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HEY I FOUND YOUR NOSE, IT WAS IN MY BUSINESS

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Presented by:
Justine M. Phillips

OVERVIEW OF EMPLOYEE PRIVACY ISSUES MAGNIFIED BY TECHNOLOGY

- Social Media
- Employee Monitoring
- Ban The Box

WHAT ARE THE CHALLENGES EMPLOYERS FACE WITH RESPECT TO WORKPLACE PRIVACY?

- What do you think?
- Solutions?

DO EMPLOYEE'S HAVE A RIGHT TO PRIVACY?

- Do employees have a right to privacy in the workplace?
  - Is there an expectation of privacy?
- Should employees have a right to privacy in the workplace?
- Where does an employer's right to run his or her business outweigh an employee's right to workplace privacy?

PROBLEMS WITH SOCIAL MEDIA IN THE WORKPLACE

- Use results in Privacy Breach
- Disclosure of Trade Secrets/Confidential Info
- Employee Morale/Gripe Sessions
- Harassment/Title VII
- Defamation
- Misuse of Intellectual Property
- Excessive Use (slacking)
- Damage to reputation
- Pornography, Obscenity
- Violence
- Union Organizing
- Unauthorized and deceptive endorsements
- Violations of Other Policies

PROTECTED SPEECH

- Activity must be "concerted" e.g., blog for co-workers
- "Concerted activity" must be "protected," i.e., related to the terms and conditions of employment
- Existing union is not required

CAN YOU SEARCH EMPLOYEE EMAILS?

- ***Scott v. Beth Israel Medical Center***
- Physician sends e-mails to his attorney over the hospital's network using his work e-mail address
- Hospital's written policy states no expectation of privacy, prohibits personal use, and provides that hospital owns all communications.
- Physician argues communications with attorney are private and privileged
- Court:
- Physician waived privilege by communicating with attorney over corporate network
- Reasoning:
- Physician had constructive knowledge of policy
- Policy prohibited personal use
- Hospital reserved the right to monitor (although it did not do so)
- Computer staff had continuing access to physician's e-mail stored on the hospital's server

BUT THEN THERE IS THIS CASE…

- ***Stengard v. Loving Care Agency***
- Stengart exchanged e-mail through her personal e-mail account, but using her company-issued laptop, with her personal attorney about potential claims against Loving Care
- After Stengart sued Loving Care, computer forensic expert discovered Stengart's e-mail exchanges with her attorney
- Defense counsel determined, based on Loving Care's electronic resources policy, that Stengart had waived the privilege

- Company "reserves and will exercise the right to review ... all matters on the company's media systems and services at any time, with or without notice."
- "E-mail and voicemail messages, internet use and communication and computer files are considered part of the company's business and client records ... [and] are not to be considered private or personal to any individual employee."
- "The principal purpose of electronic mail is for company business communications. Occasional personal use is permitted. ..."
- OUTCOME: EMPLOYEE HAD EXPECTATION OF PRIVACY AND ATTORNEY SHOULD HAVE RESPECTED HER RIGHT.

MONITORING EMPLOYEE EMAILS

- In Guard Publishing, 351 NLRB No. 70 (2007), the NLRB found that an employer can have a policy prohibiting the use of its email system for solicitations so long as the policy is enforced in a non-discriminatory manner.
- Policy should also indicate, employee has NO EXPECTATION OF PRIVACY!
- Consider adding text box
- Implement policy so there is clear written communication with acknowledgement signed by employee

MONITORING NETWORK TRAFFIC

- What if you discover illegal content on your servers?
- Can you monitor what websites your employee visits?
- How much time they spend on it?
- What they download onto company systems?

