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Federal law protects some employee speech on social media

by Douglas E. Lee

In recent years, both public and private employers have experienced the disruption that occurs when a disgruntled employee takes to Facebook to air his or her work grievances.

Unlike public employers, however, private employers have felt free to discipline or fire these employees. Private employers, after all, are not constrained by the First Amendment and need not recognize anyone's freedom of speech. Moreover, private employers in Illinois in most circumstances employ their employees at will, meaning the employers' management decisions cannot be challenged unless those decisions discriminate against an employee because of the employee's age, gender or other protected characteristic.

Suddenly, however, the discretion private employers have enjoyed is no more. As its Acting General Counsel Lafe E. Solomon explained in a report released in August, the National Labor Relations Board now maintains that the National Labor Relations Act protects some employee social media speech.

Intended to protect employees' right to unionize, the Act prohibits private employers from, among other things, interfering in employees' attempts to engage in concerted activity. These attempts, the Board traditionally has held, include discussions among coworkers about the terms and conditions of their employment. As the Board now is applying that tradition to today's technology, those employee discussions need not be private and may take place in social media open to all.

In the report, Solomon detailed the Board's handling of 14 cases in which unfair labor practice charges arose out of social media postings or policies. In half of those cases, the Board found that the employers had violated the Act. In the cases involving postings, a fact critical to the Board's determination was whether the postings were directed at or discussed with coworkers.

In one case, for example, a salesman for an automobile dealership criticized his employer on his Facebook page about a sales event the employer had conducted. His online comments – which concerned primarily the employer's choice of low-budget refreshments – were consistent with criticisms other employees had expressed before and after the sale. Shortly after learning of the postings, the employer fired the salesman.

The Board concluded that the firing violated the Act. The posting, Solomon wrote, was a "direct outgrowth" of the sales staff's earlier, protected discussion.

The employee "was vocalizing the sentiments of his coworkers and continuing the course of concerted activity that began

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Inside

Members of public bodies must complete open meetings training

by David W. Badger

A new law effective Jan. 1, 2012, requires all members of a public body subject to the Open Meetings Act to complete an electronic training curriculum. All elected or appointed members of a public body who are continuing in office and were appointed or elected prior to Jan. 1, 2012, have one year to complete the electronic training curriculum and file a copy of the certificate of completion with the public body.

All members of a public body elected or appointed after Jan. 1, 2012, have 90 days after taking the oath of office to complete the training and to file the certificate of completion. If no oath of office is required for the position, then the 90-day period starts on the date the member assumes his or her duties.

Interestingly, almost all public governmental bodies supported by tax revenue are subject to the Open Meetings Act, except the General Assembly and committees or commissions of the General Assembly.

Changes in Illinois tax law suggest need to review estate plans - again

by Gary R. Gehlbach

Recent changes from Springfield suggest that married couples should again consider changes to their estate plans.

The Illinois General Assembly recently increased the value of assets in a decedent's estate that is exempt from the Illinois estate tax to $3.5 million for persons dying in 2012 and to $4 million thereafter. While this new law takes effect June 13, 2012, it will apply to persons dying after Dec. 31, 2011. This increase comes a year after the Jan. 1, 2011, increase in the federal estate tax exemption to $5 million, which necessitated special estate planning for many individuals, especially married couples, because the Illinois exemption then was only $2 million.

In light of the increased Illinois exemption, any estate planning done in the last year might need to be revised or at least reconsidered. Moreover, the federal law that increased the federal exemption to $5 million is set to expire on Dec. 31, 2012, and, in the absence of further action by Congress, the federal exemption will decrease to $1 million. The new Illinois estate tax law, on the other hand, does not have a sunset provision and will continue indefinitely.

The recent change in the Illinois exemption was passed in the one-day "extra" veto session held on Dec. 13, 2011, when the media's attention was on pension reform. Recognizing that Illinois' financial shape is indeed dire, the General Assembly was focused on ways to decrease government spending and creating more *ad hoc* financial incentives for businesses, such as Sears, to remain in Illinois. The estate tax reduction bill, Senate Bill 397, passed the House on Dec. 12 by a vote of 81-28 and the Senate on the next day, 44-0.

During 2011, when the Illinois exemption was $2 million, many married couples revised their estate plans to take advantage of a special provision under Illinois law to provide for the creation of a new type of trust, an Illinois QTIP trust, upon the death of the first spouse. The purpose of the Illinois QTIP trust was (and still is) to allow the estate of the first spouse to die to claim a deduction that would, in most cases, totally avoid any estate tax in that spouse's estate while at the same time not cause the assets in the Illinois QTIP trust to be subject to federal estate tax in the surviving spouse's estate.

