Social Media and the Employer: The Good, the Bad, and the Ugly

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But First…A Joke

SHARE

TWITTER
FACEBOOK
GOOGLE+
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LINKEDIN

From Peter White, Derbyshire

SIR: I haven't got a computer, but I was told about Facebook and Twitter and a trying to make friends outside Facebook and Twitter while applying the same principles.

Every day, I walk down the street and tell passers-by what I have eaten, how I feel, what I have done the night before and what I will do for the rest of the day. I give them pictures of my wife, my daughter, my dog and me gardening and on holiday, spending time by the pool. I also listen to their conversations, tell them I 'like' them and give them my opinion on every subject that interests me... whether it interests them or not.

And it works. I already have four people following me; two police officers, a social worker and a psychiatrist.

Other Stories

1. Food for thought
2. Theatre: Heisenberg: The Uncertainty Principle and The Lady from the Sea
   BY PAUL BAILEY
3. Notes from the sofa
   BY RAYMOND BRIGGS

www.theoldie.co.uk/readers-corner/my-own-social-media

Employer Use of Social Media In Hiring

- Most employers are already using social media to screen candidates and discipline current employees
- A 2017 CareerBuilder survey found that:
  - 70% of employers use social media to screen candidates before hiring.
  - 54% of employers have found content on social media that caused them not to hire a candidate for an open role.
  - 51% of employers use social media sites to research current employees.
  - 34% of employers have found content online that caused them to reprimand or fire an employee.

Employer Use of Social Media In Hiring

- Of those employers in the CareerBuilder survey who decided not to hire a candidate based on their social media profiles, the reasons included:
  - Posting provocative or inappropriate photographs, videos or information (39%);
  - Posting information about them drinking or using drugs (38%);
  - Having discriminatory comments related to race, gender, or religion (32%);
  - Bad-mouthing their previous company or fellow employee (30%);
  - Lying about qualifications (27%);
  - Having poor communication skills (26%);
  - Sharing confidential information from previous employers (23%);
  - Having an unprofessional screen name (22%)
  - Lying about an absence (17%)
  - Posting too frequently (17%)

Benefits of Using Social Media Information in Hiring & Discipline

Potential Benefits:

- Can give greater insight into an applicant's abilities, interests, and demeanor.
  - Access to information about unique talents and participation in social organizations.
  - Identifying friendships with mutual friends or potential clients.
  - Insight into the way the individual communicates and treats others.
- Can reveal inappropriate or unlawful behavior prior to hire.
  - Statements may show overt acts of racism, sexism, or other discriminatory behaviors.
  - May reveal unlawful or threatening behavior.

Pitfalls of Using Social Media Information in Hiring & Discipline

Potential Pitfall #1:

Social media posts may reveal protected information about an applicant that should not be taken into account when making the hiring decision – such as:

- Age
- Race / National Origin
- Religion
- Disability
- Pregnancy;
- Health & Genetic Information
- Sexual Orientation
- Participation in Protected Activity

Pitfalls of Using Social Media Information in Hiring & Discipline

- Hiring Case Example: *Gaskell v. Univ. of K*y, No. 09-244-KSF, 2010 U.S. Dist. LEXIS 124572 (E. D. Ky. Nov. 23, 2010).
  - Plaintiff, a professional astronomer, applied for a director position at the University of Kentucky's MacAdam Observatory.
  - He was the leading candidate until a search committee member found a link online to his personal website containing an article titled "Model Astronomy, the Bible, and Creation."
  - Search committee questioned whether he held "creationist" views and the impact such views would have on the university.
  - There was evidence to indicate that plaintiff's views on evolution were at least one element of the decision not to offer the position to him.
  - In denying both parties' motions for summary judgment, the court determined that:
    - there was direct evidence of religious discrimination in the case;
    - but also found that the University of Kentucky had come forward with more than a scintilla of evidence to support its argument that religion was not a motivating factor in its decision.

