Best's Insurance Law Podcast

Social Media Claims - Episode #129

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John Czuba: Welcome to the *Insurance Law Podcast*, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Recommended Insurance Attorneys*.

We're pleased to have with us today attorneys John Schmidt and Lisa Gingeleskie from the law firm of Lindabury, McCormick, Estabrook & Cooper in Westfield, New Jersey.

John Schmidt has over 35 years of experience representing management in employment litigation matters, including the defense of whistleblower claims, discrimination, breach of contract, wrongful discharge, and violation of restricted covenant matters.

John is also included in the Chambers and Partners guide to labor and employment law, and has been certified by the New Jersey Supreme Court as a civil trial attorney.

Lisa Gingeleskie is a member of the firm's labor, employment, and employee benefits group, which she concentrates her practice in the areas of labor and employment law, as well as ERISA and employee benefits law. She also has a firm knowledge and legal understanding of social media.

We are very pleased to have you both with us today.

John Schmidt: Thank you very much.

Lisa Gingeleskie: Thank you for having us.

John Czuba: Today's discussion pertains to social media, and the rise in wrongful termination claims against employers. It also addresses social media policies and liability for employers. Lisa, today we're going to start the questioning with you. Can you tell us what constitutes social media?

Lisa: Of course. I think we're all pretty familiar with what constitutes social media. It's essentially going to be social networking, where members create online profiles to become part of an online community.

It's going to include all the networks we're familiar with, including Facebook, Instagram, LinkedIn, Twitter, any sort of blog, as well as YouTube.

John Czuba: Lisa, what remedies are available to employees as a result of an employer's misuse of social media during the hiring process?

Lisa: If an employer relies upon or is motivated by impermissible subject matter — in other words, information regarding a candidate's protected characteristics, which would include anything like religion, disability, sexual orientation, etc., and that information is discovered during an online search of the candidate, then that employer may be subject to liability under Title VII of the Civil Rights Act. Specifically, the employer may be found liable for any sort of back pay, front or future pay, and benefits denied to the candidate as a result of that discrimination. Injunctive relief may be awarded as well.

An employer may also be liable for damages including attorney fees and costs for any violations of the Fair Credit Reporting Act. If an employer uses what's called a third-party background check provider to conduct a social media background check on a potential job candidate, the employer must make sure that it is in compliance with the Fair Credit Reporting Act.

Those requirements would include notifying the employee that the employer may obtain a report about that candidate, as well as obtaining written consent before actually receiving the report.

Lastly, an employer may be subject to certain privacy violations if they seek to access a job candidate's personal social media account. New Jersey password protection legislation is one of the broadest in the country.

It specifically prohibits employers from asking a job applicant to change his or her privacy setting, as well as to request the applicant's username or password in order to view a candidate's account.

It also likely restricts an employer from sending any sort of friend request or LinkedIn request to potential candidates, because these requests would allow employers to have access to an otherwise restricted area, and could result in a violation of that individual's privacy.

Those are the three areas to be mindful of when using social media during the hiring process.

John Czuba: Thank you, Lisa. John, we'll switch over to you now. What remedies are available to employees as a result of being disciplined for making disparaging comments about his or her employer through social media?

John Schmidt: John, the key there is the word disparaging. The law is changing rapidly with regard to what comments an employee can make concerning the employer.

If the comments that an employee makes may be considered disparaging, but may also deal with terms and conditions of the workplace, such as wages, benefits, hours of work — things that would clearly be of importance to other employees, then the comments that are made by one employee or circulated to other employees, the issue then becomes whether or not they are disparaging.

If they are concerning terms and conditions of other employees and of the workplace, the National Labor Relations Act steps in. The National Labor Relations Act provides that individual employees can on their own behalf or on behalf of others engage in concerted activities for the purposes of providing mutual aid or protection to each other.

What that means is that employees have the right to engage in concerted activities to speak with each other concerning the terms and conditions of their employment.

If an employer should terminate an employee who disagrees with comments made by the employer concerning terms and conditions of employment, or is expressing concern over terms and conditions, that employee has the right to file an unfair labor practice charge with the National Labor Relations Board, who can then investigate.