RANTING—PROTECTED FORUMS

- https://www.glassdoor.com/Reviews/index.htm
- http://www.jobvent.com/
- http://hateboss.com/
- http://bossbitching.com/
- http://www.i-resign.com/uk/home/
- http://blockheadboss.com/
- www.workrant.com/
- http://www.disgruntledworkforce.com/blog/
- http://rantasaurus-rex.com/

TAKEAWAYS

- Google searching is fair game if readily accessible to the general public
- Obtain written and verifiable consent before accessing restricted content
- Avoid surveillance of protected concerted activity
- Check lawful off-duty conduct laws before taking adverse action
- Cool down before suing anonymous bloggers

BAN THE BOX

RESTRICTIONS ON USING CRIMINAL HISTORY

- Labor Code § 432.7 generally prohibits employers from seeking, and/or utilizing in employment decisions, information about:
  - Arrests that do not result in a conviction.
  - Dismissed, expunged, or sealed convictions.
  - Referral to, or participation in, a "diversion program."
  - Juvenile criminal history (including adjudications).
- Limited exceptions for employers at health facilities.
  - Certain sex offenses, if there will be "regular access to patients."
  - Certain drug offenses, if there will be access to drugs/medication.

"BAN THE BOX" LAWS

- Nine states and 15 major cities, have adopted "Ban the Box" laws covering both public and private sector employers.
- The laws typically:
  - Prohibit employers from asking applicants about prior convictions on a job application;
  - Forbid employers from seeking out or relying upon an applicant's conviction history until a particular point in the hiring process;
  - Impose a "fair chance" process regulating the conditions for employers using prior convictions as a basis for denying employment.
- "Ban the Box" ordinances currently exist in San Francisco and Los Angeles.
- On October 14, Governor Brown signed a Statewide "Ban the Box" Law (AB 1008).

CALIFORNIA "BANS THE BOX" (AB 1008)

- Becomes effective January 1, 2018.
- Part of the Fair Employment and Housing Act.
- Governs employers with five or more employees.
- Restricts circumstances under which employers may:
  - Seek or inquire into an applicants' conviction history.
  - Utilize an applicants' conviction history as a basis for denying employment.

CALIFORNIA "BANS THE BOX" (AB 1008)

- Covered employers may not:
  - Inquire into, seek, or consider conviction history before extending a conditional offer of employment.
  - Consider, distribute, or disseminate information protected by Labor Code § 432.7 while conducting a conviction history background check.
- AB 1008 does not apply:
  - To positions with a criminal justice agency or as a farm labor contractor.
  - If another law requires criminal history checks or restricts employment based on criminal history.

CALIFORNIA "BANS THE BOX" (AB 1008)

- Imposes a fair chance process for denying employment based on conviction history.
- Covered employers must do the following….

STEPS 1-2

#1 Individualized Assessment

Employers who intend to deny employment to an applicant based on his or her conviction history must first perform an "individualized assessment" of whether the conviction history has a "direct and adverse relationship with the specific duties of the job that justify denying the applicant the position."

#2 Written Notice of Preliminary Decision

If an employer makes a preliminary decision to deny employment after performing an individualized assessment of the conviction history, the employer must provide the applicant with written notification of the preliminary decision and the conviction history that is the basis for decision. The employer must also provide the applicant with a copy of any conviction history report the employer obtained, and the employer must expressly inform the employee of the right to respond to the notice of the employer's preliminary decision before that decision becomes final and the deadline by which to respond.

STEPS 3-4

 # 3 Waiting Period

Applicants will have at least five business days to respond, in writing, to any notice of a preliminary decision to deny employment based in any way on the applicant's conviction history, and employers must consider any information submitted before finalizing an employment decision. If the applicant disputes the accuracy of a conviction history report and states that they are taking steps to obtain evidence supporting that assertion, they will receive five additional business days to respond to the notice.

#4 **Final Written Notice**

Once an employer finalizes a decision to deny employment based on the applicant's conviction history, the employer must notify the applicant in writing of the final decision, of any employer-provided procedures for challenging the decision, and of the applicant's right to file a complaint with the Department of Fair Employment and Housing.

TAKEAWAYS

- Revise employment applications.
- Revise hiring process.
- Revise protocol for background checks and decisions related to adverse action.
- Revise handbook and policies to reflect compliance.

QUESTIONS?

THANK YOU FOR ATTENDING!

Justine M. Phillips

Special Counsel

(619) 338-6619

jphillips@sheppardmullin.com