Pitfalls of Using Social Media Information in Hiring & Discipline

- Hiring Case Example: *Nieman v. Grange Mut. Cas. Co.*, 2012 U.S. Dist. LEXIS 59180 (C.D. Ill. 2013).
  - *Pro se* plaintiff brought an age discrimination claim against the defendant employer.
  - Plaintiff argued that the defendant employer had learned of his age by viewing his LinkedIn profile which included the year he graduated from college (1989).
  - Court did not reach the merits of the plaintiff's claim, but denied defendant's motion to dismiss.

Pitfalls of Using Social Media Information in Hiring & Discipline

Potential Pitfall #2:

Social media posts may reveal information that could undermine employer decisions regarding discipline of current employees.

- Manager or supervisor "friendship" with a subordinate could make it harder for the Company to claim that it had no knowledge of a protected status or incident before making a disciplinary decision or taking and adverse employment action.
- Manager or supervisor "friendship" with subordinates could also give them direct access to evidence of any prejudices or personal beliefs he or she may express on a personal page.
- Manager or supervisor "friendship" with subordinates – particularly where initiated by the manager or supervisor – could impact employee discussions regarding working conditions or other terms of employment that may be protected by the National Labor Relations Act.

Pitfalls of Using Social Media Information in Hiring & Discipline

- NLRA Case Example: *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2nd Cir. 2015).
  - Second Circuit Court of Appeals affirmed the NLRB decision involving employee's comments on Facebook criticizing the employer's handling of payroll tax withholding.
  - Former employee had posted on Facebook: "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do tax paperwork correctly!!! Now I OWE money…wtf!!!"
  - A current employee added a "like" and another current employee posted "I owe too. Such an asshole." The employer then terminated the employees.
  - The NLRB found that the employees were in engaged in protected concerted activity despite the fact that obscenities were used.
  - The employer had argued that the activity NLRA protection under the *Starbucks* decision because the employees used obscenities in the presence of customers. In rejecting that argument, the Court stated:

    "[A]ccepting Triple Play's argument that *Starbucks* should apply because the Facebook discussions took place 'in the presence of customers' could lead to the undesirable result of chilling virtually all employee speech online."

Pitfalls of Using Social Media Information in Hiring & Discipline

Potential Pitfall #3:

Employer methods of gaining access to social media information can expose it to liability for invasion of privacy or violation of state or local laws.

- A majority of states (26 and counting) have enacted laws prohibiting employers from seeking personal social media account log-in information or access in some form.
- The 26 states include:

  Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maine, Maryland, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

EXAMPLE: COLORADO -- C.R.S. § 8-2-127

- Employers may not "suggest, request or require" employees or applicants to do any of the following regarding a social media account:
  - Disclose a username, password, or other means for accessing a personal account;
  - Add anyone, including the employer or his agent, to the account's list of contacts; or
  - Change privacy settings.
- Employers also may not:
  - discharge, discipline, or otherwise penalize or threaten to discharge, discipline, or otherwise penalize an employee for refusing to disclose personal account information, add the employer to the account's list of contacts, or change privacy settings; or
  - fail or refuse to hire an applicant for refusing to disclose personal account information, add the employer to the account's list of contacts or change privacy settings.

Pitfalls of Using Social Media Information in Hiring & Discipline

Potential Pitfall #4:

Social media information may not be a reliable source of information.

- No certainty that comments and content posted to an individual's page are authentic.
- Based on the 2017 Norton Cyber Security Insights Report Global Results:
  - 53% of consumers experienced cybercrime or know someone who has.
  - Among those, 6% reported losing a job due to a social media posting he or she did not post; and 12% reported knowing someone who had lost a job due to a social media posting he or she did not post.

