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EXECUTIVE summary

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This Issue's Theme: **Social Media—Staying Connected with Potential Partners**

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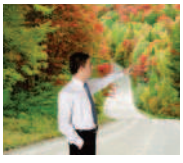

Legal Corner

Social Media and the Law

by Shlomo D. Katz

Most articles on social media seem to focus on its benefits. This column will take a contrary viewpoint and focus on some of the legal challenges that social media can create for employers, in general, and government contractors, in particular.

Social media are everywhere… and growing fast. Still, as one court noted in a case involving Facebook: It is tempting to infer from the power with which the social network has revolutionized how we interact that Facebook has done the same to the law of contracts. But not even Facebook is so powerful. While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract. In other words, while the fact patterns may be new, the legal rules that govern them are the same as the familiar rules that govern "old-fashioned" situations.

Take, for instance, the only case (so far) in which the phrase "social media" has found its way into a Government Accountability Office (GAO) bid protest decision. There, the protestor (SAIC) alleged that the awardee (MBI) had an organizational conflict of interest because it had used its access to internal government records to obtain the resumes of, and other information about, SAIC's employees. In response to SAIC's complaint, the contracting officer initiated an OCI investigation and asked MBI how it had obtained SAIC's personnel information. MBI denied that it had identified SAIC's personnel from proprietary SAIC or agency information. Rather, MBI identified a number of public means by which it had obtained the names of SAIC personnel, including:

- Obtaining names from current and former MBI employees who had provided training to SAIC employees or had worked at various locations with SAIC employees
- Reaching out to professionals in the local recruiting network to identify additional names
- Using sources such as resume posting websites and social media websites to collect additional names and contact information

Based on these representations, GAO denied the bid protest, citing prior decisions holding that a contractor's organizational structure and staffing cannot reasonably be considered proprietary where they can be discerned by regular observation by other contractors. Moreover, GAO said, a contractor's employees' names and identities are not proprietary where they are in the public domain via internet postings and where their personal information is known to relatives and friends with skills in the same line of work. In other words, if it's in the public domain, it's not a secret, the same rule that has applied to would-be trade secrets at least since King Solomon coined the phrase, "A little birdie told me."

So what is an employer to do? The year that just ended (2012) saw a

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lot of publicity, and some new laws, around employers snooping into their employees' social media accounts. But, while employers are now prohibited in some states from demanding their employees' social media passwords, no one (as far as we've heard) has yet prohibited employers from looking at the public portions of those accounts for any competition sensitive information that may be posted there. That is no different than looking at a bulletin board that an employee posts outside his office, except that the potential harm to the employer from an improper posting on Facebook is so much greater. Reviewing an employee's public profile should be adequate for purposes of preventing a competitor from seeing any sensitive information, since the competitor also will presumably have access only to that public view.

Of course, alongside such monitoring, employers must have effective, enforceable non-disclosure agreements with employees as well as policies delineating what information may or may not be shared with the public. Such agreements and policies should be reviewed by counsel because, if they are too restrictive and effectively prevent an employee from ever finding gainful employment outside the company, many courts will not enforce them.

Another area that employers need to consider is the possibility that one employee is using social media to illegally harass or bully another employee. Alternatively, what if the employee uses Facebook to criticize or even defame a supervisor? Situations like these have already begun to show up in reported court decisions, with results that vary depending on what State's law applies and other factual nuances.

In one case, for example, the National Labor Relations Board ("NLRB") upheld the firing of a car salesman who had posted sarcastic pictures and comments about his employer on Facebook. In a different case, the NLRB found that an employer did violate the law by discharging five employees for Facebook comments they wrote in response to a coworker's criticisms of their job performance.

A full-blown analysis of such cases is beyond the scope of this newsletter. The takeaway, however, is that employers must be aware of potential issues and be prepared to mitigate, or litigate, them. At, a minimum, employers should have well-drafted policies in place before problems arise, covering, among other things, permitted uses of company computers, including spelling out disciplinary consequences for improper use of social media at work. More broadly, employers should reserve their rights to deal with employees' missteps in any manner permitted by law, taking care not to make any promises or representations that could later hamstring the employer.

1. Fteja v. Facebook, Inc., 841 F.Supp.2d 829 (S.D.N.Y. 2012).
2. Science Applications International Corp., B-405718, 2012 CPD ¶ 42.
3. See Ecclesiastes 10:20.
4. Karl Knauz Motors, Inc. and Robert Becker, Case 13–CA–046452 (N.L.R.B., Sept. 28, 2012).
5. Hispanics United of Buffalo, Inc. and Carlos Ortiz, Case 03–CA–027872 (N.L.R.B., Dec. 14, 2012).

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