



Client Advisory

Blogs in the Workplace: What Should an Employer Do?

A rising number of employees are being fired due to their operation of web logs or “blogs.” Blogs are online journals that are regularly updated on Internet pages and feature the opinions of the blog’s author (the blogger), along with links to other web sites of interest to the blogger. Blogs can be written by anyone, and most can be accessed by the public. They are increasingly popular. A recent survey found that seven percent of U.S. Internet users (more than eight million people) write blogs, while 27 percent read them. These numbers undoubtedly will continue to increase.

Problems with blogs in the workplace generally have involved either blogging on company time or blogging about the company or its employees (often on an implied basis). In the most frequent scenario, the employee who hosts a blog is terminated for making statements on the blog that are, in some way, inconsistent with his or her duties to the employer or his or her continued employment.

Employment cases decided to date generally have not addressed blogging as a separate phenomenon but instead have dealt with classic employment issues as they arise in this new setting. Employees have been terminated for things such as disclosing confidential or sensitive business information; making public comments that could be harmful to the company’s interests or reputation; misusing company time (*i.e.*, spending work time on non-work related activities, such as surfing the Internet or conducting a side business); using company resources, including technology, for an improper purpose or in contravention of company policy; sending e-mails from work that are offensive or threatening; and engaging in off-duty behavior or conduct inconsistent with continued employment.

Blogging received national attention recently when media reported the terminations of several high-profile bloggers. Some of the circumstances were as follows:

- A web designer for a Los Angeles software company started a blog in February 2001. The names of her company and coworkers were not mentioned in her blog, nor was hers, but she was terminated after company executives read her posts, which included unflattering descriptions of many of them. Her blog is located at dooce.com. Getting “dooiced” is the term that has arisen since her termination to define the act of being fired because of one’s blog.

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- A Delta Airlines flight attendant maintained a blog called Diary of a Flight Attendant and was fired on October 29, 2004 for posting “inappropriate photos in a Delta uniform.” She thereafter filed a sex discrimination complaint with the Equal Employment Opportunity Commission claiming that other employees, primarily men, have photographs of themselves in uniform posted on the Internet and have not been fired for it.
 - In November 2004, a Kmart employee hoping to rebut rumors of poor Thanksgiving weekend sales posted positive, but internal, sales information on a chat site frequented by fellow employees. Kmart terminated him and said that “as with all company communications, confidential information should not be divulged to outside parties.”

Are Employees Protected?

Some of the above employees claimed to have been surprised by their terminations because their employers did not have policies prohibiting blogging. Other employees as well may be ill-informed about their rights and obligations.

Employees may overestimate the extent to which the First Amendment protects them in the workplace, particularly in the private sector. Employees are free to express opinions in blogs, but employers have protectable interests in maintaining their good names and may take reasonable steps to protect their reputations. Moreover, while some states have protections for an employee's “off-the-job” activities, publicly criticizing an employer or a supervisor may not qualify as “off-the-job” conduct. Finally, common law privacy doctrines are likely to be inapplicable simply because bloggers use a very public medium – the Internet.

What Should Employers Do?

An employer who terminates an employee due to blog content can expect media attention, even if the termination is legal. A written policy prohibiting certain offending conduct can help minimize related problems. Many employers already have computer usage policies that cover Internet, email, and other forms of electronic communication. Most of those policies probably were created to deal with improper employee computer usage during work hours, and they may not cover “off-the-job” conduct. In general, if existing policies do not cover new technologies such as blogging and chat rooms, an update for them should be considered.

While employers generally cannot prohibit an employee from having a blog while off-duty and away from the workplace, they can impose reasonable limitations on content in order for the employee to maintain employment. Policies should state that employees cannot identify or criticize the company in their blogs (either by name or implication). Employers also should

emphasize that employees should avoid creating the impression that the views expressed on a blog are anything more than personal opinions. Employee manuals in general should be updated every few years, and this general advice is underscored by the changes in usages of computers, the Internet, and other technology.

This advisory was prepared by David C. Henderson and Matthew E. Feiner. For more information, or to ensure that your technology policy and your employee manual cover these new issues, please contact your attorney at Nutter at 617-439-2000.