Massachusetts Municipal Personnel Association

SOCIAL MEDIA AND PUBLIC SECTOR EMPLOYMENT*

October 31, 2012

Presented by:
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SOME BASIC TERMS AND THEIR MEANINGS

- **Search engine**: According to Dictionary.com, a "search engine" is a computer program that searches documents on the World Wide Web for a specified word or words and provides a list of documents in which they are found.
- Examples: Google®, Yahoo!, Bing

SOME BASIC TERMS AND THEIR MEANINGS

- **Social media**: websites which allow users to share media, content, and other information online. Examples include blogs and social networking sites.

Basic Terms and Their Meanings

- **Blog**: According to Dictionary.com and the Encyclopedia Britannica, a "blog" is an online journal where an individual, group, or corporation presents a record of activities, thoughts, or beliefs. Many blogs provide a forum to allow visitors to leave comments and interact with the publisher.
- Example: JobVent.com; also, "microblogs" like Twitter®

Basic Terms and Their Meanings

- **Social networking site**: Dictionary.com defines "social networking" as "the use of a website to connect with people who share personal or professional interests, place of origin, education at a particular school, etc."
- Examples of social networking sites: Facebook®, MySpace®, Friendster, LinkedIn®, Classmates.com

Risk Tolerance Assessment

- Employers should weigh the potential risks associated with using social media and search engines to monitor employees and to mine/vet prospective candidates against the benefits that come with using such media.

Potential Benefits of Employers Use of Social Media and Search Engines in Employment Context

1. Vetting a prospect who could expose the employer to a claim of negligent hiring.
2. Reviewing social networking sites and blogs could reveal information that will help the employer determine whether the applicant will be a good fit.
3. Monitoring employee productivity.

Potential Risks Facing Employers Who Use Social Media and Search Engines

- Privacy violations
- Discrimination claims
- Fair Credit Reporting Act violations
- Violation of M.G.L. c. 150E
- Store Communications Act
- M.G.L. c. 266, §120F
- Violations of statutes with anti-retaliation provisions such as the FMLA
- Mistaken identity

Privacy

- Pursuant to M.G.L. c. 214, § 1B, "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy."
- Applies in both the hiring process and during the employment relationship.

DISCRIMINATION

- Potential statutes implicated:
  1. Title VII of the Civil Rights Act of 1964
  2. M.G.L. c. 151B, §4
  3. Americans with Disabilities Act of 1990
  4. Age Discrimination in Employment Act of 1967
  5. Genetic Information Nondiscrimination Act of 2008
- Applies in both the hiring process and during the employment relationship.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED (TITLE VII)

- Specifically prohibits employment discrimination, including refusing to hire an applicant, on the basis of race, color, national origin, religion, or sex.
- Applies to employers with 15 or more employees, including state and local governments and education institutions.
- Also applies in context of sexual harassment as a form of prohibited sex discrimination.

M.G.L. C. 151B, §4, AS AMENDED

- Specifically prohibits employers from discriminating against an individual because of race, color, religious creed, national origin, sex, sexual orientation (not including persons whose sexual orientation involves minor children as the sex object), gender identity, genetic information, ancestry, age, military status, or handicap.
- Applies to employers of 6 or more employees.

Americans with Disabilities Act of 1990, as amended (ADA)

- The ADA prohibits employers from discriminating against qualified individuals with disabilities in the private sector and in state and local governments.
- Applies to employers with 15 or more employees, including state and local governments and education institutions.

Age Discrimination in Employment Act of 1967, as amended (ADEA)

- Specifically prohibits employers from discriminating against individuals who are 40 years of age or older.
- Applies to employers with 20 or more employees, state and local governments, employment agencies, and labor organizations.

Genetic Information Nondiscrimination Act of 2008

- Prohibits employers from discriminating against individuals based on genetic information about the applicant, employee, or former employee.
- Applies to employers with 15 or more employees, including state and local governments and education institutions.

Fair Credit Reporting Act

- Before obtaining a consumer report for employment purposes, the employer must first notify the individual applicant or employee in writing that such a report may be used and must obtain the individual's authorization before asking a consumer reporting agency for the report.
- Applies during both hiring process and employment relationship.

