Employers Should Implement And Enforce Policies To Minimize Potential Defamation Exposure From Disgruntled Employees

It is an all too frequent occurrence - an employer terminates an employee for a performance problem or malfeasance and shortly thereafter, news of the termination and its cause spread throughout the organization like wildfire. In some cases, the actual basis for the termination gets muddied and distorted, like through a game of telephone, as members of the company communicate what they heard to others over and over again, often adding their own perspective concerning what they heard. In these scenarios, the employer could face potential litigation and liability from the terminated employee, who may allege that the employer and/or its employees said untrue things about her that damaged her reputation. These types of lawsuits, known as defamation actions, are common in the employment context.

The law does provide significant protections to employers from these defamation actions. For example, the most common way an employer can defend itself against a defamation lawsuit brought by a disgruntled terminated employee who alleges his reputation was sullied by untrue statements is by proving that the statements were actually substantially true. Establishing the alleged defamatory statements were substantially true is an absolute defense to any defamation claim and one in which employers rely on frequently. The law also provides employers with a "conditional privilege", also known as the "common interest privilege", that immunizes the employer and its employees from liability from defamation claims so long as the alleged defamatory communications were made without malice, i.e., the statements were made without ill will, those who made the statements had a reasonable basis for believing they were true and the statements were not communicated to people outside of the organization.

Despite the existence of these legal protections for employers, defending against a defamation lawsuit can be challenging, expensive and disruptive to an employer because these cases often involve many witnesses, are fact-intensive and obtaining evidence concerning what people may have said months (or even years) after the fact can cause serious challenges. In an effort to avoid these problems altogether, employers should implement policies that ensure terminations are handled privately amongst only company representatives who need to be involved, as well as policies that prohibit employees from discussing another's termination. These policies should be strictly adhered to and consistently enforced to ensure compliance. Through the creation and implementation of these policies, employers can better minimize the risks that it could be faced with a defamation claim brought by an unhappy terminated employee.

If you have questions about any of the issues discussed in this article, please contact Josh Waldman at jwaldman@bkcglaw.com or at 949-975-7500.

Effectively Using The Mailbox Rule To Enforce Unsigned Employee Agreements

As California labor laws evolve, employers must make sure that the written agreements they have with their employees comply with those changing laws. Not only must employers notify employees when the agreements change, but to enforce those updated agreements, employers have to be able to prove that employees received them and agreed to them. While obtaining the employee's signature on the revised agreement is the clearest evidence of receipt and acquiescence to the new terms, getting those signatures can sometimes be a logistical nightmare for the company's HR department. Prudent employers looking to avoid this headache can take advantage of an archaic legal principle known as the "mailbox rule".

The mailbox rule, which is codified at California Evidence Code Section 641, states that "a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of business." Therefore, when an employer produces evidence that it sent a revised agreement to its employee in a correctly addressed and properly mailed envelope, a presumption arises that the employee received and agreed to the revised agreement.

The presumption is, however, rebuttable, and an employee looking to avoid the revised agreement – such as, for example, an employee hoping to avoid the consequences of agreeing to an arbitration requirement for employment-related disputes – often will sign a declaration swearing that she did not receive the agreement in the mail. Depending on the trial court, the employee's declaration might be sufficient to overcome the presumption such that the trial court refuses to enforce the agreement.

There are additional steps that the employer can take to bolster the presumption in its favor and to effectively utilize the mailbox rule to enforce even unsigned agreements with its employees.

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In This Issue

SOCIAL MEDIA IN THE WORKPLACE: THE COMPETING RIGHTS OF FREE SPEECH AND EQUAL PROTECTION

Gone are the days where work stays at the office. Cell phones extend the workday and forums where people can speak out on various issues. Most of us use cell phones to communicate with colleagues, friends and family about work and life through text, e-mails (personal and work) and social media. The social media aspect is especially intriguing because anyone can convey a message to others with the press of a button. This sort of accessibility changes the landscape of the workday. Employees can affect the work environment through a single tweet or Facebook post.

Which leads us to wonder: do employers have any say in what employees can do on social media? The answer is the usual one: employees have some rights in this realm – as do employers – but to determine which rights take priority in a situation, employers should simply ask themselves the same critical questions:

First, does the law apply to me as an employer?

As always, the first step is to determine if the laws at issue – in this case, the First Amendment and California Labor Code Section 980 – apply to you as an employer.

The First Amendment comes into play because the freedom of speech is what emboldens us all to speak our minds. Certainly, it is what employers and employees think of as the protector of some unbendable right to speak our minds on social media. But as all other constitutional amendments, the First applies only to government employers. So if you are a government employer, you do have to comply with the First Amendment in deciding how to treat the use of social media by your employees.

Next, all employers have to comply with the California Labor Code. Section 980 focuses entirely on what California employers can and cannot do regarding employees and social media.

Once you know what laws apply, you can better assess your rights and obligations in the social media context, as an employer.

Second, what do the applicable laws require of me as an employer?

The second step is to determine what the applicable laws allow employers to do and what the applicable laws prohibit employers from doing.

