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Worldview

Employment

EMPLOYEE TERMINATION FOR INAPPROPRIATE TWEETS: A CAUTION FOR EMPLOYERS

The National Labor Relations Board Office recently rejected an unfair labor practice charge filed against Tuscon-based newspaper The Arizona Daily Star by a reporter fired for inappropriate Twitter postings. The employee, a crime reporter, was first counselled about the content of his tweets when he posted a snide remark about the paper's Copy Editors. According to the NLRB, he was told then "that he was prohibited from airing his grievances or commenting about the Daily Star in any public forum." That much he managed, but he nonetheless continued undaunted to post messages with other questionable content or commentary, such as: "You stay homicidal, Tucson. See Star Net for the bloody deets"; "What?!?!? No overnight homicide? WTF? You're slacking Tucson", and a clear front-runner for the Too Much Information prize: "My discovery of the Red Zone channel is like an adolescent boy's discovery of his . . . let's just hope I don't end up going blind."

"The NLRB continues to pay very close attention to all claims involving social media"

The last straw appeared to have been in response to a tweet on a local television station's feed. The station had posted, "Drug smuggler tries to peddle his way into the U.S." The reporter reposted it along with the comment, "Um, I believe that's PEDAL. Stupid TV people." After being fired because he "continue[d] to disregard professional courtesy and conduct expectations", the reporter claimed his employer had interfered with his right to engage in concerted activities, a violation of the National Labor Relations Act.

The NLRB noted that the Daily Star's prohibition against "airing his grievances or commenting" against it was over-broad and implicitly concluded that, if it had been applied equally broadly, it would indeed have been an unfair labor practice. However, the NLRB dismissed this particular charge because while the policy was over-broad, in this case it was applied to tweets that were not related to the terms and conditions of his employment but were instead simply unprofessional and potentially offensive to readers.

While businesses may take heart from the fact that the employer prevailed in this case, they should take note also that the NLRB did find the Daily Star's broad prohibition of the reporter making any public criticism of it to violate the law. Had his offending tweets had more to do with work, the result would likely have been very different. The NLRB continues to pay very close attention to all claims involving social media, and has ordered that all such charges be submitted to the Office of its General Counsel for formal advice before proceeding.

Michael Kelly, Partner, San Francisco

LONGER HOLIDAY FOR OLDER EMPLOYEES DISCRIMINATES AGAINST YOUNGER EMPLOYEES

The State Labour Court recently ruled that by linking an employee's annual leave entitlement to his age, his employer had unlawfully discriminated against him.

In Germany collective bargaining agreements frequently calculate employees' holiday entitlements by reference to their age. Younger employees tend to receive less holiday than their older peers. This was the case in the collective bargaining agreement for the retail industry in the German State of North Rhine-Westphalia, which provided for 30 days' holiday for employees aged 20 or under, increasing to 36 days for employees aged 30 or above. An employee's annual holiday entitlement was based on a 6-day working week, giving employees between 5 and 6 weeks' annual leave, which is pretty standard for Germany.

These provisions were nonetheless challenged by a 24-year-old employee who claimed they were unlawful, as they discriminated against younger employees. The State Labour Court in Düsseldorf agreed and promptly awarded him 36 days' holiday per year, being the maximum entitlement under the collective bargaining agreement. The Court said the holiday provisions were clearly age discriminatory (as younger employees were entitled to less holiday than older employees) and seemingly could not be justified, as the employer was unable to put forward any legitimate reasons for the unequal treatment. It seemed that the amount of holiday awarded and the age cut-off was totally arbitrary. The Court rejected the employer's argument that the provisions were designed to promote "greater compatibility between work and family life". It has granted it permission to appeal to the Federal Labor Court, although on the facts (in particular the vacuum as to justification) any appeal would seem to have little prospects of success.

In light of this decision, German employers (and others across Europe) should review any collective bargaining agreements which link holiday entitlement to age because if the Federal Labor Court upholds this decision it means that employees will be able to claim the maximum holiday entitlement under the relevant agreement.

Martin Falke, Partner, Berlin

"Employers should review any collective bargaining agreements which link holiday entitlement to age"

WHISTLE-BLOWING: RECENT DEVELOPMENTS IN FRANCE

In France it is difficult to implement whistle-blowing schemes and ethics hotlines. Up until 2005, for example, the French data protection authority (the CNIL) generally refused to authorise such schemes, even though they were not prohibited by law. It was forced to change its position in light of the significant problems this caused French companies whose shares were traded on the US Stock Exchange (or French subsidiaries of US companies who were also listed) and which were therefore required to have whistle-blowing schemes in place to comply with their legal obligations under the US Sarbanes-Oxley Act (SOX).

