TOO OLD FOR FACEBOOK, TOO YOUNG FOR FACELIFT: WHY I'M NO FAN OF SOCIAL MEDIA

Have you taken a close look at what’s going on under your bank’s roof?

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Yes, I’ll admit it. There is a generational aspect to my distaste for cyber-networking. For someone old enough to remember telephones with dials, it is disconcerting to watch my four-year-old granddaughter scroll through the apps on her mother’s iPhone to find a Dora the Explorer video.

But also, as an employment lawyer, I have seen the havoc that electronic communications wreak.

It is just too easy to embarrass yourself or offend someone else. The natural filters that operate in face-to-face communications are absent when using the internet. When your bank’s employees engage in social media, your bank runs risks--very possibly without knowing it.

Cyber-bullying and bosses who friend

One of the risks of employee social networking is the potential that the bank may be liable for discriminatory, harassing, or retaliatory communications between employees.

I am sure your bank has a policy that prohibits harassment based on sex or another of the legally protected categories. Within that policy, there is probably a definition of “hostile work environment,” and you may also conduct regular training that fleshes out the definition with examples of conduct that might give rise to a claim.

However, in my experience the policy and the training rarely, if ever, address social media.

After all, whatever use that employees make of their personal smart phones--even at work--is their private business, right? But new technology blurs the line between work and non-work. A derogatory tweet that targets a co-worker and goes viral before close of business may lead to liability for the bank, if nothing is done to curb it. Similarly, a boss who “friends” a subordinate on Facebook may be opening himself and the bank up to a claim of sexual harassment, if the employee perceives the boss is stalking her over the internet.

Unauthorized disclosures and other risks

A further area of exposure is the possibility that an employee may disclose confidential bank information in a Facebook posting, a personal blog, or even a photo or video posting shot in their workspace. (Images can be enlarged, you know.) While employees may be aware of the legal protections for customer financial information, they may not be as sensitive to the embarrassment that might be caused by the disclosure of personnel information, or the damage from revealing bank marketing or other business plans to competitors.

Add to this the potential liability for factual misrepresentations made in postings by employees, no matter if well-intentioned, and the penalties for violating copyright laws by downloading unauthorized software.

Perhaps the most prevalent risk posed by social media in the workplace is the simple loss of productivity. Although I am immune to its charms, I know that Facebook and Twitter can be addictive. With the advent of smart phones that allow “under the desk” access to the whole panoply of social media, the temptation for some employees may be overwhelming.

Oh, for the days when all a manager had to worry about was too many personal phone calls!

Employees have rights, right?

The cutting-edge legal question about social media is how to balance employee rights with the employer’s interest in controlling work-related behavior.

First of all, let’s dispose of the idea that employees’ social networking is protected by the constitutional right to free speech. That right protects individuals from the government’s suppression of speech. It is not an issue in private employment.

However, employees do have a right to privacy in the content of information if they have taken reasonable steps to keep the information private, for example, by restricting access, and if they derive some value in keeping the information private. The employer infringes the employee’s privacy if the employee’s interest in keeping the information private outweighs the employer’s interest in obtaining the information. The key in this balancing act is to manage employee expectations of privacy by a clearly communicated social media policy.

Employee rights also derive from the National Labor Relations Act. In a recent case which attracted much media attention, an employee was fired for calling her boss an ***hole on Facebook. She was angry about being denied a raise. Her post was viewed and “liked” by co-workers. The National Labor Relations Board (NLRB) charged the employer with an unfair labor practice on the basis that the post was “protected concerted action” protesting the terms and conditions of employment. The case settled for an undisclosed sum, with the employer agreeing to change its policy to reflect that employees could discuss the terms and conditions of employment, including on Facebook posts.

Other NLRB cases have come out differently, with the NLRB ruling that the employee’s social media outbursts were unprotected “individual griping.”

The distinction seems to hinge on whether the posts were the logical outgrowth of collective employee concerns, or an employee acting solely in his own self interest.

Bring your policies into this century and decade

What is clear is that your computer use policy needs to be updated to take account of social media.

Here are some basics:

• Define social media.

• Let employees know that you are monitoring their use of social media, and that they should have no expectation of privacy.

• Social media use should not interfere with their performance of job duties.

• Employees must identify all opinions expressed as their own, and comply with all applicable laws, including copyright, privacy, and trade secrets.

• Employees must not communicate any information regarding the bank, co-workers, customers, vendors, or competitors.

• Employees should not disclose their relationship with the bank, without advance approval from the bank.

• Workplace concerns should be addressed internally with your supervisor, Human Resources, or a member of management.

Ironic, yes. Take advantage of it

I recognize the irony that I am voicing this tirade against social media in a blog. While taking advantage of the much wider audience offered by the internet, I am criticizing others for using it. Yes, this smacks of NIMBY-ism, or, as they say in England, “Pull up the ladder, mate. I’m on board.”

But the blog also offers an opportunity to talk back. Let’s hear from you.

There are beneficial uses for social media:

• It offers access to information about job applicants not previously available.

• It allows employees to obtain banking industry-specific business and professional development information.

• It facilitates the bank’s marketing efforts with a new generation of customers.

So, please, let me know if you disagree with my Luddite outlook, or if you have more pros and cons to add to those listed here.

I welcome your comments. In the comment section below:

About the author

Marian Exall (marian.exall@gmail.com) is an employment lawyer and HR professional with 25 years’ experience advising banks and other employers on compliance issues. She is a principal and co-founder of Employment Law Compliance, Inc. which provides HR compliance solutions to banks exclusively through the American Bankers’ Association. She is a frequent speaker and writer on human resources compliance in the banking industry, including in ABA Banking Journal, on ABA Telephone Briefings and at national and state bankers’ association conferences.

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