The First Amendment prohibits government employers from enforcing any laws that suppress employee First Amendment rights. In the context of social media, government employers should not generally punish an employee who:

- uses social media outside of work; or
- uses social media during work – unless the statement(s) he or she makes on social media is/are on behalf of the employer, without the employer's authorization.

However, government employers should:

- enact reasonable investigative procedures for looking into social media activity that may violate the rights of employees under state and federal anti-discrimination laws; and
- ask employees using social media–for personal purposes unrelated to work–to use social media off the clock. For salaried employees, this approach is not realistic, so employers should ask them to refrain from posting on social media for non-work purposes while they are in the course of performing any employment duties.

Next, all employers must comply with the Labor Code. They must not:

- ask an employee (or job applicant) to disclose his or her user name or password to the employer for the employer to use to access the employee or applicant's social media;
- ask an employee to access his or her social media in front of the employer;
- ask an employee to divulge personal social media content unless reasonably relevant to investigate unlawful conduct by the employee – as long as the social media is only used for investigative purposes; or
- terminate, discipline (or threaten to do either), or retaliate against an employee for refusing an employer's request for the above information where the request is not permitted by the Labor Code.

All of this means an employer cannot ask for access to an employee's social media – either through his or her login information or by having the employee show the employer his or her social media – unless the employer is investigating any conduct by the employee that violates the law.

The only time an employer can terminate, suspend or take other adverse employment action against an employee is when the employee refuses to provide this information during a proper investigation.

As always, this exception under the Labor Code shows that employees' rights to speak freely are second to their right to work in an environment free of discrimination and harassment–in other words, in a work environment equally protecting all employees.

Finally, private employers must understand: while they are generally not required to permit employees to use social media during work, the contents of the social media may implicate employee rights that employers cannot ignore.

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SOCIAL MEDIA IN THE WORKPLACE: THE COMPETING RIGHTS OF FREE SPEECH AND EQUAL PROTECTION (continued from page 2)

Third, are there activities within the bounds of the applicable law that may still violate employee rights?

Here, the First Amendment and Labor Code Section 980 give employers some guidance on employee rights related to social media. But the employer's obligations do not end there. Employers should not assume that everything else (not expressly prohibited by the First Amendment or Section 980) they allow or engage in regarding employee use of social media is lawful. After all, social media is just another forum for communication. Employers should focus on the contents of social media postings to ensure they are complying with all laws.

If the content of social media postings by an employee concerns any of the following topics, an employer would be unwise to take adverse employment action against the employee for the posting:

- the physical conditions of the employee's work environment (i.e. unhealthy or unsafe working conditions);
- the employee's compensation (i.e. underpayment of regular wages or overtime wages, the failure to provide meal and rest breaks, and/or the failure to provide required employee benefits);
- illegal activity by the employer; and
- discrimination, harassment and/or retaliation based on protected characteristics.[1]

Ultimately, if an employer terminates an employee for raising these issues via social media, it faces liability for wrongful termination in violation of California public policy. The right to be free of discrimination and to disclose and discuss working conditions and wages are fundamental public policies in California. An employer risks violating these policies by terminating an employee who takes to social media to voice his or her displeasure over these issues.

Employers should not be distracted by the wave of social media use. It is better to understand that Facebook, Snapchat, Twitter–and the rest–are merely additional forums for employees to communicate with each other and even employers. Employers should focus on the contents of the social media postings when deciding how to respond to them.

[1] This means race, gender, religion, disability, national origin, ethnicity and age.

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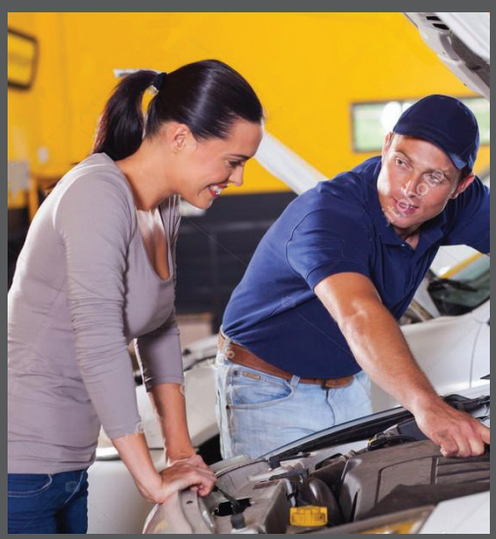
The Ninth Circuit Deals Auto Dealerships A Blow In The *Navarro* Decision

Since the time of our last newsletter, the Ninth Circuit has issued a ruling in a case that materially effects our auto dealer clients and the manner in which they pay service advisors. The Ninth Circuit case, *Navarro v. Encino Motorcars, LLC* (9th Cir. 2017) 845 F.3d 925, holds that a dealership may no longer treat service advisors as exempt from federal overtime pay requirements. Specifically, the Fair Labor Standard's Act (the "FLSA"), requires overtime pay to employees should they not fall within one of the statute's narrow exemptions.