In 2005 the CNIL published (i) guidelines on whistle-blowing and confirmed that the implementation of such a scheme requires prior authorisation by the CNIL; and (ii) what is known as a "blanket authorisation". Companies wishing to operate a whistle-blowing scheme could benefit from the CNIL's blanket authorisation by simply certifying that it complied with the strict conditions set out in the authorisation. Over 1600 companies signed up for this simplified procedure. Those companies whose schemes did not comply with the blanket authorisation had to continue to apply for prior authorisation by the CNIL, a sometimes lengthy and cumbersome process.

The sole aim of the blanket authorisation was to enable companies to comply with their legal obligations in terms of financial transparency. A scheme therefore would only be covered if it was limited to the reporting of financial, accounting, banking and anti-corruption matters. The wording of the blanket authorisation did, however, seem to allow the reporting of information that affected "the vital interests of the business or the physical or moral integrity of employees". Some employers took this to mean that they could broaden the scope of matters that could be reported under a whistle-blowing scheme to include such things as infringement of intellectual property rights, insider trading, discrimination and sexual harassment. In December 2009, however, the Employment Chamber of the French Supreme Court ruled that these additional reporting matters fell outside the scope of the blanket authorisation.

In light of this ruling the CNIL issued a revised version of the blanket authorisation towards the end of last year which made it clear that it does not cover such "vital interest" matters and that any information reported through a hotline which falls outside the scope of the blanket authorisation should be immediately destroyed or archived, almost however important to the broader wellbeing of the business. This means that any employee reports relating to harassment, etc. must be made via the normal HR channels or via trade union officials.

However, since the amendment to the blanket authorisation the CNIL has issued authorisations that re-open the door to wider reporting possibilities. On 3 March 2011, the CNIL authorised two whistle-blowing schemes bearing on discrimination for the purposes of implementing in such companies a new French regulation on diversity that includes internal reporting schemes. This authorisation has been granted under the standard authorisation procedure. Even though this procedure is more burdensome, it shows that it is possible to obtain an authorisation from the CNIL for reporting that goes beyond the scope of the blanket authorisation – provided there is a legitimate purpose. It is worth bearing in mind, however, that with the exception of SOX, "foreign" laws are not considered to constitute a legitimate purpose.

It is also worth mentioning that the revised blanket authorisation widened its scope to cover anti-competitive practices and reporting obligations under Japanese Financial Legislation, sometimes known as the "Japanese SOX".

Finally, as a result of these changes, it is important that employers that have filed their scheme under the blanket authorisation ensure their whistle-blowing provisions are compliant with these new rules by 8 June 2011.

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NEW RESTRICTIONS ON TRANSFERRING PERSONAL DATA OUTSIDE HONG KONG

If multinational corporations wish to keep or share employee records in different jurisdictions they need to review their employment contracts in light of forthcoming changes to Hong Kong's data protection laws.

The Hong Kong Government is planning reforms to the Hong Kong Data Protection (Privacy) Ordinance (the Ordinance), which has been in force since December 1996, in order to bring it into line with international privacy laws and standards. A consultation report released late last year by the Constitutional and Mainland Affairs Bureau outlines, amongst other things, greater powers for Hong Kong's Privacy Commissioner of Personal Data, as well as new offences and sanctions for repeated breaches of the data protection principles. Under the proposals the Commissioner will be able to impose fines of up to HK$50,000 and imprisonment for two years, with a daily fine of HK$1,000 for continuing breaches. This aspect of the reforms has, however, generated a great deal of public comment and so it remains to be seen to what extent it will be adopted by Hong Kong's Legislative Council when amending the Ordinance.

One of the key potential changes for employers to note is the proposal to bring section 33 of the Ordinance into force. Section 33 restricts the transfer of personal data from Hong Kong to any jurisdiction that does not have adequate data protection provisions in place. Despite having been on the statute books since 1996, this provision has never actually been brought into force. This means that as things currently stand multinational corporations may not be subject to stringent regulations on the transfer of employees' personal data to other jurisdictions, provided they have notified them at the time they collect the data that it may be transferred outside Hong Kong. If s.33 comes into force (there is currently no fixed date for this) it means that multinational corporations will be in breach of the Ordinance if they have not obtained employees' consent before sharing or transferring their personal data with other group companies in different jurisdictions or have not taken measures or reasonable precautions to safeguard the personal data of the employees. To get ready for the implementation of s.33 employers should therefore be reviewing their employment contracts for employees in Hong Kong to ensure that there will be no unauthorised personal data transfers between group companies.

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FURTHER INFOMATION

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