An Employer’s Right to Control and Use Social Media

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Disciplining/Terminating Employees Who Misuse Social Media

There are many scenarios that may prompt an employer to discipline or terminate an employee for his or her social media use. The most obvious situation is an employee who engages in illegal web-based activity while at work. Another common scenario is an employee who spends the majority of his or her on-duty time using social media sites having nothing to do with his or her job responsibilities.

Other situations may include employees who criticize a supervisor or client, post distasteful photos or videos, or call in sick and then tweet about being out and about. In the healthcare industry, an employee’s social media activity can be particularly troubling, such as when an employee decides to post information about patients on social media.

Before deciding to take an adverse employment action against an employee based on his or her social media use, employers should consider whether there are legal constraints preventing or limiting such action, as well as practical considerations. Some of the legal constraints and practical considerations employers must consider include:

Does the employer have a legal right to be viewing the employee’s activity?

Technologies exist that permit the tracking of keystrokes on a keyboard, enabling an employer/manager to discern an employee’s username and password to online accounts. Less technologically savvy employers/managers might

simply approach, pressure or otherwise obtain access from an employee's co-worker(s), who may be friends or connections of friends, of the employees.

In the first scenario, the employer runs the risk of violating the Stored Communications Act ("SCA"), which generally prohibits accessing the online account of another without that individual's consent. The second scenario can also raise SCA issues, as well as potential violations of common law privacy torts (e.g., intrusion upon one's seclusion). And, of course, as noted above, simply asking employees for the passwords to access their social media or online account generally is impermissible in many states.

Additional concerns arise if the employer permits employees to utilize their own personal devices for work activity. Typically called "bring your own device" ("BYOD") programs, an employer's ability or "right" to access information on the mobile device may be diminished when the device is owned by the employee.

Could the employee be protected under a whistleblower statute?

Federal and state whistleblower laws may protect employees who complain about certain company activities or conditions affecting public health and safety or violating public policy standards, as well as employees who report potential securities fraud violations.

Was the communication related to political activities or affiliations?

Many states prohibit employers from regulating employee political activities and affiliations or influencing employees' political activities. Taking action against an employee for objectionable political speech could violate these restrictions.

Was the employee engaging in illegal activity or "lawful off-duty activity" protected by state law?

As discussed above, some states protect employees from adverse employment action on the basis of their engaging in lawful activities when not at work. Thus, in some states, an employer may be prohibited from terminating an employee who, for example, posts pictures of himself intoxicated at a party (assuming the employee is over 21 years old).

In contrast, the employer may have more leeway where the conduct is illegal. However, even where conduct appears to be illegal, the employer may still need to take additional steps to investigate and consult with counsel before taking any action. For example, in California, employers are prohibited from excluding someone from employment based solely on an arrest, marijuana convictions more than two years old, or convictions that have been expunged or dismissed. The law is far from clear in this area, and employers should consider each situation independently.

Does the employee have a potential discrimination claim?

As noted above, employers are prohibited from unlawfully discriminating against employees as well as applicants on account of protected characteristics, including race, age, sexual orientation, marital status, disability and genetic information. An employee's manager may learn from an employee's Facebook status, for example, that the employee is pregnant. In this case, the employer cannot fire the employee on account of the pregnancy or otherwise take adverse action against the employee.

Wrongful termination claims

An employer may also face wrongful termination claims for an allegedly improper termination decision in connection with social media use. For example, employers (including non-union employers) need to be mindful of the recent interpretations of the National Labor Relations Act ("NLRA") concerning protected concerted activity rights related to social media policies and employee discipline pertaining to social media activity, which are discussed in detail below.

Does the employer make things worse by trying to make things better?