Social Media and M.G.L. c. 150E

- Under M.G.L. c. 150E, § 2, "[e]mployees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion."
- Department of Labor Relations looks to NLRB for guidance.

Social Media and Protected, Concerted Activity

Key Takeaways:

1. All employees, not just those with a union presence, have the right "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection[,]" including discussing wages, terms and conditions of their employment and criticizing supervisors and managers.
2. In the unionized context, surveillance or monitoring of employees' electronic communications is a mandatory subject of bargaining. For those employers who are not organized, the electronic communications and social media policies should make clear that the employer reserves the right to review and/or monitor all electronic records and communications, at any time, with or without notice.

Social Media and Protected, Concerted Activity

3. Employers may not enact policies that prohibit employees from discussing wages, hours, working conditions, or unionization and may not prohibit employees from making critical, even disparaging comments, or defamatory comments, when discussing the employer or the employee's superiors.

Social Media and Protected, Concerted Activity

4. To gain protection under M.G.L. c. 150E, the general rule is employee must either be engaged in protected, concerted activity, including those situations where employee seeks to initiate, induce, or prepare for group action (including comments about terms and conditions of employment through online posts). However, the former Labor Relations Commission has recognized one-person bargaining units.

Reports of NLRB's Acting General Counsel Concerning Social Media Cases

Takeaways:

- Just because an employee swears or uses sarcasm in a social media post does not mean the employee loses the protection of the NLRA to engage in protected, concerted activity relating to terms and conditions of employment;
- A policy prohibiting employees from making disparaging comments when discussing the municipality or an employee's supervisors, co-workers, or competitors will likewise be found unlawful because rules prohibiting "disrespectful conduct", unprofessional conduct, or that generally requires that online comments be conducted in an "appropriate" manner have been found to violate the Act;

Reports of NLRB's Acting General Counsel Concerning Social Media Cases

- Comments that constitute a "sharp, public, disparaging attack upon the quality of a company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income" have been found to be unprotected under the NLRA;
- However, "great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues";
- Current NLRB has often found comments that could be deemed "disparaging" to nevertheless be protected. Department of Labor Relations often follows NLRB precedent.

Reports of NLRB's Acting General Counsel Concerning Social Media Cases

Takeaways (cont.):

- Even policy that has a "savings clause" stating that policy will not be interpreted or applied in a manner that interferes with employee rights to self-organize, form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, or to engage in other concerted activities for purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities will not cure any ambiguities in an employer's social media policy because employee could not be reasonably expected to understand that "savings clause" would encompass employee discussions that employer might deem as inappropriate, unprofessional, disparaging, etc.;

Reports of NLRB's Acting General Counsel Concerning Social Media Cases

- **Takeaways (cont.):**
  Any rule or policy that includes a blanket prohibition from disclosing "confidential" information will be found to violate the NLRA on the basis that the term "confidential" is ambiguous and overbroad, and could be interpreted by employees as prohibiting them from discussing wages or other terms and conditions of employment, which are protected by the NLRA;

Reports of NLRB's Acting General Counsel Concerning Social Media Cases

- **Takeaways (cont.):**

  A policy prohibiting the disclosure of personal information about an employer's employees has been found to violate the NLRA because employees would reasonably interpret the term "personal information" to include information about employee wages and working conditions;

Reports of NLRB's Acting General Counsel Concerning Social Media Cases

- **Takeaways (cont.):**

  Policy terms or provisions such as "[c]ommunications with co-workers . . . that would be inappropriate in the workplace are also inappropriate online" would violate the NLRA because they do not specify which communications the employer would deem inappropriate and, therefore, would be ambiguous as to its application to rights protected under the NLRA;

Reports of NLRB's Acting General Counsel Concerning Social Media Cases

- **Takeaways (cont.):**

  A policy or rule that warns employees not to "pick fights" and to avoid topics that could be considered objectionable or inflammatory would be overbroad in violation of the NLRA because employees could reasonably interpret such a rule as prohibiting "robust but protected discussions about working conditions or unionism";