For 33 years prior to the *Navarro* case, the Department of Labor ("DOL") had taken the position that service advisors were exempt from overtime pay under Section 231(b)(10)(A) of the FLSA, which applies to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." In 2011, however, the DOL reversed its position stating the exemption did not apply to dealership service advisors. The DOL offered little reasoning for its decision and its drastic about-face triggered a group of service advisors working for Encino Motors at its Mercedes-Benz dealership in LA to file the *Navarro* case, seeking overtime pay from Encino Motors under the FLSA. The case worked its way up to the Supreme Court which then remanded it to the Ninth Circuit setting the stage for the Ninth Circuit's ruling in January 2017. The Ninth Circuit's decision that service advisors are not exempt employees ultimately rested upon Congress's failure in the FSLA to include "service advisors" in its list of exempt dealership employees. The Ninth Circuit looked at definitions for the job titles specifically mentioned in the statute and concluded those could not apply to service advisors. Therefore, if Congress intends for service advisors to be exempt from federal overtime requirements,it will need to amend the FSLA.



In the wake of the *Navarro* decision, dealerships should look at their service advisors' pay-plans and the hours their service advisors are working to determine if there could be exposure for a federal wage and hour claim. BKCG's attorneys are experienced in all facets of employment law, including the application of overtime exemptions under both federal and state law, and are ready to advise clients wishing to ensure compliance in the wake of *Navarro*.

Please contact Ros Lockwood at (949) 975-7500 or rlockwood@bkcglaw.com if you have questions about any issue discussed in this article, or any other related matter.

Effectively Using The Mailbox Rule To Enforce Unsigned Employee Agreements (continued from page 1)

First, using a delivery method that requires an actual receipt signature – such as certified mail or Fed Ex provides additional evidence that the document in question was, in fact, received by the employee. Second, the revised agreement can, and often should, be accompanied by a short affidavit by the person who sent the revised agreement, sworn and signed on the date it was sent, which will make it more difficult for the employee to challenge and overcome the presumption. Finally, the cover letter that accompanies the revised agreement must be clear in informing the employee that the new agreement applies to her whether she signs it or not – the employee's continued acceptance of employment after receiving notice of the changed terms is a critical factor in enforcing the new terms.

When used properly, the mailbox rule can help employers deal with the headache of chasing down signatures on revised agreements from employees who may think that they can avoid the new terms simply by neglecting to provide their signatures.

If you have any questions about how your business can effectively utilize the "mailbox rule" to notify employees of revised terms of employment, please contact Michael Oberbeck at moberbeck@bkcglaw.com or at 949-975-7500.

An Injunction, Your Answer To Employee Trade Secret Theft

The scenario is easy to imagine as it plays out often in businesses across California. An employer ends its relationship with an employee and that employee begins employment with a competitor. Soon, it appears that the former employee has provided highly confidential, trade secret information to the competitor and the employer wonders how to limit the disastrous impact if its former employee's theft. The answer could be an "injunction."

An injunction is a powerful tool and an employer can obtain one against both the former employee who stole trade secrets as well as the competitor now knowingly profiting from them. Generally, an injunction is a Court order or decree that either (temporarily or permanently) prohibits a party from doing something or compels (mandates) that a party do something. In the context of a former employee stealing company trade secrets, an injunction is usually sought to prohibit the employee and the competitor from continuing to use and profit from stolen trade secret information. A permanent injunction can be obtained from a court in an equitable proceeding without a jury. Often, however, a temporary injunction may be necessary to preserve the status quo and mitigate damage prior to the court determining whether to grant a permanent injunction.

There are steps an employer should take **before** any theft has occurred, to put itself in the best position for obtaining injunctive relief should it discover trade secret theft. First and critically, the employer must be able to demonstrate that the information taken was actually "trade secret". There is nothing improper in California about a former employer joining ranks with a competitor and using the skill and knowhow gained from her or his prior experience in that profession. In fact, California is extremely protective of an employee's right to move from one employer to another and generally prohibits actions taken by an employer to prevent its employees from leaving and working for a competitor. Therefore, in order to obtain an injunctive relief, the employer will need to "describe the subject matter or the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade[.]" (*Diodes Inc. v. Franzen* (1968) 260 Cal.App.2d 244, 253).

In addition, the employer will also need to demonstrate that the information is valuable because it is unknown to others and that the employer has taken steps to keep the information secret. The employer, as a matter or course, should protect its trade secret information by doing such things as requiring employees to sign confidentiality agreements and allowing password protected access to trade secret information only to those employees who need it. In short no court will grant injunctive relief of any kind unless the employer can show the information was trade secret **when it was taken** by the former employee.

If your business loses an employee and then discovers that employee might have stolen trade secret information, you will want to act quickly and aggressively. Contact your attorney for advice. An initial step may be to send out a "cease and desist" letter to the former employer and the competitor even prior to initiating any legal action. Then, if necessary, obtaining a preliminary or permanent injunction might prove to be the next critical step to ensuring that your valuable trade secrets remain protectable and out of the hands of your competitors.

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