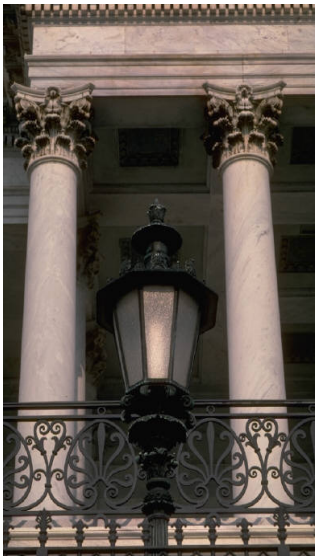

EMPLOYMENT & LABOR LAW

VOLUME II, Issue I June 2013

Social Media and the National Labor Relations Act

Social media has become a necessity in our personal and working worlds today. More information is communicated through social media than any other mechanism. Whether it is Facebook, Twitter, blogs or other instant feedback forum, the world of communication has changed and we must change with it.

As a part of managing your workforce, you may well need to manage employee use of social media. However, in doing so, you must keep in mind the National Labor Relations Act. It is common that non-union employers do not realize they are nonetheless affected by many of the provisions of the National Labor Relations Act. Specifically, as it relates to regulating employee use of social media, Section 7 of the Act provides employees the right to engage in concerted activities for the purposes of collective bargaining or mutual aid and protection. The "mutual aid and protection" provision prohibits employers from limiting or eliminating employee discussions or concerted activities relating to wages, hours or other terms and conditions of employment.

The most common manner in which a non-union employer gets crosswise with the National Labor Relations Act in the context of regulating employee use of social media is through the combination of Section 7 of the Act and Section 8(a)(1) which prohibits employers from interfering with, restraining or coercing employees in the exercise of their Section 7 rights. Often times employers include in their employee handbooks or other policies, a social media provision. Generally those policies are designed to control or limit employee use of social media in the context of or relating to their employment.

The National Labor Relations Board has provided guidance as to its interpretation of social media policies and the Section 8(a)(1) prohibitions. In Costco Wholesale Corp., Costco had a policy in an employee handbook stating "Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Handbook, may be subject to discipline, up to and including termination of employment." (*Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 7, 2012))

In reviewing this policy, the National Labor Relations Board determined that employees could reasonably construe this rule as one that prohibits Section 7 "concerted" activity for "mutual aid and protection". In other words, under Section 8(a)(1), it would reasonably tend to chill the employees in their Section 7 rights. As result, the National Labor Relations Board found that Costco's policy violated the NLRA and was unenforceable.

So what is an employer to do? Is regulation of the use of social media as it reflects on an employer "off limits"? No. Not at all. Employers have a legitimate interest in regulating employee use of social media. Indeed, employers actually have an affirmative burden to ensure employees do not use social media for the purposes of illegal harassment, by way of example. As a result, review your social media policy with these provisions of the National Labor Relations Act in mind.

Employees can discuss matters for their mutual aid and benefit by way of social media. Narrowly tailor your policy to cover those uses of social media that are clearly invalid.

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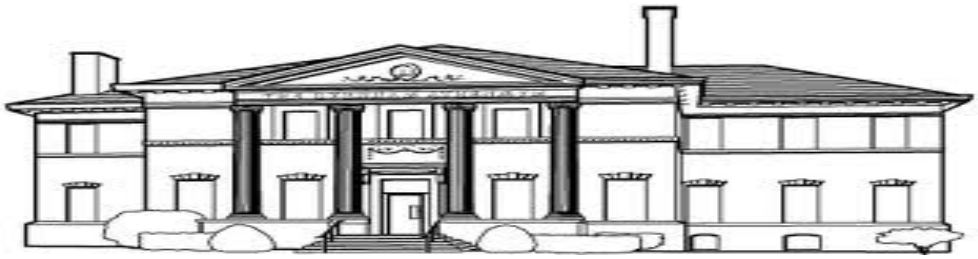

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Things You Should Know

FLSA Employee Handbook Provisions

We all may from time to time inadvertently dock an employee's pay in violation of the Wages and Hours Act. In order to ensure you minimize any risk of losing an overtime exemption due to an inadvertent docking of pay, you should include the following policy in your employee handbook:

"It is the policy of the Company to properly compensate employees. The Company does not intend to violate any wages and hours law and has every desire to ensure appropriate legal compliance. If at any point you believe that your pay has been improperly docked, please report it promptly to your supervisor. In the event an employee's pay has been improperly docked, there will be prompt reimbursement remitted."

Policy Suggestion

Although it should go without saying that employees are expected to be honest, I suggest an honesty/integrity policy.

Honesty/Integrity Policy: "You are expected at all times to be honest. At no time is it acceptable for you to lie, mislead or misrepresent yourself or our Company. Integrity and honesty are keystones to the services we provide. As a result, we expect nothing less than complete honesty and integrity from our employees. A violation of this policy may result in discipline up to and including discharge." This provides you a specific policy to reference in termination or discipline situations with a union or the Illinois Department of Employment Security.

Be Careful How You Use That Credit History

Years ago, employers routinely ran background checks which included credit histories for their employees. Often employers would use the credit history information to make a hiring decision. This is no longer acceptable. Enter the Employee Credit Privacy Act. In response to the recent and not so recent economic downturns suffered by individuals, Illinois enacted the Employee Credit Privacy Act which went in to effect in January 2011. Employers can no longer base employment decision in whole, or in part, on the credit history of an employee or applicant. You can still do a background check so long as you follow the requirements of the Fair Credit Reporting Act; however, credit cannot be a part of that check. For instance, if your background check typically includes: driving, education confirmation records, prior employment and criminal records, that information can still be gathered and used in the same manner that was allowable prior to the Employee Credit Privacy Act.

As with all blanket prohibitions, there must be exceptions. The Employee Credit Privacy Act does not prevent credit inquiries for employers such as: banks, law enforcement agencies, debt collection agencies, insurance companies and some public sector jobs. Further, the Act states, "..if a satisfactory credit history is an established bone fide occupational requirement of a particular position or a particular group of an employer's employees", the credit history can be requested and relied upon. Bone fide occupational requirements may include such things as: bonding or security requirement; unsupervised access to cash or other essentially liquid assets valued at $2,500.00 or more; the ability to transfer or what is common referred to as signatory power over business assets of more than $100.00; managing the direction and control of a business; access to personal, confidential, financial, trade secret or governmental security information; or duties meeting certain criteria established by the United States or Illinois Departments of Labor. My suggestion is, if you intend to request a credit history as a part of your background check, contact me to obtain a modified Fair Credit Reporting Act disclosure and direction for handling these inquiries.

DID YOU KNOW?

As of May 7, 2013 all employers must begin using the new Employment Eligibility Verification Form I-9s. The current form of I-9 should have a notation in the bottom left hand corner with a date 03/08/13. There are modest revisions in the form, but the deadlines remain the same. Please update your new hire materials to ensure your compliance with the requirements of the Department of Homeland Security. These I-9 forms can be found at the US Citizenship and Immigration Services website, www.uscis.gov.

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