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Can Saying Cheese Expose an Employer to Liability?

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October 25, 2013

It's holiday time! And what comes with the holidays? Company holiday parties! Pictures from holiday parties can leave employers with a holiday hangover. Below we look at several scenarios that provide some guidance and helpful hints on how to handle the work-place paparazzi.

Scenario: An employer prohibits the taking of pictures at a company holiday party.

Result: The employer's policy will have a negative effect on morale. For this reason alone, the employer should not implement such a policy. The employer's policy may also violate Section 7 of the National Labor Relations Act. Section 7 guarantees employees the right to, among other things, discuss the terms and conditions of their employment. The National Labor Relations Board, which enforces the NLRA, has held that policies prohibiting workplace photography violate Section 7 because they prohibit an employee's ability to share photographs of Section 7 activities with other employees.

Scenario: Same facts as the scenario above. But this time, the employer is a healthcare provider, and the holiday party will take place at the employer's facilities.

Result: The employer's policy will again have negative effect on morale. But this time, the employer's policy likely does not violate Section 7; so long as the policy is drafted and enforced with the purpose of preventing the disclosure of patient information. The NLRB has recognized that certain privacy interests, such as those of hospital patients, are so great that an employer may be allowed greater latitude to limit an employee's Section 7 rights.

Scenario: An employer fires two employees for commenting on Facebook photos of a drunk manager. The photos were taken at the company holiday party.

Result: The employer's actions likely violate Section 7. The NLRA protects the rights of employees to discuss activities in the workplace, including the behavior of their manager at the holiday party. Employers should cautiously approach taking any adverse employment action based upon social media activity.

Scenario: The manager in the scenario above guesses the employee's Facebook password, accesses the employee's account, and deletes the photos.

Result: The manager's actions violate the Stored Communications Act. The SCA protects information 'stored' on websites, such as Facebook, and in e-mail accounts, such as Gmail. Should an employer learn of the manager's actions, the employer's response should be no different than if the manager had gone to the employee's home and opened his personal mail.

Scenario: An employer disciplines two employees for posting holiday-party photos on Facebook during working hours.

Result: If the employer has a social media policy that prohibits the use of personal social media accounts during workers hours, then the employer's discipline is likely appropriate. All employers should have written policies covering the use of technology and social media in the workplace.

Scenario: An employer posts a photo of two employees on its website. The photo was taken at a holiday party, and for reasons unknown, the photo receives a large number of negative comments. In response, the employer deletes both the photo and the comments.

Result: The employer's actions are appropriate. An employer has the right to control the content on its own website. An employer's right of control includes the removal of content that the employer no longer believes appropriate. In fact, employers should often review their websites and remove any harmful, offensive, or discriminatory comments.

Photos from holiday parties present a unique challenge for employers, and employers are encouraged to rely heavily on HR professionals or attorneys when confronted with this challenge. Employers may also find helpful the following practices:

- Have a designated photographer, or two. Employees will be more likely to ask the photographer to take a picture. Thus, employees are less likely to take the pictures themselves. Also, a photographer has the authority to say things like: Please, no drinks in this picture. The employer can also work with the photographer to review and quarantine those pictures that are not appropriate.
- Offer disposable cameras. Disposable cameras have come full circle. They're retro, hip, and cool—under the right circumstances, of course. As employees enter the party, pass out the cameras. At the end of the party, have a place for employees to leave the cameras. The employer then has the film developed, reviews and quarantines the photos, and makes the appropriate photos available to the employees.
- Include an “appropriate photos” reminder in the “please act like a professional at the holiday party” e-mail.
- Use the company holiday party as an excuse to review and update your technology and social media policies. Employers often need a reason to review certain policies. A holiday party can provide such a reason, and with a little work, these policies can be updated just in time to bring in the new year.

HAPPY HOLIDAYS!