Pitfalls of Using Social Media Information in Hiring & Discipline

- Based on a 2015 Pew study, one-in-five (19%) teens reported that they shared a password with a friend.
  - Among teens who use two or more social media sites, 23% reported sharing a password.
  - Among teens who use five or more social media sites, 34 % reported sharing password.
- Revenge posting on social media by exes or former friends
  - Example: recent California case where woman received a $5.5 million verdict where ex boyfriend had secretly recorded her and then posted explicit images from the video on Facebook and tagged her.

Recommendations Re: Use of Social Media Information in Hiring Process

- Carefully evaluate the extent to which social media information will be used in the hiring process and establish clear rules and parameters for social media searches.
- Ensure that the employer's social media policy and other applicable policies are legally compliant with all applicable federal, state, and local laws and that such policies cover posts on private social media sites as well as official employer sites.
  - Case Example: *Redford v. KTBS, LLC*, 2016 U.S. LEXIS 16828 (W.D. La. Feb. 10, 2016)(summary judgment denied in discrimination case where post on employee's private account that resulted in his termination was not covered by the employer's social media policy).

Recommendations Re: Use of Social Media Information in Hiring Process

- Consider using a 3rd party vendor to screen candidates and their social media activity and require that the vendor NOT pass on any private or protected information.
  - Note that the Fair Credit Reporting Act requirements will likely apply if the employer utilizes a 3rd party vendor to collect the information.
- Consider checking social media only after an applicant has been interviewed or an offer has been made.
- Apply the same screening procedures consistently.
- Pay attention to applicable state and local laws regarding employer access to social media platforms and passwords and ensure that the methods utilized to obtain the social media information do not violate these laws.

Employer Liability: Direct Evidence of Discrimination

- Depending on the circumstances, posts by employees can be direct evidence of discrimination by the employer under Title VII.
  - Typically a plaintiff may prove violations of Title VII either through direct or indirect evidence of discriminatory animus (referred to as the mixed motive framework) or through the *McDonnell Douglas* burden-shifting framework.
  - Direct evidence of discriminatory animus must be evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.
  - Generally, isolated remarks unrelated to the challenged employment decision are insufficient to provide direct evidence of discrimination.

Employer Liability: Direct Evidence of Discrimination

Case Example: *Almoghrabi v. GoJet Airlines, LLC*, 2016 U.S. Dist. 11986 (E. D. Mo. Feb. 2, 2016).

- Plaintiff claimed that the supervisor posted comments on social media about President Obama that indicated a negative feeling about Middle Easterners and the Muslim faith and that the comments were direct evidence of discrimination.
- Court found that the plaintiff had not shown a link between the social media comments and his decision to terminate plaintiff. Citing *Arraleh v. Cty. of Ramsey*, 461 F.3d 967, 975 (8th Cir. 2006), the court stated:
  - "Not every prejudiced remark made at work supports an inference of illegal employment discrimination."
  - The Court must "carefully distinguish[] between comments which demonstrate a discriminatory animus in the decisional process or those uttered by individuals closely involved in employment decisions, from stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process."

Employer Liability: Direct Evidence of Discrimination

Case Example: *Finkle v. Howard Cnty.*, 640 Fed. Appx. 245 (4th Cir. Jan. 29, 2016).

- Plaintiff contended that an email from one of the hiring decisionmakers that reflected a potentially unfavorable attitude toward transgender persons was direct evidence of discriminatory animus.
- In deciding that the email did not constitute direct evidence of racial discriminatory animus, the court considered the fact that the email was written about unrelated officer training approximately 8 months prior to the hiring decision challenged in the lawsuit.
  - "Isolated remarks unrelated to the challenged employment decision are insufficient to provide direct evidence of discrimination."

Employer Liability: Co-Worker and Supervisor Harassment

- Employer liability in Title VII hostile work environment claims may depend on the status of the harasser as a supervisor or a co-worker.
  - Supervisors: If the harasser is a "supervisor," the employer is held ***strictly liable*** for the supervisor's conduct where the supervisor's harassment culminates in a tangible employment action.
    - If no tangible action is taken, the employer may escape lability by establishing (as an affirmative defense) that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided.
    - The U.S. Supreme Court clarified in *Vance v. Ball State Univ.*, 570 U.S. 421 (2013), that an employee is a "supervisor" for purposes of vicarious lability under Title VII if he or she was empowered by the employer to take tangible employment actions against the employee.