Reports of NLRB's Acting General Counsel Concerning Social Media Cases

- **Takeaways (cont.):**

  A policy requiring an employee to obtain approval from the employer prior to posting a message on a social media site or to at least check with the employer to see if posting a message is a good idea would violate the protections of the NLRA because a rule requiring employer permission from an employer as a precondition to engaging in protected activity such as posting a comment on Facebook about wages, hours, or other working conditions violates the NLRA;

Reports of NLRB's Acting General Counsel Concerning Social Media Cases

Takeaways (cont.):

- The policy must be narrowly tailored and not overbroad so as to have the potential to be construed to prohibit protected activity. (Terms of usage must be clearly defined so as to not have a vague, ambiguous, or overbroad interpretation.); also, overall context of prohibitions must be considered;
- Allegedly defamatory comments posted on social media sites will not lose the NLRA's protections unless they are maliciously false – not just false; policies prohibiting defamatory or inflammatory comments deemed unlawful by NLRB;

Reports of NLRB's Acting General Counsel Concerning Social Media Cases

Other Takeaways:

- Employer's threats to sue employee for engaging in protected, concerted activity interferes with employees rights under the NLRA;
- Discussions among co-workers about tax withholdings, concerns over commissions in light of employer's choice of marketing and sales events – protected, concerted activity;
- Employee posts criticizing manager's attitude and style have been found to be protected, concerted activity by the NLRB;

Reports of NLRB's Acting General Counsel Concerning Social Media Cases

- Comments, however, must involve protected, concerted activity – and must be made on behalf of or must flow from a discussion with other employees about the same term or condition of employment; and
- Concerted activity includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where employees bring "truly group complaints" to management.

Stored Communications Act, 18 U.S.C. § 2701, et seq. (SCA)

- Under the SCA, "whoever (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall" face criminal fines or imprisonment and civil liability.

Some Examples of Statutes with Anti-Retaliation Provisions

1. Family and Medical Leave Act of 1993
2. Fair Labor Standards Act
3. NLRA/M.G.L. c. 150E
4. Title VII
5. ADA
6. M.G.L. c. 151B

Potential Liability Created by Employee Use of Social Media

- Defamation
- Discrimination/Sexual Harassment
- Harassment/Threats
- Criminal conduct
- Disclosure of employer's trade secrets and confidential and proprietary information
- Potential invasion of privacy claims
- Breach of Massachusetts Identity Theft Law

Defamation

- If an employee posts untrue, defamatory information on a blog or social networking site about another individual, the employee could be liable for libel.
- If the defamatory comment is posted on an employer-sponsored blog or site or if the employee used the employer's computer system to post the comment, the employer could also be named as a defendant (i.e., apparent authority).

Discrimination/Sexual Harassment

- If a supervisor or manager engages in discrimination or sexual harassment on a blog or social networking site, not only will the supervisor/manager be subject to liability, the employer will be vicariously liable as well.

HARASSMENT/THREATS

- If an employee harasses, threatens, or otherwise bullies a fellow employee, the employer may be liable for failing to keep the workplace safe if the employer knew of the harassment. In addition, the employee would be subject to liability.

EMPLOYER RESPONSE TO EMPLOYEE SOCIAL MEDIA ACTIVITY

- Employers must keep in mind the potential application of the above-referenced statutes, as well as the First Amendment to the U.S. Constitution if the employee claims to be speaking about matters of public concern and such speech is not made in public employee's official capacity.
- Always thoroughly investigate and consult with counsel before taking action.
- In general, off duty conduct is private conduct.

OFF DUTY CONDUCT

- Issues arise when individuals post comments or photographs on social media through their home computers or handheld smartphones that potentially impact their positions as public employees.
- Key inquiries are whether (1) there is a nexus between the social media posts and the workplace; and (2) the employee can be identified from the post; and (3) linked to and reflect negatively upon the public employer such that the posts could constitute actionable misconduct.
- If the conduct would be inappropriate in the workplace, there is a good chance it is inappropriate off-duty.

Off Duty Conduct – 1st Amendment Concerns

- Although public employees do not lose their First Amendment rights to speak on matters of public concern simply because they are public employees, those rights are not absolute.
- "[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." Garcetti v. Ceballos, 547 U.S. 410 (2006).
- To determine whether an employee's statements are protected by the First Amendment, courts must balance the employee's interests as a citizen in commenting on matters of public concern against the government's interest in promoting the efficiency of public services it performs through its employees.

