

Social Media and Tech Issues in Labor Arbitration



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Status of Arbitral Law

- There are not many reported cases in BNA or *Elkouri*.
- Most reported cases are outcome-determinative and relate to severe misconduct using employer equipment on the job.
- The fate of the nexus test for off-duty misconduct is unclear, but it will be used until new law emerges.

Good Resources

Check course materials from June 4, 2010 Annual Employment Law Update, “Employee Speech in Cyberspace,” by Bernick & Sullivan.

Law Review Articles

- Ariana R. Levinson, *What Hath the Twenty First Century Wrought? Issues in the Workplace Arising from New Technologies and How Arbitrators are Dealing with Them*, 11 Tenn. J. Bus. Law 9 (2010).
- Lauren Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. Rev. 1315, (2009)
- Ariana Levinson, *Industrial Justice: Privacy Protection for the Employed*, 18 Cornell J.L. & Pub. Pol’y 609, (2008-2009).
- Skyler McDonald, *Defamation in the Internet Age: Why Roommates.com Isn’t Enough to Change the Rules for Anonymous Gossip Websites*, 62 Fla. L. Rev. 259 (January 2010).

On-Duty Issues

- Personal use of employer-owned equipment
- Productivity and misuse of work time
- Confidentiality of private communication

Personal use of employer-owned equipment

- Traditional Notice Issues Are Critical
- Arbitrators Will Overturn Discipline if Employee Lacks Notice of Rule or Sanction
- Effect of boilerplate agreements versus more lenient enforcement

Use of Equipment

- Arbitrators will honor employer rules about internet access for personal use.
- Outcome in abuse cases (pornography, harassment etc.) are predictable.
- Traditional labor law principles will apply (notice, discriminatory sanction, progressive discipline)
- There are few reported cases involving computer monitoring.

Productivity and misuse of work time

- Arbitrators will permit discipline for inadequate performance related to abuse of internet privileges.
- Arbitrators increasingly will test evidence for probity, reliability and persuasiveness.
- Traditional just cause will apply.

Confidentiality of private communication

- Arbitrators admit evidence from employee work computers when the data recovered involves pornography, “hate” websites, etc.
- Employees will be punished for “snooping” in the employer’s systems, but the “employer at fault” defense may also apply.

Elkouri & Elkouri, *How Arbitration Works*, 165 (Alan Miles Reuben ed., 6th Ed. 2008 Supp.)

Off-Duty Blogging/FB

- Traditional “nexus” requirements apply.
- Under the nexus test, the employer must prove that there is sufficient connection to permit discipline.

Historic Arbitral Nexus Test

- Harm to the employer's reputation or enterprise, or
- Conduct shows evidence of unfitness, or
- Significant harm to co-worker relationships

Elkouri & Elkouri, *How Arbitration Works*, (Alan Miles Ruben ed. 6th Ed.)
(2003)

Social Media Use & the Nexus Test

- In most cases, arbitrators will require proof of actual rather than speculative harm. This should apply in blogging/FB cases.
- Arbitral views of “unfitness” are linked to social attitudes which evolve over time.
- Public sector arbitrations involve “balancing” of rights versus “role model” concepts.

Blogging or FB Misconduct

- Arbitrators historically allow discipline for off-duty verbal abuse, altercations between employees, or threatening behavior to managers.
- Arbitrators will use existing case law to build law about cyber-bullying, cyber-insubordination, etc.

Future Issues

- Labor arbitrations under “personal life” clauses prevalent in teacher contracts.
- Collective bargaining similar to bargaining over drug testing and drug use.
- Attempts to create safe havens for posts on union-owned websites. *But see American Airlines, Inc. and Allied Pilots Association 125 LA 1025 (2008, Vernon.)*

Big Picture Questions

Unions currently encourage employees not to blog or use FB.

Social Networking Nightmares

1. Is this the advice unions should be giving?

Questions for Discussion

Technology experts believe that the Millennial generation will “lead society into a new world of personal disclosure and information-sharing using new media.”

2. Should employees have a “right to personal disclosure” as a form of protected activity or as autonomy right?

Questions for Discussion

If Millennials want to text/log-on to social media at work, employers with the most liberal policies may be likely to attract a wider range of qualified candidates.

3. Should employers adopt or bargain more lenient policies?
4. What is the potential effect of new work policies on laws such as the FLSA?

Questions for Discussion

Some employers report benefits from employee use of social networking sites to connect with coworkers, customers, and clients.

5. May employers require employees to have personal social media accounts?
6. 6. May employers adopt “dress codes” for what is appropriate to post on FB?
FLSA?

Thank Youís

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