Employer Liability: Co-Worker and Supervisor Harassment

- Co-Workers: If a harasser is the victim's co-worker, the employer is liable if it was negligent in controlling the working conditions.
  - "Unless the supervisor is the harasser, a plaintiff needs to show that the employer knew or should have known about the hostile work environment and yet allowed it to persist."

    -- *Gardner v. CLC of Pascagoula, LLC*, 894 F.3d 654, 657 (5th Cir. 2018).

  - "When the source of the alleged harassment is a co-worker, 'the plaintiff must demonstrate that the employer failed to provide a reasonable avenue for complaint if it knew, or in exercise of reasonable care should have known, about the harassment yet failed to take appropriate remedial action."

    -- *Fisher v. Mermaid Manor Home for Adults, LLC*, 192 F.3d 323 (E.D. NY. 2016).

Disciplining Employees for Social Media Statements

Discipline / Investigation:

- Always investigate employee complaints about offensive, discriminatory, harassing, or inappropriate social media posts by employees – regardless of whether the offender is a supervisor or a rank-and-file employee.
- Evaluate whether the alleged conduct violates a company policy or involves discrimination or harassment based on a protected characteristic or threats of violence.
- Consider whether the conduct will impact the employee's ability to work with others consistent with company standards.
- Ensure that discipline is consistently applied and properly documented.
- Confirm that the methods by which the employer obtained any social media evidence was not obtained through illegal or dishonest means.

Limits On Employer Discipline for Social Media Activity

- The National Labor Relations Act (NLRA) limits an employer's ability to discipline employees for statements made on social media platforms.
  - Section 7 of the National Labor Relations Act ("NLRA") guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and **to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,"** as well as the right "to refrain from any or all such activities." 29 U.S.C. § 157 (emphasis added).
  - Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act. 29 U.S.C. § 158(a)(1).

PRE-*BOEING* LIMITS ON EMPLOYER DISCIPLINE FOR SOCIAL MEDIA ACTIVITY

- Prior to the recent *Boeing* decision, the National Labor Relations Board scrutinized employer social media policies under the *Lutheran Heritage* standard to determine whether an employer policy or work rule violated the NLRA. 343 NLRB 646 (2004).
- Under the *Lutheran Heritage* standard, a policy would be found in violation of the statute if (1) employees would reasonably construe the language in the policy to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.
- Pre-*Boeing* General Counsel Memorandum – GC 15-04 to the NLRB's Regional Directors and officers entitled "Report of the General Counsel Concerning Employer Rules"
  - The GC Memo set forth the NLRB's position regarding employer policies and procedures and identified policy statements that it deemed to be lawful or unlawful. (Memorandum GC 15-04 was withdrawn on December 1, 2017.)
- Pre-*Boeing*, the NLRB would find a violation even if no employee had been punished under the suspect policy.

POST-*BOEING* LIMITS ON EMPLOYER DISCIPLINE FOR SOCIAL MEDIA ACTIVITY

- In November 2017 a new General Counsel, Peter B. Robb, was appointed by President Donald Trump and the composition of the NLRB changed. *The Board currently consists of a 3-2 majority favoring employers.
- December 14, 2017, the Board issued the *Boeing* decision which overruled *Lutheran Heritage*'s "reasonably construe" standard and adopted a new balancing test / standard for evaluating employer policies and work rules. 365 NLRB No. 154 (2017).

> "Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, *the Board* will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule.
>
> We emphasize that the Board will conduct this evaluation, consistent with the Board's 'duty to strike the proper balance between…asserted business justifications and the invasion of employee rights in light of the Act and its policy;' focusing on the perspective of employees, which is consistent with Section 8(a)(1)."

