

How to Tame Social Media

By Diccon Hyatt

In 2013 a Taco Bell employee posted a picture on Facebook of himself licking a stack of Cool Ranch Doritos taco shells. It's not as bad as it sounds — the taco shells were expired and about to be thrown away. But the perceived damage had been done, and Taco Bell, not wanting to be known as the restaurant that serves pre-moistened tortillas, fired the teenage worker.

Cases like that are one reason some companies have begun paying attention to the social media activities of their workers even when they are not at work. With socialization going online, so too have harassment and bullying, both of which are open invitations to lawsuits.

Having a social media policy is wise, says employment attorney **Paula Lopez, of Allyn & Fortuna in New York. Lopez and fellow attorney Nicholas Fortuna will speak on social media in the workplace at the Human Resources Management Association dinner on Monday, September 8, at 6 p.m. at the Princeton Hyatt.** Cost: \$50. For more information, call 609-844-0200, or visit www.hrmanj.shrm.org.

Lopez says employers would do well to set out written guidelines for what employees cannot say on Facebook or Twitter. "If there's an instance of an employee engaging in harassment against another employee, if the employer wants to take action, it's best to have a policy that gives the basis for taking disciplinary action against the employee," she says.

It is also common for social media policies to have provisions against disparaging the employer, or revealing trade secrets, confidential customer data, or other such information. These policies are also well advised, Lopez says, but they are also where many human resources departments get in trouble.

That's because the time-honored tradition of complaining about one's job among friends has also made its way out of living rooms and onto the Internet.

The natural reaction of companies is to prohibit any kind of trash talk or sharing of company secrets on the Web. However, there is one kind of discussion —

regarding employment and wages — that is protected by law, and banning it could backfire.

Last year a bar in Watertown, Connecticut, the Triple Play Bar and Grille, fired a bartender and a cook for a conversation they had on Facebook. A former employee had posted the following message: "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money. WTF!!!!"

The cook clicked "like" on the post. The former employee wrote one of the owners was "such a shady little man. He probably pocketed it all from all our paychecks. I've never owed a penny in my life 'till I worked for him. Thank goodness I got outta there." To which the bartender commented, "I owe too. Such an asshole."

On August 22 the National Labor Relations Board upheld the ruling of an administrative judge who ordered Triple Play to hire back the bartender and the cook. It turns out that by discussing the restaurant's tax withholding policies, the employees were engaged in "protected concerted activity." Under national labor laws, employees have the right to discuss the terms and conditions of their employment and wages without being retaliated against.

Lopez says many companies' social media policies go too far in prohibiting social media posts. "What we have seen in the last two years is social media policies that are overly restrictive, that could be interpreted by an employee to restrict his or her ability to discuss anything regarding the wages, conditions of employment, and things like that," Lopez says. "They have been deemed unlawful because they restrict the employee's rights."

There are limits to these rights, Lopez says, and



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employers can still fire workers for speech that is “disparaging or disloyal.” She recommends companies look over the National Labor Relations Board’s published guidelines when crafting their own policies.

www.nlr.gov/rights-we-protect/protected-concerted-activity.)

Lopez was born in Ecuador, and grew up in Northvale, where her father was an office manager for an Ecuadorian airline. Lopez’s family has a long tradition of involvement in the legal profession, going back to her great grandfather who was also a lawyer, so it was not surprising that Lopez and an older sister both became attorneys. “It was something that I always found interesting,” Lopez says. “I was always exposed to it through my family.”

Lopez graduated from Rutgers in 2000, and got her law degree from Tulane in 2003. She joined Allyn & Fortuna in 2005, and has represented a host of corporate clients in employment law disputes.

Lopez offers several other pieces of advice:

Include examples

Lopez says companies should include examples of the kind of conduct they are trying to prohibit, such as abuse and harassment. “An employer should use specific, concrete examples to make sure that what they are trying to prohibit doesn’t encompass activities that are protected by the labor act,” Lopez says. Good things to prohibit are offensive, abusive, malicious remarks, and racial slurs.

Hold a training day

“Make sure employees are trained in social media policy,” Lopez says. “And make sure to revisit the policy

at least yearly, given the constant changes in social media sites.” Also, it’s a good idea to have employees sign a document acknowledging they know the policies.

Be fair and square:

If a company disciplines one person for violating the policy, it should discipline everyone else who violates the policy in the same way. “The policy should be enforced and applied consistently to all employees,” Lopez says. “You don’t want to have a claim that it has been applied discriminately.”

Act before the fact:

Lopez says there is nothing wrong with employers looking at a candidate’s publicly available social media activity during the hiring process. “A lot of employers will, in reviewing applicants, do a search online and see what comes up,” she says. Lopez cautions that whoever is reporting back the social media information should only report certain things. They should not report lawsuit-worthy characteristics such as gender and race.

“You don’t want the applicant to think they weren’t hired based on a protected characteristic,” she says. Rather, the person looking at Internet posts can reasonably report things “like if they were drunk without any clothes on.”

And what does all this mean to employees? Lopez says they should be careful what, if anything, they say about their employer online. While they may intend for a discussion to stay among friends, the public nature of the Internet means that comments blowing off steam could easily get back to a boss.

“A good thing to keep in mind is, ‘If my employer sees this, would I be OK saying this to their face?’”