Duff on Hospitality Law

Social Media Grab Bag Update

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Accessing Social Media Accounts

California has now joined Illinois and Maryland in banning employers from requesting social media passwords from current or potential employees or from requiring that employees log in while in the employer's presence. Other states with pending legislation on this subject include Massachusetts, Michigan, Minnesota**,** Missouri, New Jersey, New York, Ohio, Pennsylvania, South Carolina and Washington.

Because this trend is sweeping the nation, employers in any state should be careful and not request that employees divulge their social media passwords or otherwise pressure employees into granting access to social media accounts. This is good advice not only because of the legislative action, but for common sense reasons. Accessing an employee's private social media account can lead to, among other things, the discovery of the employee's membership in a protected class or the employee's protected concerted activity, the employer's knowledge of which could cause problems if the employee is later disciplined. In other words, ignorance is bliss. This is especially important to remember as the election draws near and employee use of social media to express political beliefs becomes more and more frequent.

On a somewhat related note, a recent errant Tweet during the presidential debate is a good reminder of the importance of social media policies. A KitchenAid employee posted a negative comment about President Obama during the debate, which wouldn't normally be an issue, except for the employee was an official Tweeter (Twitterer?) for the KitchenAid brand and accidentally posted this from the *official* KitchenAid Twitter account. As you can imagine, there was quite a reaction.

Ownership of Social Media Accounts

In our previous post, we talked about the tricky issue of who owns social media accounts that are closely linked to the employer. In a recent federal court decision, a federal judge permitted the employer to assert ownership over what had been originally an employee's personal Linked In account after it terminated her. In this case, the employee had been a founder of the company before it was acquired, used the account to promote the company, and had given her password to another company employee who helped her "maintain" the account, so arguably the account had become a company account. The court rejected the woman's argument that her employer violated the Computer Fraud and Abuse Act (CFAA), a federal anti-hacking statute, on the basis that the harms cited by the plaintiff were too speculative. While an unusual case, this example underscores the need for a social media policy that makes it clear who owns what social media accounts.

Overbroad Social Media Policy

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In one of its first decisions involving social media, the National Labor Relations Board (NLRB) struck part of Costco's social media policy on the basis that it was overbroad. The part of the Costco policy that was struck down stated: "Employees should be aware that statements posted electronically (such as 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 Agreement, may be subject to discipline, up to and including termination of employment." The NLRB said this was overly broad because it could be interpreted by employees as prohibiting employees from discussing terms and conditions of employment. This is not news, as the NLRB guidance has already made it clear that prohibiting "harming the company's reputation" is not allowed.

Employee Termination Upheld

In a recent second decision involving social media, the NLRB affirmed an employee Facebook firing. There, the NLRB found that the employee's post was not protected when a car salesman posted a picture of a Land Rover that was accidentally driven into a pond by a customer's 13 year-old son. The employee posted the picture with the caption, "Oops." Because this did not deal with terms and conditions of employment, the termination was valid. In the same opinion, the NLRB also discussed another post that it found *was* protected. The same employee posted on Facebook mocking the dealership for serving hot dogs and bottled water at a customer event, including photos of the event and the caption "No, that's not champagne or wine, it's 8 oz. water." The NLRB stated that this was in fact protected activity, but it upheld the termination anyway because it was the Land Rover picture that got the salesman fired. This decision merely affirmed a case that was in one of NLRB's previous Memoranda, so, again, this is not really news beyond the fact that the published decisions may signify the seriousness with which the NLRB is now approaching social media.

Keep checking this blog for future social media developments. In the meantime, if you have any questions, please contact Greg.

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