Consider discovering social media activity that addresses your workplace, refers to high level persons in your company and makes troubling allegations, but you cannot determine who is responsible for the posts or immediately confirm

whether the allegations are true. Should you start questioning employees potentially responsible or named in the posts, or conducting forensic investigations? Maybe. The decision will, of course, turn on the facts and circumstances, but one course of action that ought to be considered is doing nothing. Frequently, the person responsible for the social media activity is simply seeking attention, and if the person does not get it, he or she may just move on to another topic.

Ultimately, hiring, disciplining and firing are all critical parts of the employment relationship, and what is appropriate social media use in one workplace may not be in another. An employer relying on web-based information to make these decisions should be aware of potential legal repercussions and consult with legal counsel to manage the risks inherent in any adverse employment decision.

Labor Relations Considerations

The NLRA affords employees (even those who are not unionized) the right to engage in "concerted activity," including the right to discuss the terms and conditions of their employment, (and even to criticize their employers), with coworkers and outsiders. Not all concerted activities are protected by the NLRA; only those activities that are engaged in for the purpose of collective bargaining or other mutual aid or protection are covered.

What is Concerted Activity?

In general, concerted activity is activity "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where individual employees bring "truly group complaints" to management's attention. However, the Labor Board has held that individual employee gripes are not concerted activity.

When is Concerted Activity Protected?

An employee's concerted activity will be protected under Section 7 of the NLRA where, for example, the employee's statements implicate the employee's working conditions, regardless of how those statements are communicated. Another example of protected activity under Section 7 occurs when the employee protests supervisory actions. However, these protections can be lost where the employee's outbursts about a supervisor are too "opprobrious" to maintain protection under Section 7. The use of curse words or expletives alone is unlikely to reach this level.

Protection also could be lost where the communication is disloyal or has the tendency to damage an employer's business *and are made with reckless disregard of the truth or are maliciously untrue*. What exactly constitutes protected concerted activity requires further examination and analysis of the facts at issue on a case-by-case basis.

Decisions from the National Labor Relations Board ("NLRB"), the government agency charged with interpreting the NLRA, shed some light on what constitutes protected concerted activity in the social media context. In one decision, for example, the NLRB held that the employer acted unlawfully when it discharged two employees who made comments on Facebook about terms and conditions of employment, including the conduct of their supervisor, because such protests constituted protected concerted activity.

Whereas in another case, the NLRB ruled that an employee who communicates an "individual gripe rather than any shared concerns about working conditions" has not engaged in protected concerted activity.

The NLRB has also found certain policy language regarding employee social media use to be problematic, including the following:

- Prohibiting posts discussing the employer's non-public information, confidential information, and legal matters (without further clarification of the meaning of these terms);
- Prohibiting employees from harming the image and integrity of the company, making statements that are detrimental, disparaging or defamatory to the employer, and prohibiting employees from discussing workplace

dissatisfaction;
- Prohibiting posts that are inaccurate or misleading or that contain offensive, demeaning or inappropriate remarks, and instructing employees to use a friendly tone and not engage in inflammatory discussions;
- Requiring employees to secure permission prior to posting photos, music, videos, quotes and personal information of others;
- Prohibiting the non-commercial use of the employer's logos or trademarks;
- Discouraging employees from "friending" co-workers;
- Prohibiting online discussion with government agencies concerning the company;

- Encouraging employees to solve work problems in the workplace rather than posting about such problems online; and,

- Threatening employees with discipline or criminal prosecution for failing to report violations of an unlawful social media policy.

On the other hand, the NLRB has found a social media policy that prevented "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct" to be lawful "since it prohibit[ed] plainly egregious conduct, such as discrimination and threats of violence."

Additionally, the Acting General Counsel determined that an employer's social media policy preventing the dissemination of trade secrets and confidential information was lawful where the policy provided numerous examples of what specifically should not be disseminated, such as system development information, processes and internal reports. By providing these examples, the Acting General Counsel found that employees would "understand that it does not reach protected communications about working conditions." Employment decisions based on these types of social media activities, then, are likely to be deemed lawful.

Article provided by the Jackson Lewis law firm.