Use of Social Media: Employment Law August 11, 2017

Charles D. Miller, P.C.

Charles Miller, J.D.

Senior Lecturer- UTA College of Business, Department of Accounting

FAIR LABOR STANDARDS ACT-1938

- Minimum wage as reaction to Depression
- “Lifting people out of poverty”

1932-MINIMUM WAGE INTRODUCED 1938-ADOPTED

- US Congress-Used Interstate Commerce Clause as source of power
- 40-hour week; OT for hours exceeding 40
- OT Exemptions-administrative, professional, executive
- Basis: Cost to of food/clothing/shelter to maintain a family of four
- 52 weeks x 40 hours@$7.25=$15,080
- Can you live on $15,080?

FLSA-VERY MUCH AMENDED/DEBATED

- States can exceed federal minimum
- Ongoing battles re “wages” e. g. break time, uniforms, meal periods, etc.
- 800-pound guerilla: “Ripple effect upward” e.g if raise minimum do all wages go up?
- Only US Congress can raise minimum
- Public policy implications e.g. Minimum wage rate in China is $1.75/Hour
- PPP-Purchasing Power Parity?

RESULT OF INCREASING WAGE MINIMUM ?

- Eliminate jobs
- Impacts lower-skilled workers most
- Increases poverty by job elimination
- Loss of “training benefit” of first job experience e.g. self discipline, work ethic, etc.
- How many started first job near minimum wage?

“LIVING WAGE” MOMENTUM

- New York ($15.00/Hour by 2020, $15.00/Hour in NYC by 2018)
- California-$10.00/Hour; $15.00/Hour by 2022
- New Jersey – Legislature increased to $15.00 but vetoed by Governor Christie (but not from closed beach)
- Los Angeles; 7/1/16 became $10.50; $15.00/Hour by 2020
- Washington D.C.-$15.00/Hour by 7/1/2020
- Certainly an easy “campaign promise” to make to constituents
- Is US Congress wiser to not increase-or gridlock?

RESULT…

- Federal courts extremely pro-wage increase by any means e.g. classification issues (e.g. Alexander vs. Fed Ex case)
- US Government-Uses executive branch agency regulatory power to increase “wages” via interpretation and substantive rulemaking at any opportunity.

OVERTIME EXEMPTIONS

- Executive, professional administrative
- Each defined in Regulations
- Test:
  - "Duties test"-Executive/administrative/professional defined in Regulations
  - "Salary level test" e.g. minimum / lagged behind

“CONGRATULATIONS, YOU ARE PROMOTED”

- Mims v. Starbucks case (S.D. Texas) 2007
  - Barista - waited on customers
  - Became store manager i.e. an “executive” with no OT.
  - 20% higher salary, 10-20% bonus, paid sick leave
  - “I want my overtime-doing same tasks -still pouring lattes!
  - 70% of time in his same old “pre-promotion” duties
  - Court-highest paid employee at store, overlap of duties does not mean still an employee!
  - He loses-no OT!

WHITE COLLAR OT EXEMPTIONS-FOCUS ON THE "SALARY LEVEL TEST"

- 2014-President Obama asks US DOL to update regulations re OT for white collar persons
- Federal Register-NPRM in Federal Register Notice given of proposed rules on July 6, 2015
- Minimum annual salary to obtain exemption-Was $23,660 ($455 per week) with proposed rule to increase to $47,476 ($913 per week)

OTHER ISSUES

- Employer can use nondiscretionary bonuses and incentives for up to 10% of salary amount
- Tied to 40% of average full-time salaried worker in census region as justification
- Highest compensated salaried (HCE) employees amount to be at 90th percentile or $134,004
- Automatic adjustments every 3 years to maintain percentile rankings - a new concept.

