Employee Discipline for Social Media Posting Contrary to Company Values

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From the political campaigns of 2024 through the recent tragedy of the assassination of Charlie Kirk, public discourse on social media has been active, and often provocative, divisive and offensive. We see the outpouring of opinions and arguments covering an endless variety of social, economic and political subjects. We may have interest when a friend or family member posts, or a myriad of reactions when the post comes from a public figure. But, when we are an employer and the posting involves our employees, our reactions may include consideration of added questions like possible discipline or even discharge of the posting employee. When an employee's public post can be perceived as offensive or politically inflammatory, a business may face public backlash or even organized boycotts. For this reason, employers may be inclined to take prompt adverse action and avoid the risks of employee disharmony, creation of a hostile work environment, failing to meet customer expectations, and suffering damage to the reputation of the company. This is more than understandable in a market dominated by at-will employment.

Even when social media posting is done outside of work, employers may have serious, legitimate concerns about the social media activities of employees. For purposes of this brief report, our focus is limited to the private sector without the constitutional free speech constraints applicable to state action. Private sector employees will rely most often on state statutes, anti-discrimination laws and contractual protections to avoid or challenge discipline based on social media posts. An employer's other employees, business partners, and customers may see the posts of the employee and regard them as inflammatory or simply in conflict with their own views. An employer can understandably regard controversial messages from its employees as being in poor taste, culturally alarming or, in one way or another, "bad for business." But when an employer initially considers an employee's social media posts to be cause for discipline, it is wise to evaluate appropriate factors

before acting.

The National Labor Relations Act

Social media communications from employees that address wages, benefits and working conditions at the company may be legally protected as concerted activity under the National Labor Relations Act ("NLRA"). The National Labor Relations Board, which is again in transition under the new administration, may interpret employees' social media posting as protected activity and make it unlawful for the employer to discipline based on that post. As such, employers must carefully evaluate the posting to avoid potential unfair labor practice charges. With unionized employees having "just cause" protections under a labor agreement, employers should also be prepared to show a connection between the employee's off-duty posting and a legitimate business interest before taking any disciplinary action.

Misidentification and Artificial Intelligence

Employers must also confirm that the employee subject to discipline *actually shared* the post at issue. In the current AI environment, combined with hacking and other electronic intrusions, deception on social media is abundant. Therefore, employers should consider misidentifications and reasonably verify that the message legitimately came from an employee before acting. Though absolute certainty may not be possible, due diligence must always be exercised.

Company Social Media Policies and Evenhanded Enforcement

When disciplinary action is considered, the employer must take full account of the company's policies that cover such behaviors and the past practices followed when confronted with other employees' social media posts. Employers should have social media policies. These policies should inform employees of the boundaries of social media in the workplace, and those boundaries should be lawful. The policies should provide clear guidance on what conduct is prohibited and clearly describe the consequences for an infraction. Employers making adverse employment decisions will have more compelling defenses when the prohibitions have been stated clearly in advance in writing provided to the employee. Creating clear, reasonable expectations for the employee about social media behaviors that are disfavored or prohibited will often prevent the unwanted behavior.

If an employee violates the policy, employers should ensure to enforce the policy consistently with prior actions or inactions. Discipline is more fair, justifiable, and defensible when the employer can point to a clear company policy and a past record of equal enforcement. On the other hand, inconsistent applications of such policies can result in hostile employees, discrimination claims, and even more negative effects on the business.

As an employer's social media policies are drafted it is advisable to account for the law of the jurisdiction. Some states have laws that protect employees' off-duty political activities and speech, so employers' social media policies must account for these variations. For example, California, New York and Colorado have statutes protecting private sector employees who engage social media for their political activities and expressions. However, these jurisdictions typically do not protect social media posting that amounts to hate speech, calls for violence, or makes direct threats against co-workers.

Anti-discrimination and anti-retaliation laws are also relevant when drafting and enforcing social media policies. Federal and state laws prohibit discrimination and retaliation against employees on the basis of race, religion, and national origin, among other protected characteristics. When social media communications discuss affirmative action, Middle East conflict, or immigration, the discipline may implicate protected groups and attract scrutiny from federal and state regulators. To avoid possible conflicts, employers should include a purpose statement in their social media policy that defines the legitimate business interest underlying the policy's creation and enforcement. Employers should also notify employees that nothing in the policy is meant to conflict with or reduce the employees' protections under other applicable state or federal laws.

Conclusion

Employers are routinely focused on employee morale and building a culture of fairness. Their social media policies and related discipline should bolster the preservation of a culture of fairness. When social media related discipline is excessive or unduly harsh, it can spawn negative employee reactions and harm the workplace culture. When employee social media posts are troubling to the employer and discipline is considered, it is best to evaluate the specific content and context of the post. How would other employees react if they discovered that the offending employee was disciplined? Similarly, as an employer considers the possible reactions of customers and other constituents of the company and wants to avoid condoning an insensitive or offensive employee posting, pursuing balance and reasonableness may help avoid a negative customer response to publicity about harsh discipline of a company employee.