

2013 IAPD/IPRA Soaring to New Heights Conference January 24-26, 2013 Hyatt Regency, Chicago

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SATURDAY, JANUARY 26, 2013

8:30 A.M. TO 9:45 A.M.

SESSION #317

DEALING WITH PERSONNEL ISSUES: AN EVER GROWING LIST

PRESENTERS:

KERI-LYN J. KRAFTHEFER, ESQ.

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DEALING WITH PERSONNEL ISSUES: AN EVER GROWING LIST

2013 IAPD/IPRA Conference
Saturday, January 26, 2013
8:30 a.m. - 9:45 a.m.
Session 317

Keri-Lyn J. Krafthefer, Esq.
Robert T. McCabe, Esq.

Ancel Glink Diamond Bush DiCianni & Krafthefer, P.C.



SOCIAL MEDIA AND SOCIAL NETWORKING POLICIES



1. Social Media and Social Networking Are Constantly Evolving

- ▶ Facebook
- ▶ Twitter
- ▶ Flickr
- ▶ Google Plus
- ▶ And by the time we leave today, ???



2. Social Media and Social Networking Policies



- ▶ If you don't have one, you need one
- ▶ A good social media policy will contain several elements
- ▶ But, be careful about policy language that is too broad

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3. Elements of Social Media and Social Networking Policies

▶ Definitions

- You need clarity regarding what your policy addresses
- What is a "blog?"
- What is a "comment?"
- What is a "social networking site?"



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▶ Monitoring

- Tell employees that you will be monitoring what they post on the Internet about the District
- In Illinois, you can no longer request or require Facebook or other social networking site passwords as a condition of employment or continued employment



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Elements of Social Media and Social Networking Policies, cont'd

► Identifying Themselves as District Employees

- Address employees identifying themselves as an employee of the District
- If they identify themselves as an employee, they hold themselves out as representatives of the District
- They must therefore take responsibility for representing the District professionally



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- Encourage employees not to list the District as their employer – it's easier this way
- Inform employees that if they are identifying themselves as a District employee, they must provide a disclaimer that their views and opinions are not the views and opinions of the employer

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Elements of Social Media and Social Networking Policies , cont'd

► Content of Postings

- No confidential or proprietary information
- Disclaimer regarding views and opinions expressed
- Provide disclaimer language:
The views expressed by the author in the blog are the author's alone and do not represent the views of opinions of [Your Name Here]



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- ▶ Training – common sense goes a long way, but it may be helpful to have training and provide some examples of what is inappropriate, in case employees become confused
- ▶ Be responsible and respectful in postings



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4. Social Media and Social Networking Policies – Pitfalls



- ▶ NLRB Decisions on Social Networking Policies
 - Costco
 - Policy was too broad
 - Policy precluded certain activities that fall under Section 7 of the National Labor Relations Act – specifically grievances, on the job protests, picketing and strikes, organizing, joining unions and engaging in “other concerted activities for the purpose of collective bargaining or other mutual aid or protection”

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- It may now be advisable to add language to social networking policies that defines and distinguishes “protected and concerted activities” from those activities which are otherwise prohibited by your policies



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Social Media and Social Networking Policies – Pitfalls, cont’d

► Karl Knauz BMW

- Again, policies regarding internet usage and social networking were overbroad
- Termination of employee upheld
- Posting of photo showing Land Rover in pond after a 13-year-old was allowed to sit behind the wheel of the running vehicle and hit the gas instead of the brake, driving it into the pond, was not “protected concerted activity” nor was the comment “This is your car. This is your car on drugs” next to the photo

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- Complaining that the upscale dealership was also only serving hot dogs and hamburgers at a promotional event was also not “protected concerted activity” under Section 7


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► The Bottom Line



- Review your policies
- If you don’t have one, get one
- If you do have one, make sure that it does not broadly prohibit employees from commenting about the workplace or work conditions
- Review and revise often




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WAGE AND HOUR ISSUES

5. Wage and Hour Issues



- ▶ On the rise
- ▶ Administrative Office of the United States Courts, employees filed 7,008 wage and hour lawsuits in the 12-month period ending March 2011
- ▶ In 2000, employees filed 1,854 such suits

- ▶ Plaintiffs' attorneys like these cases
- ▶ Facts are usually straightforward
- ▶ They can receive attorneys' fees
- ▶ Liquidated damages are an issue




Wage and Hour Issues, cont'd



- ▶ On the Phone; On the iPad;
On the clock?
 - If non-exempt employees are answering phone calls, e-mails or texts, they are on the clock
 - Exceptions
 - De minimis time – What is it?
 - Rounding
 - “Waiting to be engaged” v. “engaged to wait” – Can the employee use his or her personal time or not?

