Daily Labor Report®

November 13, 2014

Employment Law

Workplace Social Media Use Puts Law Into New Context, Officials Say

By Lorraine McCarthy

Nov. 12 — Many of the legal issues related to workplace use of social media are the same ones employers have faced for years, but in a technologically different context, officials from the Equal Employment Opportunity Commission and the National Labor Relations Board said during a panel discussion Nov. 12.

An employer that happens to see a job applicant's pro-union Facebook posts is in essentially the same position as one that finds out an applicant is a union “salt” seeking to organize the workforce—a situation employers have faced for years, NLRB Member Harry I. Johnson said during the program on workplace use of social media sponsored by the law firm Dilworth Paxson LLP in Philadelphia.

In either case, if the unsuccessful applicant claims he was rejected because of the employer's prior knowledge of his union views, the employer will have a problem unless it can demonstrate a business reason for the hiring decision, NLRB General Counsel Richard F. Griffin told participants.

In a similar vein, EEOC Commissioner Chai R. Feldblum said an employer using social media as a recruiting tool may inadvertently learn medical or other information about a candidate that it is barred from asking about or considering.

“If you find it and use it to make an employment decision, bingo, you have a violation,” Feldblum said.

Targeted Job Ads May Lead to Bias

Feldblum said the ability of social sites like Facebook to target advertisements to narrow subsets of users leaves an employer vulnerable to accusations of unlawful hiring practices if the ads are focused in such a way that potential applicants are excluded based on age, sex or other protected criteria.

The risk is greatest for employers that recruit exclusively through social media, although it exists even when an employer adds social media to a broader recruitment strategy as a way to get a more diverse response, Feldblum said,

Eric B. Meyer, who heads Dilworth Paxson's new social media practice group, suggested that employers might be able to avoid bias claims by assigning the task of using social media to vet potential new hires to someone other than the person making the hiring decision.

Employers that go that route should make sure any information gleaned about an applicant through social media is “really hermetically sealed up the chain of command,” Johnson said, because the NLRB has “a pretty liberal” standard for imputed knowledge.

Asked if there is any social media use by employees that employers can ignore, Feldblum was adamant that there is no “off-the-clock” social media use.

Online Posts Can Create Hostile Work Environment

A sexually harassing comment about a co-worker posted on a personal blog or a Facebook page can contribute to a hostile workplace if it becomes known to the target and/or to other workers, Feldblum said.

“Once you're told of harassment, you have a responsibility to track down those facts” beginning with asking to see the post, she said.

Because surveillance of employees violates the National Labor Relations Act, employers should exercise care if a worker invites a supervisor to view his or her social media posts, according to Johnson.

If the supervisor accepts the invitation and then begins dropping hints that he's watching that worker, it could be interpreted as surveillance, Johnson said.

Griffin said he draws a distinction between monitoring for a business purpose, such as installing security cameras around a building, and monitoring targeted at concerted protected activity, such as installing a camera trained on a corner of the property where union representation authorization cards are being signed. The same type of distinction can be applied to employer monitoring of social media use by employees, he said.

He said employees can't be disciplined for engaging in conduct on social media that would be protected in another context.

Employers often say negative comments about the company are disparagement, but “criticism and dissatisfaction is sort of grist for the mill of this statute,’’ Griffin said, referring to the NLRA.

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