Off Duty Conduct – 1st Amendment Concerns (cont.)

- Court's Two-step inquiry:

  (1) Whether employee spoke as a citizen on a "matter of public concern" – a very case-specific, fact-dependent question. If no, the employee has no First Amendment cause of action based on public employer's reaction to the speech.

  (2) If yes, then the question becomes whether the government had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance between the speaker's expressions and employment.
- Government has broader discretion to restrict speech when it acts in its role as employer, but such restrictions imposed must be directed at speech that has some potential to affect the entity's operations.

Off Duty Conduct – Other Concerns

- 1st Amendment political freedom of speech retaliation claim – Bland v. Roberts (former sheriff's deputy terminated by incumbent sheriff for clicking "Like" button Facebook in support of the incumbent's opponent).
- Invasion of privacy concerns – M.G.L. c. 214, § 1B.

THE LESSONS OF CITY OF ONTARIO V. QUON

Issue: Whether the City of Ontario, CA violated police officers' 4th Amendment rights by obtaining and reviewing transcripts of text messages sent by officers who exceeded the police department's text message character limit.

THE LESSONS OF CITY OF ONTARIO V. QUON

Held: Because the search of Quon's text messages was reasonable, the City of Ontario and the other petitioners did not violate Quon's 4th Amendment rights.

THE LESSONS OF CITY OF ONTARIO V. QUON

Key Takeaways:

1. An expectation of privacy exists to electronic communications, including those sent or received on employer-issued devices, unless there is a clear policy statement to the contrary.
2. When conducting workplace investigations, employers must ensure that any search of employee communications is limited to the purpose of the investigation so as to minimize any intrusion on the subject employee's privacy.
3. Others who communicate with a subject employee may also have their own legitimate privacy claims.
4. Privacy claims will likely be evaluated on a case-by-case basis.

THE LESSONS OF CITY OF ONTARIO V. QUON

5. To the extent a current policy does not explicitly cover a new area of technology or social media, such as the text messages at issue in *Quon*, employers must ensure that they effectively inform their employees, both orally and in writing, that they will interpret the existing policy to cover the new technology or social media.
6. All employers, including public employers, must ensure that supervisors and managers be trained to avoid deviating from the content of the electronic communications or social media policies.

RECOMMENDED PRACTICES FOR MINIMIZING LIABILITY

- If using search engines and social media to screen applicants or monitor employees, employer should ensure that such sites are **uniformly** applied.
- Document! Document! Document! Be sure to thoroughly document all applicant/employee searches conducted on search engines and social media.

RECOMMENDED PRACTICES FOR MINIMIZING LIABILITY

- If the employer decides to use search engines, social networking sites, and blogs, the municipality should consider having an employee who is not a decision maker perform the search and filter out any protected class information prior to forwarding such information to a decision maker.
- Limit access to information found on social media sites to those in the municipality with a need-to-know. (e.g., HR, hiring decision makers)

Recommended Practices for Minimizing Liability

- Restrict inquiries about applicants solely to job-related content.
- Always articulate a legitimate business reason for not selecting a candidate.
- Adopt and implement a social media policy that picks up where the electronics communication policy left off or that expands the scope of the electronics communication policy.

Recommended Practices for Minimizing Liability – Social Media Policy

- Policy should notify employees that the employer reserves the right to monitor the computer system and employees have no expectation of privacy when using the employer's computer system.
- Policy should also manage employee expectations concerning access to and use of social networking sites or blogs on the job.
- Policy should comply with all relevant laws, especially the M.G.L. c. 150E and M.G.L. c. 214, § 1B.

Recommended Practices for Minimizing Liability – Social Media Policy

- Policy should prohibit employees from disclosing confidential information, defining "confidential" information in the process. Note: confidential information is very limited in the public sector.
- Policy should also include provision that all questions relating to policy be directed to designated manager.
- Policy should include reference to disciplinary action in case of violation.

Recommended Practices for Minimizing Liability – Training

- Train both management and employees on the use of and expectations associated with social media, and the consequences of violating the social media policy.

Questions?