The pressure to engage in estate tax planning is now gone for most individuals and couples, at least pending further action by Congress. However, those persons, especially married couples, who revised their estate plans in 2011 should consider whether revisions are now in order to simplify the plans. At least until Congress addresses the sun-setting $5 million federal exemption, married couples whose total combined estates are not expected to approach $3.5 million likely can avoid estate tax planning. Note, however, that essentially all assets owned by a decedent or in which the decedent has an interest at the time of his or her death – in trust or joint tenancy or payable to a designated beneficiary or otherwise, generally including the death benefit of most insurance on the decedent's life – are subject to estate tax.

The regrettable certainty in estate tax planning is that the law is guaranteed to change.

New law eases ability to obtain deceased's medical records

by Gary R. Gehlbach

On Nov. 23, 2011, Gov. Pat Quinn signed a new law that specifically authorizes the release of a deceased patient's medical records.

Under the new law, "a deceased person's health care records may be released upon written request of the executor or administrator of the deceased person's estate or to an agent appointed by the deceased under a power of attorney for health care."

In the absence of an executor or administrator, or if an agency does not exist, and the decedent had not specifically objected in writing to disclosure of his or her records, then the deceased person's health care records may be released upon the written request of the deceased person's surviving spouse.

However, if the decedent was not survived by his or her spouse, then, provided that the decedent had not objected in writing to the disclosure, the records may be released to an adult son or daughter, a parent of the deceased or an adult brother or sister of the deceased.

Health care facilities are specifically authorized to provide a copy of the records upon payment of the statutory fee and receipt of a signed "Authorized Relative Certification." Apparently, however, the executor or administrator, or an agent under a health care power of attorney, is not required to submit a certification.

Illinois Supreme Court clarifies law regarding restrictive covenants

by Douglas E. Lee

In December, the Illinois Supreme Court ended two years of uncertainty in Illinois courts regarding the enforceability of restrictive covenants – sort of.

In *Reliable Fire Equipment Co. v. Arredondo*, the court reversed an appellate court ruling that refused to enforce a restrictive covenant that was part of employment contracts. In doing so, however, the court overruled two other lower court decisions that had held that restrictive covenants always are enforceable. The court also emphasized – much to the chagrin of employers hoping for certainty – that the enforceability of covenants must be determined on a case-by-case basis.

The primary legal issue in *Arredondo* was whether an employer must have a legitimate business interest in enforcing a restrictive covenant or whether, as the lower courts had recently held, a covenant that was part of a contract always could be enforced. Citing decisions back to 1896, the Illinois Supreme Court said that the existence of a legitimate business interest always has been – and must remain – part of determining whether to enforce a covenant not to compete.

As described by the court, whether a restrictive covenant ancillary to a valid employment relationship is enforceable depends on whether the covenant:

- Is no greater than necessary to protect a legitimate business interest of the employer;
- does not impose undue hardship on the employee and
- does not injure the public.

In further explaining its "three-prong rule of reason," the court rejected bright-line rules that appellate courts have adopted to bring predictability to the issue. Instead, the court said, "each case must be determined by its own particular facts," meaning that the "same identical contract and restraint may be reasonable and valid under one set of circumstances, and unreasonable and invalid under another set of circumstances."

When determining whether an employer possesses a legitimate business interest in limiting an employee's future employment opportunities, the court said, lower courts should consider a number of factors, including "the near-permanence of customer relationships, the employee's acquisition of confidential information through his employment, and time and place restrictions."

Therefore, while the decision in *Arredondo* clarifies the law regarding the enforceability of restrictive covenants, it provides lower courts, employers and employees little guidance as to whether a particular covenant will be enforceable.

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when the salespeople raised their concerns at the staff meeting," Solomon continued. "Further, we concluded that this concerted activity clearly was related to the employees' terms and conditions of employment. Since the employees worked entirely on commission, they were concerned about the impact the Employer's choice of refreshments would have on sales, and therefore, their commissions."

In another case, the Board determined that an employer did not violate the Act when it terminated a bartender who posted messages on his Facebook page criticizing the employer's tipping policy and complaining about the employer's customers. The firing was lawful, the Board said, because the postings did not involve concerted activity.

