



Hidden Shoals:

Social Media Invades the Workplace

Thompson Coburn's Annual Labor,
Employment and Employee Benefits Law Seminar

Agenda



- Trends in Employee Social Media
- Employer Social Media Use and Policy Issues
 - Protected Concerted Activity
 - Risks and Limitations
- Takeaways
- Questions and Discussion

Recent Trends



Media

The Associated Press terminates n

Bourne school board member fired aching job after

They Criticized the NYPD, Then Their

CULTURE

'Cheap': Employee Dragged for Sending Coworker's Social Media Post to Boss

BY TAYLOR MCCLOUD ON 2/22/22 AT 6:12 PM EST

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Harris' suit to UPS uniform

By Lee Brown

April 5, 2022 | 1:45pm | Updated

PDATED THU, MAR 17 2022·3:51 PM EDT

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Hypotheticals:

Can these employees be disciplined for their conduct?

Scenario #1:



An off-duty employee attends a “politically charged” protest and posts photos and commentary online while wearing a Company logo shirt. Her employer’s website is inundated with posts identifying the person and demanding that they be fired.



Scenario #2:



Luxury car dealer hosted event to introduce new car model. Employees discussed unhappiness with the event. One employee posted the following on Facebook:

- “I was happy to see that [employer] went ‘All Out’ for the most important launch of a new BMW in years . . . A car that will generate tens of millions of dollars of revenues for [employer] over the next few years. The small 8 oz. bags of chips, and that \$2.00 cookie plate from Sam’s Club, and the semi fresh apples and oranges were such a nice touch . . . But to top it all off . . . The Hot Dog Cart. Where our clients could attain an over-cooked wiener and stale bun.”

Scenario #3:



A part-time paint store employee posts viral TikTok videos of paint mixing. A company investigation determined he was making the videos on company time and with company equipment.

The employee says he was motivated by a desire to demonstrate how the store could market its products online.

Scenario #4:



New bartender, close friend of the GM, was charging customers for premium liquor but giving them standard liquor. Another bartender posted on Facebook that the new bartender was “screwing over” the customers. She also posted that dishonest employees, along with a management that looks the other way, will be the death of a business. Two co-workers agreed.

Scenario #5:



Jane was recently hired by Beauty Supply, a beauty product store. Shortly after she was hired, she posts on social media that she was “dress-coded” at her new job. She also posts the text “hot girls get dress coded at work” while posing for the camera and showing off her outfit. She finished the video by sticking her two middle fingers up at the camera. Management did not approve of the color and the distressed nature of Jane’s outfit and it was not in accordance with their dress code. Jane gets many likes and comments supporting her dress. Management fires Jane. Was Beauty Supply justified?

Scenario #6:



Joe, a male employee at Beauty Supply, comes to work with distressed jeans in violation of Beauty Supply's dress code. He also posts to his social media site the following message: "I wear these distressed jeans to stress my pay. #holesinmypockets." He films the video at work. Beauty Supply fires him because he filmed it at work. Was Beauty Supply right to discharge Joe?

Legal Considerations

Social Media Policy Issues



- A wide range of state and federal statutes may apply to employee social media use:
 - National Labor Relations Act (NLRA)
 - Anti-Discrimination Laws
 - State Off Duty Conduct Laws
 - First Amendment (public employees)

Protected Concerted Activity



- Section 7 of NLRA protects “concerted activity”
 - When two or more employees take action for their mutual aid or protection regarding terms and conditions of employment
 - This applies to Union and non-Union employers, but not public employers
 - A single employee may also engage in protected concerted activity if he or she is acting on the authority of other employees, bringing group complaints to the employer’s attention, trying to induce group action, or seeking to prepare for group action

Protected Concerted Activity



NLRB's Position Re: Social Media:

- Employees have the right to address work-related issues and share information about pay, benefits, and working conditions with coworkers on Facebook, YouTube, and other social media. This can include some, but not all, issues that may be considered political or interest-group driven
- An employee individually griping about some aspect of work is not 'concerted activity.' To be protected by Section 7, what employees say online must have some relation to group action, or seek to initiate, induce, or prepare for group action, or bring a group complaint to the attention of management

Protected Concerted Activity



The “Like” Button:

- Clicking the “Like” button in response to on-line discussion of alleged payroll tax mismanagement by the employer “was sufficiently meaningful as to rise to the level of concerted activity”
- *Triple Play Sports Bar and Grille* found that employer unlawfully discharged 2 employees



National Labor Relations Act



- Basic Rules
 - Employees cannot be terminated for engaging in protected, concerted conduct, i.e., “conduct with or on the authority of other employees, and not solely by and on behalf of the employee himself”
 - Where it is in dispute whether discipline was motivated by concerted activity or by an employee’s abusive conduct, causation is at issue and *Wright Line*’s burden shifting framework is applied. *General Motors*
 - Disparaging comments about employers lose protection if unrelated to a labor issue/dispute or “disloyal, reckless, or maliciously untrue.” *Jefferson Standard*

Off-Duty Conduct Statutes



Many states have enacted laws prohibiting employers from discriminating on the basis of an employee's lawful off-duty conduct (for example, California, Illinois, Missouri, and New York).

