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What Employers Should Know As Election Spurs Online Rants

By **Vin Gurrieri**

Law360, New York (May 3, 2016, 1:38 PM ET) -- With the race for the White House shifting into high gear, millions of Americans are sounding off about the state of the contest on social media, and experts say employers should be prepared to guard against legal trouble that could result from missteps in workers' online political venting.

As Republican presidential front-runner Donald Trump and Democratic favorite Hillary Clinton appear poised to lock up their respective parties' nomination, Americans of all ages are letting their views fly on social media. More than in previous election cycles, news articles are being shared on Facebook, tweets are going viral, and comment threads are bursting at the seams with people ready and willing to make their opinions known.

With the polarized state of the electorate, the recipe exists for conflicts — particularly between fellow employees who fall on opposite ends of the political spectrum.

Aimee E. Delaney, head of Hinshaw & Culbertson LLP's employment practice, said management must tread carefully when dealing with the social media world.

"You get this a lot where some kind of post catches wind in the workplace, and now put a hotly contested election on top of it," Delaney said. "Given employee freedoms with social media, employers have to tread carefully."

Here, Law360 looks at the things employers need to know to effectively deal with their workers' social media barrage.

Outright Bans Are Banned

One thing employers can't do is issue any outright ban against employees espousing their political views in a public forum, Delaney says.

But when it comes to any type of workplace rule at all limiting employees' social media use, Delaney noted, recent decisions by the National Labor Relations Board have created "such a fine line" that no pattern has emerged as to what is acceptable, and, as a result, employers "don't know where the line is."

"There is a risk of some amount of exposure," Delaney said.

Sheena R. Hamilton, an employment lawyer at Dowd Bennett LLP, says that it's OK for employers to implement policies that require employees to use their "best professional judgment" and then reviewing conduct on a case-by-case basis should an issue arise.

Employers can also require that their workers refrain from posting or commenting in a way

that would violate a company's anti-discrimination policies, according to Hamilton.

"Even if it's just repeating a candidate's statement, if it's done in a hostile way, it could implicate anti-harassment and anti-discrimination policies," Hamilton said.

But while employers can seek to impose certain basic rules governing political speech on social media, Adam S. Forman of Epstein Becker Green said that employers have to be careful not to impose any rules that are too broad, such as a rule that employees don't pick fights online.

"Employers have to resist the urge to be general and overbroad," Forman said.

The NLRB Is Watching

Delaney says employers that tread into employees' private social media dealings are entering "dangerous territory," since those areas are the personal province of the employee. In particular, employers have to be wary of taking any actions that could be perceived as restricting workers' rights under Section 7 of the National Labor Relations Act, which protects concerted activity.

"There is a universal environment of not infringing on the NLRB's interpretation of Section 7 rights," Delaney said.

Forman, whose practices includes a specialization in counseling employers on social media issues in the workplace, said employers have to be careful to analyze whether any particular conduct or postings qualify only as spirited discussions, which would be protected under the NLRA, or rise to the level of egregious conduct that loses the statute's protection.

Forman pointed out that the NLRB in recent years has sided with employees even in controversial cases, citing a ruling **last year** in which a catering company was found to have violated the NLRA when it fired a server who called a manager a "nasty mother f-----" on Facebook two days before a union election. That behavior, the board said, did not forfeit legal protection.

Pepperdine University School of Law professor Victoria L. Schwartz said the NLRB has offered samples in recent years of what lawful policies look like and said the agency is often willing to give the benefit of the doubt to employers that are engaging in a good faith effort to craft a viable policy.

"Employers can't do anything to restrict employees from speaking about working conditions," Schwartz said, adding that is a reason employers must be careful when crafting social media policies.

But Schwartz said that any employer policy must tread carefully to make sure it won't fall on the wrong side of the NLRB's line.

"In the context of the election, if an employer says to employees, 'Make sure you behave civilly,' the employer has to make really clear that they are not seeking to limit protected activity," Schwartz said.