FINAL RULE ANNOUNCED - MAY 18, 2016

- OT exemption begins at $47,476 annual salary
- Thus - More “exempt employees” now get OT as fewer make over $47,476 i.e. meet “salary level” test
- All “white collar managers, making less than $47,476 will get OT
- Estimated 4.0M to start getting OT as of December 1,2016
- RESULT - Can call them professionals/whatever but not true professionals under Federal Regulations since do not Meet Prong #2 (Salary Level)
- December 1, 2016 was to be effective date of Final Rule.

WHAT HAPPENED?

- Texas Federal district court judge issued nationwide preliminary injunction against Final Rule implementation after November presidential election.
- Department of Labor has asked for delay in implementation of Final Rule three times.
- Secretary Acosta confirmed April 27, 2017.
- Final Rule in limbo. Likely to be changed “Salary test” lowered or ignored as executive department or alleged “over reach abuse” by Obama administration.

NEW ISSUE

- In past, private sector employees had to be paid OT.
- Public sector employees could opt for “comp time” of 1.5 hours.
- May 2, 2017 – U.S. House voted to allow private sector employee same “comp time” option. Also, could change mind within set time (e.g. 30 days) and “cash out”.

DONNA KASMAN v. KPMG

- Class membership expanded with more class members
- Estimated settlement value $250-350 in 2015
- Impossible to know what is going on as an outsider
- Battle of PR firms/press releases
- Class goes back to 2008 on tolling of limitation periods
- www.sanfordheiser.com
- June 2017 – KPMG paid $420,000 to resolve OFCCP investigation of Asian discrimination at Short Hills, NJ offices.
- Today selecting experts and exchanging reports (“Battle of Statistics”)
- OFCCP to merge with EEOC?

LAW FIRMS INCLUDED ALSO

- August 2016 – $100 Discrimination lawsuit by Female lawyer (“all male dictatorship”) filled against Chadbourne & Parke
- August 2016 – Proskauer Rose retained as legal counsel
- June 2017 - Proskauer Rose sued by formal lawyer for discrimination.
- July 2017 – Norton Rose Fulbright (f/k/a Fulbright & Jaworski in Houston) acquired Chadbourne and added as defendant.

DONNA KASMAN vs. KPMG-2011

- Much media attention in accounting industry
- Allegation of gender discrimination and Equal Pay Act
- Class action-1,000 members and “projected” 10,000
- Claims
- Fewer % of females make Senior Manager than industry average
  - Fewer women make Partner than industry average
  - Women managers tracked to non-partnership paths
  - Women paid less

SUMMARY

- Focus-Does client/company have exempt employees (do not pay OT for extra hours) who make between $23,660 and the higher threshold of $47,476? If so, may need to raise salary to “new minimum” under salary level test.

SOCIAL MEDIA AND EMPLOYMENT LAW

- Social media now affects virtually every workplace
- Social media presents legal risks before, during and after employment
- Employers ignore social media at their peril

PRE-EMPLOYMENT CONCERNS

- You can learn a lot from social media:
  - Verify application information
  - Ability to interact with others
  - Judgment
- What could go wrong?

HIRING PROCESS - CYBER-SLEUTHING AND SOCIAL MEDIA SCREENING

Risks of social media screening

- **Exposure to discrimination claims**
  - Decision maker cannot “unsee” information about race, age, religious beliefs, disabilities, etc.
  - Exposure to protects characteristics not readily obvious, such as marital status, family restrictions, transgender transition, etc.
  - Exposure to protected “off-duty” activities.
- **Implicating the Fair Credit Reporting Act**
  - If employer uses a third-party to view social media profiles.
- **Accuracy and authenticity**
  - Cannot verify that the social media is posted by the applicant (i.e., same name but different person).
  - Risk of fraudulent accounts.

HIRING PROCESS - CYBER-SLEUTHING AND SOCIAL MEDIA SCREENING

Minimizing risks associated with social media screening

- Implement a policy.
- Use a screening system.
- Hire a third party to do the screening?
- Look at social media content later in the interview process.
- Keep records.