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- ▶ Honestly, don't rely on the exceptions and make requests of your non-exempt staff that occur after hours only when absolutely necessary
- ▶ Establish clear work rules that provide that non-exempt employees must:
 - Get supervisor's approval if they are going to work overtime

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- ENFORCE THIS RULE: HAVING IT IN THE POLICY MANUAL IS NOT ENOUGH
- Clearly advise employees that they are not to check work e-mail, texts, etc. when not working (You can even block employees from accessing work e-mail if need be)
- ▶ Or, make it clear that if non-exempt employees are expected to check their work e-mail, texts, voicemails at times other than regularly scheduled hours, they must report the time and you must pay them for it



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Wage and Hour Issues, cont'd

- ▶ Telecommuting
 - This applies to non-exempt employees
 - Hours must still be recorded and reported accurately
 - Computer log on/log off records
 - Phone records of work time
 - Employment laws such as requirements regarding breaks and lunch periods must still be adhered to
 - Overtime must still be paid when applicable
 - Must pay close attention to telecommuting employees



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NEW EEOC GUIDANCE REGARDING CRIMINAL CONVICTIONS

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6. New EEOC Guidance

- ▶ Out in April 2012
- ▶ Bright line rules – “Those with felony convictions need not apply” – are out
- ▶ Three part test should be employed
 - Consider the nature and gravity of the offense
 - Consider how much time has passed since the conviction and employment decision
 - Consider the nature of the job sought

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- ▶ Individually assess each applicant using the above criteria
- ▶ Don't ask about convictions unless they are relevant to the job sought
- ▶ Consider when, during the employment process, the above assessment should occur



- ▶ Keep very accurate records of your assessment process and maintain them for each candidate to which they apply – We recommend developing a uniform protocol and following it for each candidate
- ▶ Don't ask about convictions on the job application



7. Illinois Law Regarding Park District Employees



- ▶ Background check required
- ▶ Enumerated felony convictions
- ▶ Law prohibits hire of individuals convicted of enumerated felonies within seven (7) years of application with park district
- ▶ Law prohibits a park district from knowingly hiring a person convicted of sexual or physical abuse of a minor under the age of 18



- ▶ EEOC says – compliance with state law alone will not be a defense to allegations of discrimination
- ▶ By the way, compliance with federal law will be a defense
- ▶ Our position – follow state law
- ▶ Since your choice is to violate state law or comply with EEOC guidance, follow state law because EEOC guidance is not the law – it's guidance

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NLRB AT-WILL EMPLOYMENT ISSUES



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8. NLRB v. American Red Cross (February 1, 2012)

- ▶ Red Cross had at-will policy that required employees to sign an acknowledgment which stated, "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way"
- ▶ Held that this language violated Section 7 rights

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- ▶ The reason for this was that it was determined that this language would lead employees to believe that they could not change at-will status, no matter what
- ▶ Can do nothing, including unionizing or engaging in collective bargaining, that would change their at-will status
- ▶ Chills employees' interests in exercising Section 7 rights

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9. Recent Advice Memos From the NLRB Provide Additional Guidance

- ▶ SWH Corporation – Lawful at-will policy language (October 2012)

*The relationship between you and Mimi's Café is referred to as "employment at-will." This means that employment can be terminated at any time for any reason, with or without cause, with or without notice by you or the company. No **representative** of the Company has authority to enter into any agreement contrary to the foregoing "employment at-will" relationship. Nothing contained in this handbook creates an express or implied contract of employment."*

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- ▶ The difference in this language and the language in American Red Cross is the use of the term "representative"
- ▶ The language leaves open the possibility that someone, just not a "representative", has the authority to change the at-will status and, therefore there is no Section 7 violation

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Recent Advice Memos From the NLRB Provide Additional Guidance, cont'd

- ▶ Rocha Transportation – Another example of lawful at-will policy language (October 2012)

Employment with Rocha Transportation is at-will. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the Company. Nothing in this Handbook or in any document or statement shall limit the right to terminate employment at-will. No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.

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- ▶ This policy, unlike the one in American Red Cross, gives *someone* the authority to modify the at-will policy and therefore does not violate Section 7

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FMLA SERVICEMEMBER PROVISIONS



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10. FMLA Twelve (12) Month Periods

- ▶ 12 weeks in 12 month period for qualified employees for childbirth, serious health condition, family member serious health condition
- ▶ 26 weeks in 12 month period for the care of a covered servicemember
- ▶ What if employee invokes leave for a covered servicemember after taking general FMLA leave?



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- ▶ Any general FMLA leave used under 12 week entitlement prior to leave being invoked for servicemember does not count toward the "single 12-month period" for 26 week servicemember entitlement
- ▶ So if servicemember-related FMLA leave comes after general FMLA leave, it is possible that an employee could be on leave for 38 consecutive weeks

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Questions



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