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Technical Update

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Colorado Statute Draws Lines for Employers Regarding Social Media

A recently passed Colorado law prohibits employers from requiring employees or applicants to provide login and password information for social media sites. C.R.S. §8-2-127 (May 11, 2013). It also forbids an employer from requiring an employee or applicant to add employers to their list of contacts. Other employer policies, such as a policy that prevents an employee from wasting work time using social websites at work while working are not prohibited by the statute.

An employee wishing to file a complaint for violating this law may file with the Colorado Department of Labor and Employment and fines of $1,000 for the first offense and $5,000 for any second offense can be charged.

There are other laws that may protect social media use that do not interfere with the employee's ability to perform their job. C.R.S. §24-34-402.5 prohibits termination for lawful off-duty activities off the premises of the employer during nonworking hours. There are three invasion of privacy torts (civil claims) recognized in Colorado as well. These are invasion of privacy by intrusion, invasion of privacy by appropriation, and public disclosure of private facts. Depending on the privacy settings for the internet material, there could be violations of privacy for unauthorized access and/or use of private posting or material as well as unauthorized misappropriation for someone using an identity that did not belong to them. There are miscellaneous case holdings on these issues in various jurisdictions.

Protection exists under the First Amendment (free speech) of the U.S. Constitution, applying the Garcetti/Pickering standards regarding issues of public concern but excluding matters that are actually private employee grievances. See Morris v. City of Colo. Springs 666 F.3d 654, 660-61 (10th Cir. 2012)(citation omitted).

Protection also exists under the Fourth Amendment (reasonable expectation of privacy). This is the type of privacy right that C.R.S. §8-2-127 seeks to clarify. One out of state case has held that, as regards Facebook, the "friends of friends" scope is not protected as private, since there is no individual user control over such a broad group of contacts. Chaney v. Fayette Cnty. Public Sch. Dist. No. 3:13-cv-89-TCB, 2013 WL 5486829, at 4-5 (N.D. Ga. Sept. 30, 2013).

There might also be other claims relating to the "zone of privacy" under the Fourteenth Amendment of the U.S. Constitution, if the invasions of privacy were related to traditional topics such as marriage or procreation. While there is no absolute, blanketing right of privacy for employees; neither is there an effective method for an employer to forbid all off-duty, off-property private use of the internet to employees.

What This Means to Counties

Termination for cause based solely on the content of public posts on social media or websites should be reviewed very carefully by your county attorney before a decision is made. If an employee is posting things off duty, off the employer's work site, and does not impair the individual's ability to perform their job duties, it may be a legally protected activity. On the other hand, if an employee is wasting time on the internet while at work, or not performing their work due to time spent on social media, or posting items that are not "free speech" and substantially impair their ability to perform their job, an "on the job" performance issue may exist. A supervisor or elected official should consult with your county attorney about how to proceed.