EMPLOYEE SOCIAL MEDIA USE

Can an employer monitor an employee's social media activity?

EMPLOYEE SOCIAL MEDIA ACTIVITY

Social media snooping

- Is it OK to snoop into someone else's private social media posts? (No!)
- OK to use publicly available information.

Three influential cases

- Konop (9th Cir.) - The federal Wiretap Act does not apply to access of secured websites because it only covers interceptions of information that is being contemporaneously transmitted.
- Pietrylo (DNJ) - Restaurant managers violated federal Stored Communications Act and New Jersey equivalent by coercing employees into giving access to private MySpace group page without authorization.
- Ehling (DNJ) - Employer did not violate Stored Communications Act or National Labor Relations Act (NLRA) where employee wrote private Facebook post critical of employer and Facebook friend saw the post and freely reported it to the employee's manager as an authorized user.

"Authorized User Exception"

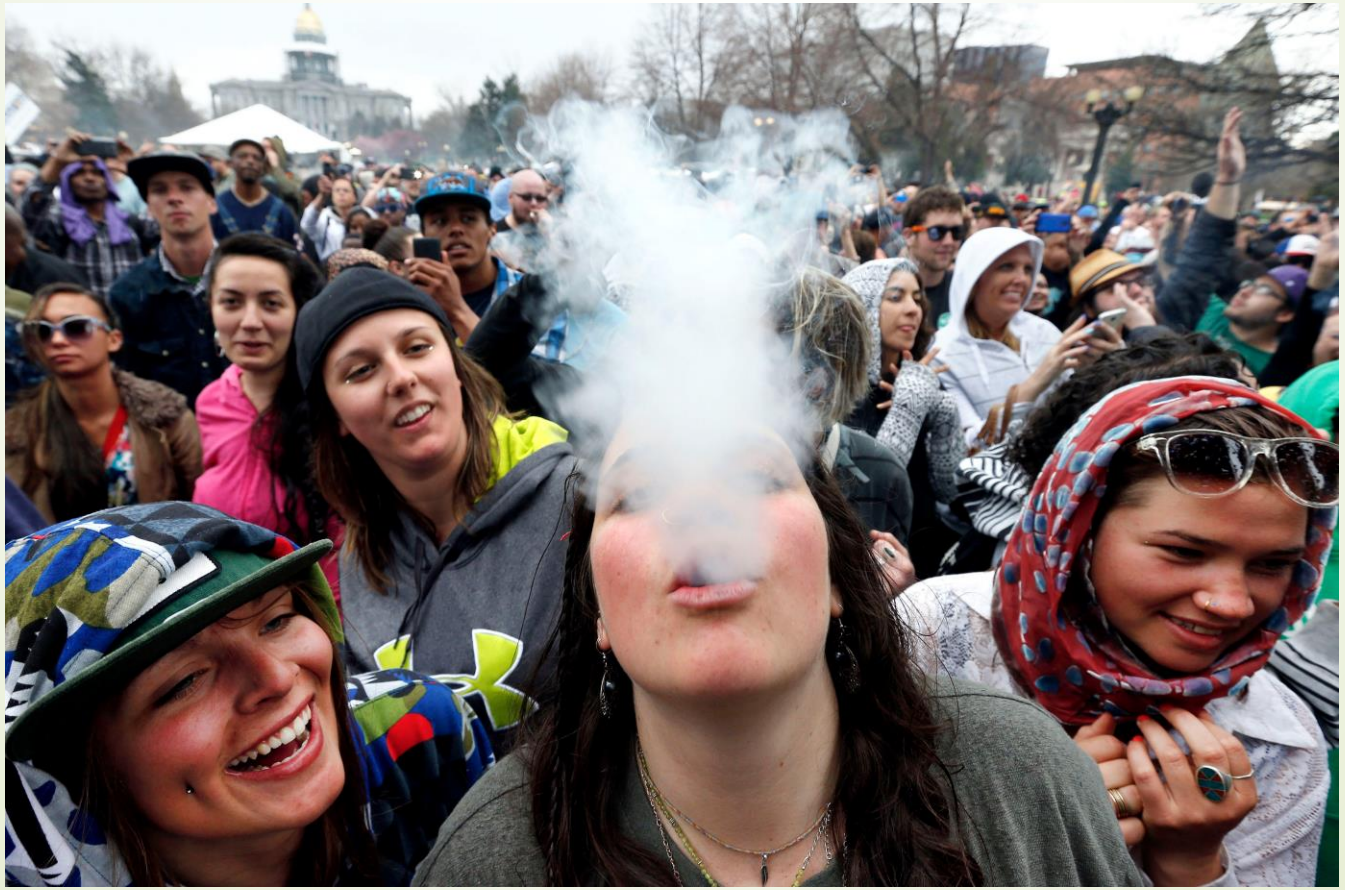
- Consent is KEY.

