL MEDIA PROTECTION ACT - WISCONSIN

- Prohibits employers from:
  - Requesting or requiring an employee or applicant to disclose access information to a personal social media account .
  - Refusing to hire an applicant because the applicant refused to provide access to a personal social media account.

SOCIAL MEDIA PROTECTION ACT - WISCONSIN

- Terminating or otherwise discriminating against an employee because the employee:
  - refused to provide the employer access to a personal social media account; or
  - opposed the employer's potential violation of the law, or filed a complaint or testified or assisted in an action against the employer for such a violation.

SOCIAL MEDIA PROTECTION ACT - WISCONSIN

- Employers may require access information in order to gain access to an electronic communications device supplied by or paid for by the employer.
- Employers may discipline or discharge an employee for transferring the employer's confidential or financial information to the employee's personal social media account without the employer's authorization.
- Employers may comply with a duty to screen applicants for employment prior to hiring and may comply with a duty to retain employee communications that is established under state or federal law, rules or regulations.

OPEN RECORDS

- Wis. Stat. § 19.31:
  - Public policy under Wis. Stat. § 19.31 is to give the public the greatest amount of access to public records as possible.
  - Unless a clear statutory or common law exception applies, the custodian must "decide whether the strong presumption favoring public access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure." *Hempel v. City of Baraboo*, 2005 WI 120.

OPEN RECORDS (CONT.)

- Custodian must determine whether to release the public record or rely on clear statutory or common law exception.
- A request must reasonably describe the record sought. This means a reasonable limitation as to subject matter or length of time included in request:

ELECTRONIC RECORDS

- Electronic Records
  - Records include electronically stored records:
    - video tape recordings;
    - cell phone and other electronic device recordings;
    - e-mails and social media.

ELECTRONIC RECORDS (CONT.)

- However, “the content of a document must have a connection to a government function to constitute a record within the meaning of Wis. Stat. § 19.32(2).” *Schill v. Wisconsin Rapids School District*, 327 Wis. 2d 572 (July 16, 2010).

ELECTRONIC RECORDS (CONT.)

- Electronic Records should be retained for 7 years according to Wis. Stat. § 19.21(4)(b).
- Facebook or other forms of electronic communications likely public records.

PROTECTED CONCERTED ACTIVITY

- Although states and political subdivisions are not included in the NLRA's definition of "employer," NLRB precedent concerning social media provides useful guidance on some of the issues that may arise in the public sector.

PROTECTED CONCERTED ACTIVITY (CONT.)

- Wisconsin law, like the NLRA, recognizes the concept of "protected concerted activity."
  - Employee may be protected from blogging/tweeting/posting to social media sites if the employee has:
    - Told his co-workers about his or her posts;
    - Discussed terms of employment or work environment on the site;
    - Allowed co-workers to post responses or comments.

EXAMPLE

- *Triple Play Bar and Grille* (August 2014)
- Employees terminated following Facebook status update and comments:

TRIPLE PLAY CONT.

- "*Maybe someone should do the owners of Triple Play a favor and buy it from them. They cant even do the tax paperwork correctly!!! Now I OWE money…Wtf!!!!*
  - *"I F***ING OWE MONEY TOO"*
  - *Co-worker "liked" initial status update*
  - *"It's all Ralph's fault."*
  - *"He's such a shady little man."*
  - *"I owe too. Such an a**hole"*

TRIPLE PLAY CONT.

- Employer has legitimate interest in preventing disparagement of its products and services and protecting its reputation from defamation.

TRIPLE PLAY CONT.

- The Board found that:
  - This was an ongoing labor dispute regarding employer's tax-withholding practices.
  - It was not directed towards the general public.
  - The comments didn't mention employer's products or services, much less disparage them.

TRIPLE PLAY CONT.

- The employer has high burden to show comments were maliciously untrue (actual knowledge or reckless disregard for truth).
  - Characterization of employer's agent as an "a**hole" is not a statement of fact.

TRIPLE PLAY CONT.

- Having found the activity was protected and concerted, and did not lose protection of the NLRA, did the employer violate the Act by firing the employees?

TRIPLE PLAY CONT.

- *"The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment."*

TRIPLE PLAY CONT.

- The term “inappropriate” is imprecise that employees would reasonably understand it to encompass discussions and interactions protected by Section 7 of the NLRA.

Thank You!

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