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Limits on Employer Access to Personal Social Media

by Carina L. Wilmot

Montana law limits employer access to an employee's personal social media. Mont. Code Ann. § 39-2-307. "Personal social media" means a password-protected service or account, such as email, messaging, website profiles, and online accounts, among other password-protected services or accounts. Employers may not require or request an applicant or employee to disclose a user name or password, to access personal social media in the employer's presence, or to divulge any personal social media or information contained within it. Montana's personal social media statute does not limit the employer's right to access employer-issued electronic devices. Nor does it apply to social media accounts opened for and intended solely for educational purposes or accounts opened for or provided by an employer and intended solely for business-related purposes.

Exception for Misconduct or Investigations: Employees must provide their user name or password to personal socia media to employers when the employer: (1) has specific information about an employee's activity that indicates work-related misconduct or criminal defamation; (2) has specific information about the unauthorized transfer of the employer's proprietary or confidential information, trade secrets, or financial data to a personal online account or service; or (3) is required to ensure compliance with federal laws, regulatory requirements, or rules of self-regulatory organizations; and when an investigation is under way and the employee's information is necessary to make a factual determination in the investigation.

Violations: If an employer makes a request or demand that violates § 39-2-307, and the employee does not comply, the employer may not retaliate or take adverse action against the employee. Employees may also have a cause of action for related statutes regarding privacy in communications and, if the employer is involved in a computer security breach, Montana's Consumer Protection Act.

Civil discovery: In a worker's compensation claim investigation, an employer was allowed to make a discovery request for private social media posts in an effort to obtain information relevant to whether the employee could use her hands, engage in physical activity, and work. TB v. MSF, Worker's Compensation Court Claim 2015-3535 (September 29, 2015). Discovery rules still allow an employer to request in discovery private, personal social media posts necessary to make factual determinations in a civil matter.

Best Practice Recommendations: We recommend employers review their employee handbook and policies regarding personal social media to ensure compliance with the limits on access to personal social media. Employers should take § 39-2-307 into consideration before requesting access to employee personal social media accounts for any reason.

Seasonal Employees Subject to New Probationary Periods Per Policy

by Daniela E. Pavuk

Mark Dundas was a seasonal employee with Winter Sports, Inc. (WSI) for each winter season from 2003 to 2014. WSI again hired Dundas for the 2014-2015 winter season. Dundas had also applied for other positions with WSI, but was not hired for those. Dundas sent an email to management expressing his "very low opinion" of the CEO and another manager. Dundas used profane statements to coworkers when discussing his job and his superiors. WSI terminated Dundas because of his insubordinate and inappropriate behavior.

Dundas sued WSI for wrongful discharge under Montana's Wrongful Discharge from Employment Act (WDEA). Dundas alleged that WSI lacked good cause to terminate him; that WSI failed to follow its written personnel policies; and that WSI terminated him for refusing to violated public policy or for reporting violations of public policy. Mont. Code Ann. § 39-2-904(1)(a) – (1)(c).

District Court Awards Summary Judgment to WSI: WSI moved for summary judgment. WSI argued Dundas was terminated during his probationary period, which meant WSI could terminate him for any reason or no reason at all. WSI's employee handbook included a written policy stating that rehired seasonal employees "are considered a new employee for all purposes." WSI's employee handbook also included a six-month probationary period. Dundas disagreed, and argued he was in "continuous employment" at WSI since 2003 and that he satisfied the six-month probationary period long ago.

The district (lower) court granted WSI summary judgment because Dundas could not establish a wrongful discharge claim because he was a probationary employee who could be terminated for any reason or no reason. Mont. Code Ann. § 39-2-904(2)(a). Dundas appealed.

The Montana Supreme Court affirms (upholds) the District Court Decision: With few exceptions, the WDEA is the exclusive remedy under Montana law for an employee to recover damages for wrongful discharge. The Montana Supreme Court has held that one of the purposes of the WDEA is to protect employees from wrongful discharge ***after*** the completion of their probationary period. Montana law is clear that ***during*** an employee's probationary period, either the employer or the employee may terminate the relationship at will for any reason or no reason. Mont. Code Ann. § 39-2-904(2).

The Montana Supreme Court rejected Dundas' argument that his employment was "continuous" because it contradicted WSI's express handbook policy relating to the temporary period of seasonal employment. The Court agreed with the District Court that there was no reason to construe the plain language in WSI's employee handbook "in any other way than as it is written." The policy clearly stated that a seasonal re-hire is a new employee for all purposes, which included for the purposes of the probationary period.

The Court also rejected Dundas' public policy violation because Dundas failed to produce any evidence that demonstrated any constitutional provision, statute or administrative rule that WSI violated or that he reported. *See* Mont. Code Ann. § 39-2-903(7) for definition of "public policy."

Employer Takeaway: If you employ seasonal workers, consider a clearly worded written policy that specifically states employment terminates at the end of the temporary period, and that if a seasonal employee wishes to be considered for re-hire, they are considered a new employee for all purposes.

Recent Developments in the Law: Montana's minimum wage increased to $8.30 as of January 1, 2018.

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The National Labor Relations Board Overruled *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). *Lutheran Heritage* expressed the Board's previous standard governing whether facially neutral workplace rules and employee handbook provisions unlawfully interfere with the exercise of rights protected by the National Labor Relations Act (NLRA). The previous standard found that employers violated the NLRA if their workplace rules were "reasonably construed" by an employee to prohibit the exercise of NLRA rights. The new standard is: Applying a reasonable interpretation, the Board will evaluate whether a facially neutral policy, rule or handbook provision potentially interferes with the exercise of NLRA rights. The Board will evaluate: (1) the nature and extent of the potential impact on NLRA rights, and (2) legitimate justifications associated with the rule. Applying the new standard, the Board concluded that Boeing lawfully maintained a no-camera rule prohibiting employees from using camera-enabled devices to capture images or video without a valid business need or approved camera permit. The Board majority reasoned that, while the rule potentially impacted NLRA rights, the impact was slight and was outweighed by important justifications, including national security as Boeing designs and manufactures military aircraft for the federal government, some that is classified.

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