These laws vary in specificity. They generally protect an employee's participation in recreational or leisure activities during personal time, such as tobacco use, consuming alcohol, possessing firearms, or engaging in political activities.

Off-Duty Conduct Cont'd



Illinois 820 ILCS 55/5(a):

“Except as otherwise specifically provided by law, . . . it shall be unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual uses lawful products off the premises of the employer during nonworking and non-call hours. . . .”

Off-Duty Conduct Cont'd



Missouri's R.S. Mo. § 130.028(1):

Prohibits employers from “discriminat[ing] or threaten[ing] to discriminate against any employee in this state, with respect to his or her compensation, terms, conditions or privileges of employment by reason of his political beliefs or opinions.”

First Amendment



- Applies only to public employees.
- Speech is protected where the employee speaks as a private citizen about a matter of public concern and the employee's free speech interests outweigh the employer's efficiency interests.

April 1, 2022
5:01 PM CDT
Last Updated 9 days ago

Employment

Appellate

Firefighters' Facebook post critical of union official is free speech, says court

By Daniel Wiessner

Monitoring Social Media

Anti-Discrimination Laws



Depending on the size of the employer, the following federal anti-discrimination statutes may apply:

- Title VII of the Civil Rights Act of 1964 (Title VII)
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act
- Section 1981 of the Civil Rights Act of 1866 (42 U.S.C. § 1981)
- Equal Pay Act
- Genetic Information Nondiscrimination Act (GINA)
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
- Immigration Reform and Control Act of 1986 (IRCA)

Social Media in Hiring: Risks



- Viewing a prospective employee's social media during the hiring process can reveal information about protected class status, union affiliation or support, or off-duty conduct that can later become the basis for a discrimination or unfair labor practice claim
- Making hiring decisions based on the lack of a social media presence may implicate age discrimination
- Using targeted advertising to post a job on social media may create an appearance of discrimination against a non-targeted group

Social Media Policies

NLRA: Handbook Policies



Handbook Policies Under the NLRA:

- Policies that expressly restrict Section 7 concerted activity are illegal
- Facially neutral policies are subject to a two-factor balancing test to determine legality:
 - 1) The rule's potential impact on protected concerted activity;
 - 2) The employer's legitimate business justification(s) for the rule.

NLRA: Handbook Policies



Under the current standard, the Board has proffered three categories of handbook provisions under the Act:

- 1) Generally lawful rules (no NLRA interference or employer interests outweigh potential NLRA impact)
- 2) Rules requiring individual scrutiny (rule interferes with NLRA rights but is that interference outweighed by legitimate employer justifications); and
- 3) Generally unlawful rules

NLRA: Handbook Policies



The Board's General Counsel recently filed a brief urging the board to return to its previous "*Lutheran Heritage*" rule governing facially neutral policies.

Under *Lutheran Heritage*, facially neutral policies were held unlawful if "employees would reasonably construe the language to prohibit Section 7 [concerted] activity."

Social Media Policies



- Be intentional; one size does not fit all, but Board-approved policies can be informative
- Avoid generalities so as not to chill protected conduct; include specifics. *Medic Ambulance*
- Connect policies to legitimate business interests
- Prohibit employee social media posts that identify the employee's relationship to the employer

Social Media Policies Cont'd



- Be clear about whether use of social media on employer's IT resources is encouraged, prohibited, or simply tolerated
- Note that all other policies and employee obligations that might apply to social media use remain in force
 - E.g. reference policies prohibiting discrimination, harassment, and retaliation
- Prohibit defamation and non-Section 7 disparagement through use of social media

Social Media Policies Cont'd



- Prohibit employees from disclosing or misusing confidential or proprietary information
- Inform employees that employer's electronic information communication system is not private
- Consider a Disclaimer
 - E.g.: “These Guidelines do not prohibit employees from discussing among themselves or others their wages, benefits, and other terms and conditions of employment or workplace matters of mutual concern.”

Additional Considerations



- Asking someone with access to view and/or monitor an employee's private profile
- Supervisors and managers "friending" or "following" employees' social media pages

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Discipline for Social Media Posts



- Take Away:
 - Tread lightly when terminating for negative social media posts
 - Posts that are mere personal gripes are typically not concerted/protected
 - Posts appearing to express thoughts of group or seeking support from others are concerted/protected
 - Current efforts to shift in the direction of more employee-friendly interpretations

QUESTIONS?

Further Discussion