The Boeing Co., 365 NLRB No. 154 (2017)

- The Board delineated the following three categories of employment policies, rules, and handbook provisions under the new standard in *Boeing*:
  - *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
  - *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rules would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
  - *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

The Boeing Co., 365 NLRB No. 154 (2017)

- June 6, 2018, General Counsel Robb issued Memorandum GC 18-04 to the NLRB's Regional Directors and officers providing "Guidance on Handbook Rules Post-*Boeing*."
  - GC 18-04 clarifies the *Boeing* decision and identifies examples of rules that fall within the *Boeing* standard's categories.
  - GC 18-04 notes that the vast majority of conduct covered by the types of civility rules referenced in the memo, including name-calling, gossip, and rudeness do not implicate Section 7 at all and that even if some rules of this type could potentially interfere with Section 7 rights, "any adverse effect would be comparatively slight since a broad range of activities protected by the NLRA are consistent with basic standards of harmony and civility."
  - GC 18-04 notes that "while protected concerted activity may involve criticism of fellow employees or supervisors, the requirement that such criticism remain civil does not unduly burden the core right to criticize."
  - GC 18-04 identifies as unlawful Category 3 rules confidentiality rules specifically regarding wages, benefits, or working conditions and rules against joining outside organizations or voting on matters concerning the employer.

The Boeing Co., 365 NLRB No. 154 (2017)

- **Category 1 Rule Examples**:
  - the no-camera requirement in the *Boeing* case,
  - the "harmonious interactions and relationships" rules that were issued in *Williams Beaumont Hospital*, and
  - other rules requiring employees to abide by basic standards of civility.
- **Category 2 Rule Examples**:
  - Confidentiality rules broadly encompassing "employer business" or "employee information"
  - Rules regarding disparagement of the *employer*
  - Rules banning off-duty conduct that might harm the employer
  - Rules against making false or inaccurate statements
- **Category 3 Rule Examples**:
  - a rule that prohibits employees from discussing wages or benefits with one another
  - rules against joining outside organizations
- The Board clarified that "even when a rule's *maintenance* is deemed lawful, the Board will examine circumstances where the rule is *applied* to discipline employees who have engaged in NLRA-protected activity, and in such situations, the discipline may be found to violate the Act."

Civility Rules Pre- and Post *Boeing*

GC Memo: Pre-Boeing Prohibited Civility Rules

- Don't pick fights online.
- Do not make insulting, embarrassing, hurtful, or abusive comments about other company employees online and avoid the use of offensive, derogatory, or prejudicial comments.
- Show proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion.
- Do not send unwanted, offensive, or inappropriate emails.
- Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by email.

GC Memo: Post-Boeing *Permitted* Civility Rules

- Behavior that is rude, condescending or otherwise socially unacceptable is prohibited.
- Disparaging the company's employees is prohibited
- Rude, discourteous or unbusinesslike behavior is forbidden.
- Disparaging or offensive language is prohibited.
- Employees may not post any statements, photographs, video or audio that reasonably could be viewed as disparaging to employees.

Confidentiality Rules Pre- and Post *Boeing*

GC Memo: Pre-Boeing Prohibited Confidentiality Rules

- Do not use any Company logos, trademarks, graphics, or advertising materials in social media.
- Company logos and trademarks may not be used without written consent.
- Never publish or disclose the Company's or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to the Company.
- Prohibiting employees from disclosing details about the Company.

GC Memo: Post-Boeing *Permitted* Confidentiality Rules

- Employees are forbidden from using the Company's logos for any reason.
- Do not use any Company logo, trademark, or graphic without prior written approval.
- Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors, or customers.
- Divulging Hotel-private information to employees or other individuals is prohibited.

