

## Employee Blogging

*It's just come to your attention that one of your most valued employees is the author of a daily blog about life at your company. Upon inspection, it appears you're a featured character in his work, referred to alternatively as "Legal Geek" or "Clueless Wonder," with both your work style and fashion sense analyzed in disconcerting detail. More importantly, the author also discusses the company's product development process, coming awfully close to the line on disclosure of proprietary information. Besides removing him from your holiday card list, what do you do?*

### Why You Should Care

Employers have good reason to be concerned about employee blogs. Blogging's informal, damn-the-torpedoes style and penchant for contentious issues, coupled with the Internet's immense reach and the ability to cache and save published comments, make it easy for blogs to run afoul of defamation, copyright, privacy, trade secret and similar laws. Blogging may increase the risk that employees will breach confidentiality obligations, whether inadvertently or by design, and that an employer's network could be exposed to security threats from third parties. It's even possible that employers could be found vicariously liable for employee blogs originating in the workplace, on the theory that the employer provided the means to blog but failed to exercise control. Indeed, the mere tolerance of workplace blogging could be viewed as a corporate endorsement of the blog's content. So, given all that, what - if anything - should employers do about employee blogging?

### Should Employees Be Allowed to Blog from the Office? Probably Not

Employee blogging from the office is the (relatively) easy case. While some employers may find that the benefits of permitting blogging outweigh the potential dangers, most will likely reach the opposite conclusion. In addition to the various liability issues and potential network security risks, the simple fact is that blogging from the workplace can be a significant drain on productivity. Unless an employer is confident it is deriving real value from employee blogging, a prohibition of personal employee blogging in the workplace may be a sensible move. This could be readily accomplished through an amendment to the employer's general Internet usage policies.

Many companies, however, have determined that official (or quasi-official) "corporate blogs" produced by authorized employees can provide substantial benefits. Indeed, some organizations, reportedly including Microsoft, have even put full-time bloggers on staff. This is very different from permitting unfettered workplace blogging, as these sanctioned blogs could be expected to evidence somewhat more restraint than that of Spike from Shipping. Nonetheless, it would still be advisable to establish general blogging guidelines, particularly since these corporate blogs could more readily be deemed binding on an employer than those of individual unauthorized employees. Moreover, even such "corporate blogs" may pose certain risks under the securities laws, as will be addressed in a future advisory.

## Bloggging Outside the Office ... A Tougher Issue

What about employees blogging outside the workplace, on their own time and equipment? Such blogging raises many of the same concerns as blogging from the office, including the potential impact on a company's reputation and the risk of disclosure of confidential information. Regardless of where they originate, employee blogs can be a megaphone for a disgruntled or unscrupulous worker -- and even the happiest of employees can drop an unintentional bombshell while blogging the day's events after a two martini happy hour.

The reaction of some employers to these concerns has been to prohibit all blogging by employees, whether in the workplace or elsewhere. Other prominent companies, including Delta Airlines and Google, have made headlines by terminating employees for issues pertaining to their personal off-site blogs. These responses, however, while perhaps understandable in certain cases, may be somewhat problematic.

First, an outright prohibition of blogging outside the office may be bad for business. Employees and potential employees may resent what they see as an inappropriate abridgment of their rights, and valuable time may be wasted trying to police an unpopular (and perhaps unrealistic) prohibition. This could also readily morph into bad publicity for the employer, both within the blogosphere and in the mainstream media.

Worse, contrary to popular belief, it is possible that an employee discharged for off-site blogging could have a basis for a wrongful termination claim, with a right to a jury trial and the potential for punitive damages. An exception to the "at will" doctrine of employment law exists in many states for terminations that violate public policy. In California, for example, an "at will" employee may bring a wrongful discharge action -- a so-called *Tameny* claim -- if the discharge is based upon the employee's exercise of certain fundamental and substantial statutory rights or privileges. If an employee uses his blog for "political purposes," discharge of that employee for blogging may be actionable as a violation of the Labor Code's prohibition against interference in an employee's right to engage in political activity. The same could be true for other statutorily protected activity, such as discussing compensation with other employees, promoting health and safety in the workplace or whistleblowing.

Even where no specific statute is implicated, a successful *Tameny*-type claim might still be made based solely upon the constitutional right to free speech. Blogging by state or federal employees, for example, may be protected by the First Amendment. In California, the state Constitution's "liberty of speech" provision has been held to apply to the actions of even non-state actors where the situs of the abridgment to speech is a 'space' that "is freely and openly accessible to the public." In the case of employee blogging, that situs is arguably the Internet, a space that is clearly "accessible to the public." Thus, a California court could rule that a discharge for blogging violates public policy and is unlawful per se. While we do not believe this legal theory has yet been litigated, few companies would wish to be the test case.

Moreover, employees in several states could have recourse to anti-SLAPP (Strategic Litigation Against Public Participation) statutes in connection with blog-related actions. Anti-SLAPP laws protect free speech, and could result in various sanctions against companies found to have improperly quashed their employees' First Amendment rights. Accordingly, employers may wish to tread with some care in addressing employee blogging.

## Considering a Different Approach

Clearly, not every employee blog will reflect poorly on an employer or disclose sensitive information. On the contrary, blogging employees may be among the most creative, entrepreneurial and technologically savvy members of an organization, and may serve as powerful advocates for the companies they work for. Given that, and in light of the risks in banning off-site blogging, the better approach may be to balance the positive aspects of the blog with appropriate safeguards against the greatest risks.

As a start, employers should establish written blogging policies that alert employees to potential liabilities and reiterate the obligation to protect confidential information. Employees should be encouraged at all times to use good judgment and sound discretion in connection with their blogging activities. Clear examples should be given of what is permissible and what is not, and a corporate representative could be appointed to deal with employee questions in the close cases, perhaps on a confidential basis. Employers should also make it clear that violations of blogging policies constitute legitimate grounds for termination. Such steps would provide useful guidance to employees wishing to exercise the right to blog freely, while substantially diminishing the risk of inadvertent errors or a successful wrongful termination claim in the event an employee crosses the line into the territory of the impermissible.

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This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

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