

Blogs & Employment Law Issues:

Navigating the Competing Risks

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**Raymond H. Hixson, Jr.
Heller Ehrman LLP
(ray.hixson@hellerehrman.com)**

OVERVIEW

- How the law may restrict an employer's regulation of blogging
 - Employee privacy issues
 - Whistleblower laws
 - Discrimination laws
- When the law may impose an affirmative obligation to regulate blogging
 - Harassment
 - Trade secrets

Restrictions on Regulating Employee Blog Activity

- Privacy laws:
 - California Labor Code Sections 96(k) & 98.6:
 - Prohibits discharge or discrimination against an employee for “lawful conduct during nonworking hours away from the employer’s premises.”

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TRUE OR FALSE?

- Section 98.6 protects an employee who makes sexually offensive comments about another employee on an internal company blog.
 - What about an external blog?
- Section 98.6 protects an employee who discloses the company’s trade secret information on an external blog.
- Section 98.6 protects an employee who makes remarks on an external social networking blog regarding an employee’s weight.
 - Compare: Auto Club terminations

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California Constitution Right to Privacy

- Requires “reasonable expectation of privacy”
 - Compare: cases holding no reasonable expectation of privacy on company e-mail.
 - Smyth v. Pillsbury Co.
 - TBG Insurance Services

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Unauthorized Access to Web Site

- Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir. 2002)
 - Employee created secure web site to post information critical of employer and management
 - Two employees gave manager permission to log in under their names
 - Wiretap Act: summary judgment for employer affirmed because information not intercepted during transmission
 - Stored Communications Act: summary judgment reversed
 - Although “users” may authorize others to access, authorized employees may not have been “users”

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TRUE OR FALSE?

- An employer may terminate an employee for making negative comments on a blog regarding the company's product.

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Whistleblowers

- “Protected activity” under whistleblower laws includes:
 - Opposing unlawful activity
 - Exercising a legal right
 - “Concerted activities” – speech regarding terms and conditions of employment
- Employers sometimes fail to recognize that certain employee complaints are protected whistleblower complaints

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Is “Public Opposition” Protected?

- Publicly aired complaints about legal issues or terms/conditions of employment are generally considered “protected activity”
 - See, e.g., NLRB v. Mount Desert Island Hospital (unlawful failure to re-hire nurse who publicly complained in letter to the editor of local newspaper)

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What’s Not Protected Whistleblower Activity

- Complaints made in bad faith
- Unreasonably disruptive complaints
- Gratuitously tarnishing the company or management
- General disagreement on business decisions

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Discrimination Laws

- Key: Ensure consistency when regulating employee conduct
 - Simonetti v. Delta Air Lines, Inc. (filed N.D. Ga. 9/7/05)
 - Plaintiff posted photos of herself in uniform
 - Alleges discrimination based on gender, retaliation for filing EEOC charge, and retaliation for supporting union

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Recommendations

- Before disciplining an employee for blogging activity, evaluate:
 - Whether similarly situated employees have been treated the same
 - Might the blogging qualify:
 - as protected whistleblowing
 - for protection under California Labor Code Section 98.6

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Workplace Harassment

- Two types of unlawful harassment claims
 - Quid Pro Quo
 - Hostile “Work Environment”

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Categories of Unlawful Harassment

- Race (color too)
- National origin (ancestry)
- Citizenship
- Age
- Religion
- Gender (gender identity)
- Pregnancy
- Political affiliations/activities
- Sexual orientation
- Disability
- Work-related injury
- Medical condition
- Military service
- Marital status
- "Association" Discrimination
- Whistleblower Status

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Duty to Prevent Harassment

- Employers must take prompt corrective action to prevent harassment
 - Can provide a defense to harassment by a non-supervisor
 - Strict employer liability for harassment committed by a supervisor

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Blog = “Workplace” ?

- Blakey v. Continental Airlines, 164 N.J. 38 (2000)
 - Co-workers posted negative remarks regarding plaintiff on “Crew Members Forum” on Internet
 - Plaintiff sued Continental
 - Lower courts dismissed claims
 - Participation in Crew Member Forum entirely voluntary

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Blakey v. Continental Airlines

- New Jersey Supreme Court reversed:
 - Employers have no duty to monitor private communications
 - But, employer has duty to stop harassment:
 - in “settings related to the workplace”
 - that is part of a pattern of harassment in the workplace

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Hypothetical Scenario

- George, the General Counsel of ABC Co., is perusing an unauthorized external blog regarding ABC when he notices that someone has posted an insulting message about an engineer named Donald. The message states in part: “Donald is way too old for the job. Not only is he hard of hearing, he refuses to listen. You can’t teach an old dog new tricks. George should get rid of him!” The message is posted by an anonymous user. To George’s knowledge, neither Donald nor anyone else has complained about the message.
- Is George under an obligation to do anything?
 - What if Donald complains about it?
- If you were George, what would you do?
- What if you learned that the message was posted by a customer representative (age 25) who has been critical of Donald on numerous occasions?
- What if the message was merely critical of George’s performance, but made no reference to his age?

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Recommendations

- If it's unclear whether blogging was sufficiently connected to the workplace, err on the side of pursuing corrective action
 - Risk of harassment claim may be greater than risk of employee privacy claim

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Recommendations

- Update the following personnel policies to address blogs:
 - Standards of conduct
 - Harassment
 - Confidential information
 - Computer use
- Adopt a separate, detailed policy for company authorized blogs

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Recommendations

- Update employee trainings to address blogs:
 - Harassment training
 - Trade secrets training
- Regularly monitor company blogs

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Employee Trade Secret Issues

- Requirements for “trade secret” protection:
 - Derives value from fact that the information is not generally known; and,
 - Reasonable steps to protect secrecy

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Effect of Internet Publication

- Does publication of information on the Internet destroy “trade secret” status?
 - Some early cases said yes.
 - DVD Copy Control Ass’n Inc. v. Bunner, 116 Cal. App. 4th 241 (2004)
 - Protection not necessarily lost if “publication is sufficiently obscure or transient or otherwise limited so that it does not become generally known to the relevant people.”
 - Quick widespread dissemination after publication destroyed trade secret status.

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Identifying Anonymous Bloggers

- Lawsuit against “Doe” defendant
 - Motion for expedited discovery
 - Subpoena identity from service provider
 - Anonymous posters are notified of subpoena
 - Opportunity to file motion to quash

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Dendrite Int'l v. John Doe No. 3, 775 A.2d 756 (N.J. App. Div. 2001)

- Legal standard for requiring disclosure:
 - Plaintiff must:
 - allege all prima facie elements of cause of action
 - present some evidence in support of each element
 - Evidence weighed against Defendant's First Amendment interest in anonymous speech

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Anonymous Bloggers

- Dendrite holding: disclosure not required due to weak proof of harm.
 - Affect on company stock price not established
- Immunomedics v. Jean Doe, 775 A.2d 773 (N.J. App. Div. 2001)
 - Disclosure of blogger identity required:
 - "worried employee" stated that "Immunomedics was 'out of stock for diagnostic products in Europe'" and that the company was "going to fire the Immunomedics 'european manager.'"
 - Violation of employee confidentiality agreement

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Recommendations

- Provide employees with trade secrets training
 - Address blogs
- Internal identification of company trade secrets
- Monitor company blogs
- Act immediately if potentially sensitive information is disclosed