LOCKE LORD® QUICKStudy
Labor & Employment Practice
May 24, 2013

Properly Manage Ownership Of Social Media Accounts to Avoid Unpleasant Surprises

By: Kevin D. Kelly

Effective use of social media has become indispensable to most businesses. However, many companies have not addressed an important issue related to social media, namely, who owns the rights to social media accounts utilized by company employees for both business and personal promotion purposes. Some companies have been unpleasantly surprised when a key employee leaves the company and claims that a social media account that he used in conjunction with his work is his personal property, not the company's. Much of the value of a social media account lies in the followers of the account, and an employee who is able to take an account and all of its followers with him/her, perhaps to a competitor, can cause significant damage to a company's social media marketing strategy. By addressing up-front with employees the issue of who owns social media accounts, companies can avoid such disruptions.

Disputes Over Social Media Ownership Are On the Rise

Several cases in the past two years highlight the issues that can arise when ambiguities exist over ownership of social media accounts, and the volume of recent cases demonstrates that disputes over social media accounts are becoming more prominent.

In *Maremont v. Susan Fredman Design Group, Ltd.*, (N.D. Ill. 2011), for example, the plaintiff, an interior designer for the defendant company, utilized her "personal" Facebook and Twitter accounts to promote her work for the company and also authored a design-related blog. Maremont's accounts had a following of over 1,000 people—i.e., over 1,000 prospective customers. In her lawsuit, Maremont alleged that while she was away from work recovering from an accident, the company accessed her Facebook and Twitter accounts and posted material under her name without her knowledge or consent, and she claimed that this amounted to a breach of her rights under state and federal law. For its part, the company contended that its actions were lawful based in part on the fact that Maremont was using these social media accounts for work-related purposes. The court disagreed with the company and denied its motion for summary judgment on at least some of Maremont's claims. The court determined that although Maremont used her accounts to promote the company's business, she had created, through the accounts, a "*personal* following . . . *for her own economic benefit*" that she could use not only to promote the Susan Fredman Design Group, but also to promote another employer in the future. (Emphasis added).

PhoneDog v. Kravitz, (N.D. Cal. 2011), is another prominent case centered on a dispute over the ownership rights to social media accounts. The PhoneDog case centered on the ownership of a Twitter account that Kravitz maintained while employed by PhoneDog—an account that had over 17,000 followers. Following the termination of his employment with PhoneDog, Kravitz kept the account for himself, although he did change the account name to remove an express reference to "PhoneDog." Despite the name change on Twitter, however, all of the followers connected to the account remained with Kravitz personally because he had control over the account itself. PhoneDog sued over Kravitz's retention of the account, and, predictably, the court was forced to grapple with the ambiguous issue of who had greater rights to the Twitter account. Ultimately, the case settled, but reportedly with Kravitz retaining ownership of the Twitter account.

Similar issues have arisen in the cases of *Eagle v. Morgan*, (E.D. Pa. 2011), which involved a dispute over a LinkedIn account, and *Ardis Health, LLC v. Nankivell*, (S.D. N.Y. 2011), which involved a dispute over rights to a social media website for cosmetic products.

Asserting Company Ownership Of Social Media Accounts

To avoid disputes over social media account ownership, companies that have an extensive social media presence should consider clarifying, in written agreements with employees, the rights and duties of the company and employees with respect to social media accounts. For example, a company whose salespeople utilize social media accounts to generate leads and to showcase expertise to potential customers in a particular industry would be well-advised to ensure that the company's rights to those social media accounts—and their potentially large number of followers—are protected even after the salespeople who manage the accounts leave the company. If a salesperson creates a blog on industry trends (using company time and resources), the company will want an agreement in writing with the employee that addresses the fact that this blog is the company's property and that the employee will transfer all pertinent access information upon termination of employment.

Many companies have social media policies in their employee handbooks, but such policies typically do not cover issues pertaining to ownership of those social media accounts that fall in the gray area between the company's branded social media accounts (e.g., the "XYZ Company" Facebook page, which is clearly company property) and the purely personal accounts of employees that are used exclusively for personal purposes (which are clearly the property of individual employees). The gray area accounts—those used by employees to promote a company's business but that may not be registered in the name of the company itself—are the ones that require thoughtful attention with respect to ownership issues. Note, too, that employee handbooks typically contain disclaimers expressly stating that the policies in the handbook do not create enforceable contract rights. Such disclaimers could be an impediment to using a social media policy from an employee handbook to assert ownership over a social media account, and thus it is certainly preferable to address social media ownership in signed, written agreements with employees.

In crafting a written agreement governing ownership of social media accounts, companies must steer clear of several issues, however. First, an increasing number of states have passed laws prohibiting employers from requiring applicants or employees to provide access to their personal social media accounts. To avoid violating these social media privacy laws, any written agreement must carefully distinguish between personal and business-related social media accounts. Second, the National Labor Relations Board ("NLRB") has focused heavily on protecting the rights of employees to engage in concerted activity via social media. The NLRB has repeatedly found companies in violation of Section 7 of the National Labor Relations Act ("NLRA") for having social media policies that arguably constrain employees from communicating with other employees or the general public via social media regarding the circumstances of their employment. Any written agreement with employees regarding social media ownership rights must be drafted to avoid interfering with employees' NLRA Section 7 rights.

Conclusion

By dealing with social media ownership issues proactively, companies can avoid the problems exemplified by the four cases noted above. A well-drafted agreement between a company and its employees who utilize social media for job-related purposes can ensure that the good-will and followers developed by those employees using company time and resources does not leave with the employees when their employment ends.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact a member of Locke Lord's Labor & Employment Practice Group or contact the author:

Kevin D. Kelly | 312-443-0217 | kkelly@lockelord.com