UTA ATHLETICS DEPARTMENT

- All athletes must allow access to social media accounts as a condition of scholarship receipt.
- Cannot ask for passwords to allow “change of content” to accounts.
- Constantly supervised by compliance staff.
  - Female athlete at grandmother’s ceremony to renew wedding vows pictured on Facebook. Asked by AD Staff to remove photograph.

EMPLOYEE JUST POSTED THIS ON FACEBOOK

Can you rely on it taking adverse employment actions?



OFF-DUTY CONDUCT LAWS

- Twenty-nine states and Washington D.C have some form of law protecting off-duty conduct.
- Texas, Florida, Ohio, Michigan, Pennsylvania do not

OFF-DUTY CONDUCT LAWS

- In Texas, generally yes because use of marijuana is not permitted.
  - Failing to take remedial action could lead to a claim for negligent hiring or retention against the employer down the road.
- Other states also foreclose an employer from taking adverse actions based on lawful conduct that occurs after hours and offsite.
  - E.g., California, Illinois, Wisconsin.
- Answer may vary depending on state.
- Answer will always vary depending on facts!

EMPLOYEE SOCIAL MEDIA USE

Is inconsistent application of social media policy evidence of discrimination?

BEDFORD V. KTBS, LLC (W.D. La. 2015)

- Television station implemented social media policy with provision prohibiting employees from responding to viewer complaints.

- Male on-air reporter wrote a negative post on his Facebook page about a viewer who had commented on one of his stories and was fired.

BEDFORD V. KTBS, LLC (W.D. La. 2015)

- Reporter sued for race and gender discrimination because station had not fired white female employees who had done the same thing.
- KTBS moved for summary judgment.
- Court concluded that station's inconsistent application of its policy created a triable issue of fact for the jury and denied motion for summary judgment.
- The case illustrates the importance of consistently applying social media policies to avoid liability under employment statutes, such as Title VII or the ADA.

EMPLOYEE SOCIAL MEDIA USE

Can you take action against an employee who posts that he and his coworkers are “fed up” with their supervisor and the Company’s policies?

NLRA SECTION 7

"Employees shall have the right:

- to self organization,
- to form, join, or assist labor organizations,
- to bargain collectively through representatives of their own choosing, and
- to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and
- shall also have the right to refrain from any or all such activity…"

PIER SIXTY LLC

- Employees sought to unionize company, and made complaints about supervisor to management
- Supervisor later used a “loud voice” and “raised, harsh tone” during catering event.
- Employee posted on Facebook:

“Bob is such a NASTY M---------- don’t know how to talk to people!!!!! F---- his mother and his entire f-------- family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!”

- Did NLRB determine employee’s comments were protected?

PIER SIXTY LLC

- Yes
- Employee's post was protected discussion of employee mistreatment
- Employee did not lose protection because "vulgar language is rife in [Pier Sixty's] workplace, among managers and employees alike."
- Facebook posts "were not a slur against [Bob's] family but, rather, an epithet directed to [Bob] himself."

