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The Professional Networking Predicament: Negative or Positive, There Could Be a Lawsuit

By Perla C. Alvarez, Esq.

By now it seems that almost everyone is a member of at least one social media website. For professionals in particular, LinkedIn® is often used to find jobs, people, and business opportunities within a member's contact network. However, as with most things, along with the many benefits come legal risks, including potential liability in the employment context.

One example is a recent case in the United States District Court for the District of Minnesota, *TEKsystems, Inc. v. Hammernick*, No. 10-00819 (D. Minn., filed March 16, 2010). The *Hammernick* case involved, in part, a legal claim based on the LinkedIn® "contacts" feature, which allows LinkedIn® members to store and reach out to professional contacts. The defendants in *Hammernick* were former TEKsystems employees who signed employment and post-employment non-compete and non-solicitation agreements. After the defendants began working for a competitor, TEKsystems filed suit, alleging that the former employees engaged in a variety of activities that breached their non-compete and non-solicitation agreements, including contacting at least 20 TEKsystems contract employees through LinkedIn®. Ultimately, the parties reached a stipulation, and the case was dismissed, but the lesson remains - social networking communications may be just as valid a basis for a lawsuit as more traditional concepts of communication.

Similarly, social media contacts may lead to the disclosure of company vendors or clients, which many employers consider confidential or proprietary business information. This is especially a

concern on social media sites for professionals, which encourage networking between business contacts. Thus, employees sometimes list their employer's vendors and clients as "contacts." Typically, this information is then available to anyone in the employee's network, publicizing what the employer may deem to be confidential and proprietary. Moreover, if the employee subsequently separates from the employer, he or she will have access to valuable client and vendor contact information.

Another growing area of concern centers on social media "recommendation" features, such as the Recommendations feature on LinkedIn®. These features are what one would expect - users can draft a "recommendation" for other users with whom they have worked or have done business for, which is then posted publicly on that user's profile. While the legal implications of drafting a negative recommendation may be easier to foresee (e.g., defamation, discrimination, retaliation), employers should also be wary of positive references, which may appear harmless but can prove detrimental to employers in civil lawsuits brought by the recommendation recipient. For example, a positive recommendation from a co-worker or, even worse, a supervisor could prove detrimental to an employer's defense that an employee had job performance problems and could undermine an employer's legitimate non-discriminatory reason for other adverse employment actions.

How an Employer Can Avoid Legal Risks

As an initial suggestion, employers should treat communications and references with online professional networking websites as they would treat any other communication or reference. Employers should review company policies related to providing references, and in their employment reference/recommendation policy, prohibit current employees from "recommending" or commenting on the job performance of current or former employees via social media websites without prior specific authorization from the employer. Alternatively, employers may permit an employment reference/recommendation policy that only allows employers to indicate the employee's dates of employment, positions with the employer, and salary.

To avoid legal risks associated with the disclosure or use of potential confidential or proprietary information such as vendor and customer lists, employers should review their policies and ensure that the policies address social networking websites and contact lists. If employees have restrictive covenants, employers should remind those employees that post-employment solicitation on social media websites may constitute a breach of a non-solicitation covenant. Further, it may prove beneficial to include specific references to social media websites in restrictive covenants so employees clearly understand that they cannot solicit customers and prospective customers using such media.

It seems that the increasingly ubiquitous nature of social media in the workplace calls for near-constant review of company policies. But there is good reason for that - by its nature, the law tends to lag behind changes in technology. Aspects of social media life that now

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seem common are just beginning to impact legal precedent, and as more lawyers become familiar with social media technology, you can expect to see more lawsuits applying long-standing legal principles to new technology. The *Hammernick* case is one such example, and there will be many more in the years ahead. But by reviewing and updating your company's social media policy to address recommendations and contacts on social media websites, such as LinkedIn®, you will help reduce the risk of employer liability and increase the protection of potential confidential and proprietary information.

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