If in fact they find that there was a violation of the National Labor Relations Act, that the employee was engaged in concerted activity, the employee can be reinstated with back pay and all benefits that they lost as a result of being disciplined.

John Czuba: John, thank you. Lisa, what remedies are available to employees as a result of being disciplined or violating an employer's social media policy?

Lisa: As John discussed, any sort of discipline imposed pursuant to a company policy that restricts employees from any sort of discussion that involves the terms and conditions of employment — that can include wage, hours, any host of things that employees could discuss with one another — may implicate Section 7 of the National Labor Relations Act.

Specifically, if this policy restricts an employee's ability to engage in what John referred to as concerted activity, which is when two or more employees take action for their mutual aid or protection regarding those terms and conditions of employment, employers may be subject to liability under the Act.

Those penalties can include reinstatement of an employee to her former position, payment of lost earnings and benefits to the employee, removal of any sort of information related to the discipline and termination against that employee from her personnel file, rescission of the policies and provisions that preclude employees from engaging in concerted activity as well as other forms of injunctive relief, including having to possibly post a notice that outlines the employees' rights under the National Labor Relations Act.

John Czuba: Thank you, Lisa. John, what liability, if any, is the employer exposed to from an employee's use of social media to harass another co-worker?

John Schmidt: As in any workplace situation, an employer is obligated to maintain a workplace that is free from harassment resulting from a protected classification such as sexual harassment, racial harassment, disability harassment.

If the employee uses social media to harass a co-employee because of a protected status, and it can be established that the harassment occurred on the job while using the employer's protected tools — the employer's computer, the cellphones or other means of communication that are provided by the employer — the employer could be liable based on upon a vicarious liability situation for the conduct of the co-employee in harassing the coworker.

Therefore, the employers have to be vigilant. In doing that, they should make certain that they have provided a personnel policy that clearly explains to the employees that the employees have no ownership interest in any of the employer-provided tools such as computers.

The employer should monitor those computers, emails, text messages using their equipment on a regular basis to make sure that there is no harassment that could then impose some type of vicarious liability against the employer for violation of harassment policies and/or employment discrimination laws.

John Czuba: John, is there anything risk or claims managers should be concerned or aware about regarding the potential for litigation?

John Schmidt: Yes, several things. First, risk managers should be aware that New Jersey law in particular — and I'm certain that other states that view employee rights in a liberal fashion such as California, Michigan, Wisconsin — New Jersey law has said that its whistleblower statute, the Conscientious Employee Protection Act is not preempted by the National Labor Relations Act.

As a result, someone who is disciplined for exercising their rights under the National Labor Relations Act can bring a cause of action under New Jersey whistleblower statute, and probably under the other state whistleblower statutes.

That means that in addition to back pay and reinstatement, the employee would also be entitled to other forms of compensatory damages, such as emotional distress damages. They could be awarded attorneys' fees. They could also be awarded punitive damages.

This is particularly risky because in New Jersey, for instance, there was an employment discrimination matter just several weeks ago where a jury verdict in Morris County awarded $87,000 in damages to the employee, and the attorney has submitted an attorneys' fees application for $2.8 million.

It's getting to the point where the legal fees are driving many of these cases. I would strongly urge also that the risk managers, as part of their job duties, should consult with the employers, if it is at all possible, to make sure that they have good personnel policies so they're dealing with social media and the risks associated with them.

This is particularly evident because only four percent of the workforce is currently represented by a union, and yet the National Labor Relations Board is imposing its will upon all employers irrespective of whether they have a collective bargaining agreement.

The majority of the workplace has no regular exposure to the National Labor Relations Board, and yet could be subjected to an unfair labor practice charge because of violating social media policies and being charged with an unfair labor practice.

John Czuba: Thank you both very much for joining us today.

John Schmidt: Thank you. Have a good day.

Lisa: Thank you.

John Czuba: That was attorneys John Schmidt and Lisa Gingeleskie from the law firm of Lindabury, McCormick, Estabrook & Cooper in Westfield, New Jersey.

Special thanks to today's producer, Frank Vowinkel. Thank you all for joining us for the Insurance Law Podcast. To subscribe to this audio program, go to iTunes or our web page, www.ambest.com/claimsresource.

If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at lawpodcast@ambest.com. I'm John Czuba, and now, this message.

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