TRIPLE PLAY SPORTS BAR AND GRILLE (2d Cir. 2015)

Former employee posted:

- employer “can’t even do the tax paperwork correctly!!! Now I OWE money . . . Wtf!!!”

- Several other former employees also responded that they owe money, purportedly because of employer’s mistakes.
- Current employee “liked” original comment and was fired for disloyal conduct.
- NLRB found that pressing “like” on Facebook was protected activity under the NLRA.

TRIPLE PLAY TAKEAWAYS

- An employee's negative comment online may not constitute disloyalty, especially if there is no mention of the employer's products or services.
- While an obscene comment made in the physical presence of customers may cause an employee to lose her NLRA protections, a similar comment made on social media may remain protected, even if customers view the social media comment.
- Employers should continue exercising caution to avoid drafting overly broad social media policies.

FEDERAL TRADE COMISSIONS (“FTC”) REGULATION

- In 2009, the FTC updated its Guides Concerning the Use of Endorsements and Testimonials in Advertising.
- FTC released updated Dot Com disclosures in 2013.
- Employers may find themselves facing an FTC enforcement action based on their employee’s online activities.

FEDERAL TRADE COMISSIONS REGULATIONS

- Employees must disclose clear connection.
- Disclosure must be clear and conspicuous.
- Disclosure must be of typical results.

DEUTSCH LA., INC.

- Deutsch LA was marketing on behalf of Sony's PlayStation Vita, a gaming console
- Deutsch employees were called to log on to their personal Twitter accounts and to tweet #gamechanger with positive comments.

DEUTSCH LA., INC.

- FTC alleged the tweets were deceptive because they appeared to be endorsements from actual users of the PlayStation rather than employees of Sony's ad agency.
- Deutsch and Sony settled with FTC.
- Sony's settlement involved providing cash or credit refunds or merchandise vouchers.

CDM Media v. Simms (N.D. Ill. 2015)

- Marketing company and employee had noncompete with confidentiality clause.
- Company launched “CIO Speaker Bureau” for CIOs interested in speaking at Company events.
- 679 members comprising Company’s customers and potential customers.
- Employee listed as contact person for LinkedIn account.
- After resignation, employee refused to change contact information or provide membership list and other communications.
- Breach of contract?
- Theft of trade secrets?

CDM Media v. Simms (N.D. Ill. 2015)

- Court denied defendant employee's motion to dismiss breach of contract and trade secret claims.
- Court held that if member communications were private messages to the employer, they are likely covered by confidentiality agreement.
- Court also refused to dismiss claim that membership list was trade secret under Illinois state law.

CONTENT CAN BE OWNED BY COMPANY OR BLOGGER

FACTORS:

- Who created or managed
- Industry
- Information known about followers
- Subject matter sent from account
- Policies or agreements bearing on account ownership

- Be proactive.
- Written agreements to define:
  - Who owns employer related social media accounts.
  - Who owns the information generated by and contained in social media accounts.
  - When and how such accounts may be used.

SOCIAL MEDIA SOLICITATIONS

Can posting on social media constitute solicitation of customers or employers in violation of an individual's non-solicitation agreement with a former employer?

CORPORATE TECHS., INC. V. HARNETT (1st Cir. 2013)

- Employment Agreement prevented employee "'solicit[ing], divert[ing] or entic[ing] away existing [CTI] customers or business' for a period of twelve months following the cessation of his employment."
- Employee left after a year and sent out a blast email that announced his new place of employment to a targeted list of recipients, 40% of whom were (or had been) Corporate Tech customers.
- Employee had numerous interactions with customers after initial contact.
- Court found Employer was likely to succeed in showing that Employee violated the Agreement because Employee's conduct could be construed as "enticing" customers away from Corporate Tech.

SOCIAL MEDIA POLICIES

- Novartis
- Coca-Cola
- Social Security Administration
- Adidas
- All the above are easily available online.

TBD