"Although the employee's Facebook posting addressed his terms and conditions of employment, he did not discuss the posting with his coworkers, and none of them responded to the posting," Solomon explained. "There had been no employee meetings or any attempt to initiate group action concerning the tipping policy or raises."

In the report, Solomon also warned that many employers' social media policies are overbroad and unlawful.

In one policy reviewed by the Board, a hospital prohibited employees from using any social media that might infringe on others' privacy, posting messages that might embarrass, harass or defame a hospital employee and posting any false statement that might damage the hospital's reputation.

After the hospital disciplined a nurse for posting a message critical of another employee's absenteeism and then terminated the nurse for posting a statement critical of the hospital, the nurse reported the hospital to the Board. The Board found the hospital's social media policies violated the Act because they, while potentially well-meaning, unlawfully limited employees' ability to discuss wages and other terms and conditions of their employment.

An employee's social media speech will not lose its protection, Solomon wrote, merely because it is defamatory, false or offensive. False speech, she noted, is protected unless it is "maliciously false." Similarly, cursing and insults are protected unless they are significantly outside the realm of normal workplace conduct.

So far, no employer has challenged the Board's social media positions in court. Some employers therefore are not convinced that the Board's positions will remain good law. Until a court strikes down the positions, however, private employers must be careful when dealing with employee social media speech.

Employee who refuses to follow law still eligible for unemployment benefits

by Douglas E. Lee

An Illinois appellate court recently held that an employee who was fired after she refused to take the lunch break required by Illinois law still can collect unemployment benefits.

In the case, *Smiley v. Illinois Dept. of Employment Security*, the employer specifically directed the employee to take a 30-minute lunch break. While the employee punched out, she kept working and refused to leave her desk. She then got into a shouting match with her supervisor and shortly thereafter was terminated.

The employee's claim for benefits was denied at all three levels within the Department of Employment Security, on the grounds that her refusal to take the required lunch break and her insubordination constituted "misconduct" under the Unemployment Insurance Act. The employee then appealed to the Circuit Court of Cook County, where she finally prevailed.

On appeal, the Illinois Appellate Court for the First District agreed with the trial court that the employee's conduct did not rise to the level of "misconduct" under the Act.

"Misconduct," the court held, "is found where there has been (1) a deliberate and willful violation of (2) a reasonable rule or policy (3) which harms [the] employer or fellow employees."

The employee's conduct in this case did not rise to that level, the court said, because the insubordination had lasted only four minutes, because it was the employee's only act of insubordination in ten years of employment and because the employee had proven to be coachable when other employment problems had arisen. The court also noted that the employee recently had missed three months of work as a result of a stroke that the employee attributed to stressful changes in her job duties.

While courts frequently have defined "misconduct" under the Act in ways that baffle employers, the decision in *Smiley* features a balancing approach that is largely unprecedented. Whether the approach in *Smiley* is an aberration or something other trial and appellate courts will adopt remains to be seen.

In Print and At the Podium

Mr. Lee has been elected to the board of directors of KSB Hospital . . . **Mrs. Considine** currently is serving on the Gala Committee of the Dixon Area Chamber of Commerce & Industry . . . **Mrs. Vivian** recently was a featured speaker at the Illinois State Bar Association Real Estate Law Conference, presenting to other Illinois lawyers about developments in real estate law . . . **Mr. Gehlbach** published two articles in recent issues of the Trusts and Estates newsletter of the Illinois State Bar Association. In the November issue, the article analyzed a recent Illinois appellate court decision on trust law. In the December issue, the article addressed planning opportunities for high-worth individuals to significantly reduce Illinois estate tax . . . In one of **Mr. Lee**'s most recent commentaries for the web site of the First Amendment Center, he analyzed an Oregon federal trial court's decision that a blogger in a libel case was not entitled to the protections afforded journalists in similar cases.

Deals and Decisions

Shortly before he died in July, **Mr. Ehrmann** completed the briefing in his appeal of a local judge's ruling concerning the marital status of certain property. The Illinois Appellate Court for the Second District recently accepted **Mr. Ehrmann**'s arguments, ruled in favor of his client and reversed the local judge's decision . . . During September and October, **Mrs. Considine** completed 20 trials and contested hearings in family law cases . . . **Mrs. Foulker** has been named counsel for the Lee County Council on Aging . . . **Mr. Lee** recently helped a client settle litigation that had been pending for seven years, through a settlement that involved an exchange of franchises and other assets . . . **Mrs. Considine** completed two adoptions for clients, one of which involved prospective parents unrelated to the child and complex paternity issues.