Private Posts May Migrate to Work

While employers are not allowed to actively monitor the private social media posts of employees under the NLRA, the private social media dealings of a worker could still creep into the workplace if another employee, perhaps one that is offended by a post, complains and brings the issue to management.

If such an issue causes employees' relationships to deteriorate where their work performance is affected, then management may have to step in. But even in those cases, Schwartz said, employers have to be careful not to take any adverse actions against employees because of their political speech.

"That is a situation where an employer still has some flexibility because it starts to impact the operations of the workplace," Delaney said. "Given employee freedoms with social media, employers have to tread carefully if they [impose] discipline."

In such cases employers must perform a balancing analysis and be sure to have clear policies in place for what is acceptable behavior and what is out of bounds.

"Ideally, the employer should try to figure out a way they won't have to work together," Schwartz said, likening the situation to one where co-workers are in the middle of a contentious divorce and need to be separated while at work.

A trickier scenario for employers could be if a worker uses social media to criticize a political stance taken publicly by a supervisor or management official.

In such a scenario, Delaney noted, employees have to tread carefully if they decide to air public criticism on social media of political stances taken either by their company or by individual managers and supervisors.

"The employee is likely in that situation to get into some problems with insubordination and an employer could take some discipline," Delaney said, but she added that any such discipline must come with an analysis of Section 7 rights by employers to make sure they don't run into trouble with the NLRB.

Ultimately, Forman said, employers need to treat complaints by employees toward their colleagues on a case-by-case basis, assess the facts of each individual situation, and take a consistent approach toward all such disputes.

In such situations, Forman would recommend that employers handle the disputes as they would any other workplace personality conflict — separating employees with the conflict.

"If that's not possible, you would have to have some discussion with the employees and say that everyone has to act civilly and that the company will take action if any policy was violated," Forman said.

Some Rules Are OK

While crafting a legal and effective social media policy may be tricky for employers, Morgan Lewis & Bockius LLP partner Jonathan C. Fritts said there are certain basic measures that employers can legally take to short-circuit potential problems that could arise from workers' election-related posts.

"Employers could say that employees can't [post or blog] while they're supposed to be on working time," Fritts said.

Additionally, employers can restrict activity that occurs over email when the recipient is on duty and make sure employees know that they can't express political views in a manner that suggests the viewpoint is on behalf of the company itself, such as on a company-run Twitter feed.

"You can say that those communications have to go through the PR or communications department," Fritts said.

But while employers have some more flexibility regulating worktime conduct, Forman said an important caveat is that they need to be uniform and consistent in what they regulate.

For example, employers could be at risk if they don't allow social media posts during worktime but don't prohibit employees from checking their Facebook pages during the same time.

"The more personal, non-working things are allowed, the more risk [an employer] is treating [an employee] disparately," Forman said, adding that it's more important for employer to target specific misconduct.

Location Matters

Schwartz said that private employers have a legitimate interest in keeping the workplace civil, but that they have to be mindful of the laws in their state, noting that about half of all states have laws that protect private-sector employees' political activity.

The scope of those laws, however, depends on the particular state, according to Schwartz.

Similarly, Forman pointed out that in California and certain other states, political affiliation is protected and that public-sector workers are protected by the First Amendment when it comes to political speech.

"In the bigger picture, whether it's a fight about the NCAA tournament and which team will win that gets hostile, or an election, employers should have a policy," Forman said, while cautioning that such a policy should be "narrowly tailored" to encompass specific conduct.

Hamilton struck a comparable tone, saying that employers in hotbed political locales like California, New York, and Washington, D.C., should consider including language in their social media policies no discipline will be taken against employees based on their political views.

"Nowadays, I can't imagine an employer [that doesn't] have a social media policy, and [they should] want to add a line specific to state law," Hamilton said.

--Editing by Jeremy Barker and Kelly Duncan.