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Social media, employees and the law

BY ROBERT CELASCHI | FOR BUSINESS FIRST

Facebook is only 9 years old, Twitter newer than that, and the iPhone even newer. Little wonder, then, that social media laws are still playing catch-up. That's especially so when it involves employers. What is an employee allowed to tweet? When can an employer demand to see a Facebook page?

This past January, the Applebee's restaurant chain fired a waitress for posting a diner's receipt that had a snippy note on it about tipping. ("I give God 10 percent. Why do you get 18?") Among other things, the image also showed the customer's signature.

"It's a hot topic these days. What's interesting to me is that so much of the change is coming at the state law level," said attorney Wesley Newhouse with Newhouse Prophater Letcher & Moots LLC in Columbus. The direction is generally for more protection of employees.

This year, state Sen. Charleta Tavares introduced Senate Bill 45, which would prohibit employers and labor organizations from requiring job applicants or employees to give access to private social media accounts.

For now, though, an Ohio employer can ask for passwords, and can probably fire or refuse to hire anyone who won't turn them over, said labor and employment attorney Sara Jodka. Her firm, Porter Wright Morris & Arthur LLP, typically sees social media involved in two kinds of cases. One is when an employee writes something unwelcome that catches the employer's attention. The other is when social media becomes relevant to a case about something else, such as wrongful termination or workplace harassment.

An employee of a government agency, including a state university, has some protections that an employee of a private employer may not have, Newhouse said. And federal law does protect some

WITH NO HELP from Facebook or Twitter as far as evidence goes, Sara Jodka at Porter Wright has built a practice representing employers who have social media troubles with workers.

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social media speech. The National Labor Relations Act allows co-workers to talk outside the workplace about the terms and conditions of their employment. If at least one Facebook friend is a co-worker, there's a case to be made that it's protected speech.

But last year also saw a case where a car dealer fired an employee who complained online about the quality of hot dogs being served to customers at an event. The NLRB decided that was just a rant that had nothing to do with working conditions, Jodka said.

Employers can prohibit social media postings on the job, but the policy language must be precise, she said.

"You can certainly restrict an employee's use of social media, but you can't just say 'on working time.' Working time is not defined," she said. "Compensated time" is a better phrase.

A good rule of thumb is to treat social media the same as if someone walked into the office and put the comment on a piece of paper, Jodka said.

In fact, that's not too far removed from how some companies learn about an offending post or tweet.

"Here's what appears to happen with clients I deal with," said Jim Petrie, chairman of the Employment and Labor group at Bricker & Eckler LLP. "A disgruntled employee says something on a Facebook page and they are friends with coworkers. Then the coworkers print it off and slide it under the supervisor's door."

It may not be a direct jab at the company, but could be a photo of the person playing volleyball while they claim to be on medical leave to recover from knee surgery.

If the manager doesn't already have access to the social media page, the company can't hack its way in, and Facebook, for example, doesn't give up the evidence, Jodka said. But the employee might be required to hand over the content for a court case.

That came into play for an employee at Buckeye Ranch, a nonprofit organization in Grove City that helps children and their families deal with mental health, emotional, behavioral and substance use issues.

Jody Howell filed a sexual harassment lawsuit against Buckeye Ranch and tried to restrict the social media files her employer could see in preparing its defense. The U.S. District Court agreed.

"We did get told that you can't have certain things," said Michelle Delery Stratman, corporate counsel for Buckeye Ranch. At the same time, "she was supposed to preserve the things that were public. The issue is, they didn't preserve those."

The case ended up getting dismissed, she said.

Buckeye Ranch has a policy that employees will be disciplined or fired for posting some information online, such as violating the Health Insurance Portability and Accountability Act.

"We also have this thing that you can't tarnish our image and identify yourself as a ranch employee," Stratman. "Obviously, if you quit, we have no control over that."

Contentious postings could conceivably turn into a libel case, but Jodka hasn't seen one.

"One thing with a case of libel: There have to be actual damages," she said. Pegging a monetary amount on a tweet or a post could be tough.

The thing for employees to remember is that once something is posted on the Internet, the poster has no control over who may repost it, revise it or attach a picture to it, Newhouse said. For employers, he advises learning social media's features, set policies about its use in the workplace, and train managers about what they can and can't do when they spot a potential problem.

"An employer with a one-size-fits-all approach to every problem in a certain category is likely going to run into difficulty, especially when it is new technology," Newhouse said. "You need to be flexible and find resolution, rather than rigid enforcement of what may be an outdated policy."

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Sara Jodka's top 10 rules to use to get social media into evidence:

Rules of evidence were created to keep hearsay from being introduced to a judge or jury. But social media statements are admissible under several court rules.

1 An opposing party's statements, which to qualify must be made by the party while in their individual capacity (RULE 801(D)(2))

2 Present sense impression, which can be used a lot of time with Tweets and some Facebook posts, because those are typically made to describe something or explain and event or condition while the person tweeting is actually watching it (RULE 803(1)

3 Excited utterance, which is a statement relating to a startling event or condition (RULE 803(2))

4 A then-existing mental, emotional or physical condition, which is a statement of the person's then-existing state of mind (such as motive, intent or plan) or emotional, sensory or physical condition (such as mental feeling, pain or bodily health) (RULE 803(3))

5 Statements made for medical treatment/diagnosis, which include statements that describe medical history, including past or present symptoms, their inception or general cause (RULE 803(4))

6 Recorded recollection, which includes any statement the witness once knew about but is later to unable recall it well enough or accurately (RULE 803(5))

7 Reputation concerning character, which can be gleaned from someone's Facebook friends' posts that may relate to the plaintiff to describe the plaintiff's reputation among their associates or community (RULE 803(21))

8 Statement under belief of imminent death (RULE 804(2))

9 Statement against interest (RULE 804(3))

10 Statement of personal or family history, which includes statements about one's birth, adoption, ancestry, marriage, divorce, etc. (RULE 804(4))

Source: Sara Jodka, Porter Wright Morris & Arthur LLP