POST-*BOEING* LIMITS ON EMPLOYER DISCIPLINE FOR SOCIAL MEDIA ACTIVITY

- The *Boeing* decision made the new standard **retroactive** with respect to all pending cases. Since then many of the federal courts of appeals have remanded their post-*Boeing* cases involving the employer policies and work rules under the NLRA back to the NLRB for consideration under the new standard.
  - *Grill Concepts Servs. v. NLRB*, 722 Fed. Appx. 1 (D.C. Cir. 2018) (remanding matters that rest on the now-replaced "reasonably construe" test for reconsideration in light of the new *Boeing* test per the Board's request);
  - *Dish Network, LLC v. NLRB*, 2018 U.S. App. LEXIS 19862 (5th Cir. July 18, 2018) (remanding findings relevant to the new *Boeing* test to the Board per the parties' request);
  - *Everglades College, Inc. v. NLRB*, 893 F.3d 1290 (11th Cir. 2018) (vacating the Board's ruling on the unfair labor claim and remanding it to the NLRB so that it can apply the new *Boeing* standard).

State Law Limits On Employer Discipline for Social Media Activity

- Rise of state laws protecting employee off-duty conduct.
  - Many states have enacted laws protecting employees from discipline for engaging in lawful conduct / lawful activities outside of work.
  - Most of these statutes are aimed at smoking and the consumption of other lawful consumable products.
  - California, Colorado, New York, and North Dakota have more far-reaching statutes that implicate social media activities:
    - California: CA Labor Code §§98.6(c)(1) and 1101
    - Colorado: C.R.S. §24-34-402.5
    - New York: N.Y. Labor Code §201-d
    - North Dakota: N.D. Cent. Code §14-02.4-03

California Lawful Activities Law

- CA Labor Code 1101 provides:

  No employer shall make, adopt, or enforce any rule, regulation, or policy:

  a. Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

  b. Controlling or directing, or tending to control or direct the political activities or affiliations of employees.

- Employers are also prohibited from discharging or taking an adverse action against an employee for engaging in such conduct. CA Labor Code 98.6(c)(1).

- Law subjects employer to civil penalties of up to $10,000 per employee for each violation, in addition to lost wages and benefits and reinstatement orders.

Colorado Lawful Activities Law

- C.R.S. 24-34-402.5 provides:

  It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction:

  a. Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or

  b. Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

- Law applies to businesses with at least 16 employees during each of 20 or more calendar workweeks in the current or preceding calendar year.
- Law provides for a private right of action in any district court of competent jurisdiction. Plaintiff can seek all wages and benefits that would have been due him or her up to and including the date of the judgment had the discriminatory or unfair employment practice not occurred.
- If the plaintiff is the prevailing party, the court "shall" award him or her court costs and reasonable attorneys' fees.

New York Lawful Activities Law

- NY Labor Law § 201-d makes it unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:
  - an individual's political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property, if such activities are legal;
  - an individual's legal use of consumable products prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property;
  - an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property; or
  - an individual's membership in a union or any exercise of rights granted under Title 29, USCA, Chapter 7 or under article fourteen of the civil service law.

North Dakota Lawful Activities Law

- N.D. Cent. Code 14-02.4-03 provides:

  It is a discriminatory practice for an employer to fail or refuse to hire an individual; to discharge an employee; or to accord adverse or unequal treatment to an individual or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of race, color, religion, sex, national origin, age, physical or mental disability, status with respect to marriage or public assistance, *or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.*

- Case Example: *Clausnitzer v. Tesoro Ref. & Mftg. Co.*, 820 N.W.2d 665, 671-72 (N.D. 2012) (finding that employee failed to raise a genuine issue of material fact that his actions—drinking alcohol and then driving a company vehicle—did not conflict with the employer's essential business-related interests).

Ethical Considerations for Counsel in Obtaining Social Media Evidence

- "Friending" parties and witnesses on social media or directing another to do so.
  - Rule 4.01 – Truthfulness in Statements to Others
  - Rule 4.02 – Communication with One Represented by Counsel
  - Rule 4.03 – Dealing with Unrepresented Person
  - Rule 4.04 – Respect for Rights of Third Persons
  - Rule 8.04 – Misconduct
  - State Bar of Texas Ethics Opinion No. 671 (March 2018)
- Duty to provide competent representation by staying abreast of technology (social media evidence).
  - Rule 1.01 – Competent and Diligent Representation

Ethical Considerations for Counsel in Obtaining Social Media Evidence

- **Rule 4.01(a). (Truthfulness in Statements to Others)** – In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.
- **Rule 4.02. (Communication with One Represented by Counsel)** – In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
- **Rule 4.03. (Dealing with Unrepresented Person)** – In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Ethical Considerations for Counsel in Obtaining Social Media Evidence

- **Rule 4.04(a). (Respect for Rights of Third Persons)** – In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- **Rule 8.04(a). (Misconduct)** – A lawyer shall not violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not the violation occurred in the course of a client-lawyer relationship;
- **State Bar of Texas Ethics Opinion No. 671 (March 2018)** (concluding that Texas lawyers and their agents may not anonymously contact an anonymous online individual in order to obtain jurisdictional or identifying information sufficient for obtaining a deposition pursuant to TRCP 202).

Ethical Considerations for Counsel in Obtaining Social Media Evidence

- **Rule 1.01(a). (Competent and Diligent Representation)** – A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless: (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or (2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.
- **Comment 8 to Rule 1.01 (Maintaining Competence)**: Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law. To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances. Isolated instances of faulty conduct or decision should be identified for purposes of additional study or instruction.

Hollie L. Reiminger

Principal

Hollie has experience representing companies in complex commercial litigation and employment disputes. Before joining the Firm, Hollie was an associate at Baker Botts, L.L.P. in the trial department where she worked on a wide variety of matters, including contract disputes, employment matters, and securities litigation, among others. During that time, Hollie also participated in the City of Houston's Municipal Court Volunteer Prosecutor Program during which she prosecuted Class C Misdemeanors in eight jury trials. Hollie's practice now focuses on labor and employment matters, including employment litigation, wage and hour compliance, development of personnel policies and employment manuals, drafting of employment agreements, severance agreements, and settlement agreements, non-compete litigation, and employment-related investigations and administrative proceedings.

Hollie is a graduate of the University of California at Berkeley School of Law (Boalt Hall) (2007) and the University of Texas at Austin (2004). She is a member of the Houston Bar Association and the Fort Bend County Bar Association.

Laurence E. Stuart
Managing Principal

Larry is an experienced counselor and trial lawyer. He is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization and represents clients in all types of labor and employment matters, including wrongful termination and employee disloyalty litigation, development of personnel policies, implementation of workforce reductions, negotiation and drafting of employment agreements and compensation packages, and investigations and administrative proceedings. Larry has tried cases to verdict, judgment and decision in state and federal court, before administrative agencies, and in arbitration.

Larry has been named a Texas "Super Lawyer" fourteen times (2003-2005 and 2008-2018) by Thomson Reuters. Larry has served as President and General Counsel of HR Houston and as an instructor for the Equal Employment Opportunity Commission's Technical Assistance Program. He is an Adjunct Professor in Management/Lecturer in the Jones Graduate School of Business at Rice University and previously served as President of Jones Partners. Larry is a member of the National Association of Corporate Directors, the Society for Human Resource Management and other professional organizations. He is a regular speaker at national and regional conferences and has authored numerous articles on employment law topics. Before founding the firm, Larry was a partner at Baker & McKenzie and co-director of the labor and employment practice at Legge Farrow.

Larry is a graduate of Tulane Law School and the University of California Irvine. During law school, Larry was a summer clerk for the Honorable Earl Johnson, Jr., Associate Justice of the California Court of Appeal, Division Seven. Larry is licensed to practice in Texas, California and New York.