Five Social Media Employer Mistakes to Avoid

Social media has been and will continue to be an issue for employers. It has become the way people, especially Millennials, who make up a significant amount of the restaurant-industry workforce, communicate. When most employers think about social media in the workplace, they tend to think solely in terms of the high-profile social media firing cases where employers have terminated employees for posts made on social media. While social-media based discipline is certainly an issue for employers, there are a number of other social-media related issues that employers should be aware of. In this piece, five are addressed, starting with the most familiar and common offender, social media discipline.

1. Disciplining/Terminating Employees for Social Media Posts

Social media-based discipline concerns two issues: (1) employer policy; and (2) content. In many circumstances, an employer may discipline an employee for social media posts, including for posts that may negatively impact the employer's business, goodwill or that disclose confidential information, etc. Some social media communication, however, is legally protected, meaning an employer could get in a lot of hot water with a court or the National Labor Relations Board (NLRB) for disciplining an employee for making protected post.

This issue became a major focus for the Obama-era NLRB, which greatly expanded its oversight over the social media issue, and held a number of employers liable for illegal policies and employee discipline. To do this, the NLRB relied on Sections 7 and 8 of the National Labor Relations Act (NLRA), which grant employees (union and non-union alike) broad protection to engage in concerted protected activity, such as discussing work conditions; complaining about the terms and conditions of employment; and discussing wages, hours, safety, etc., on social media. For the most part, employee discipline in this area has been tied to the violating of a workplace rule or policy. Due to the tie in to policy, the NLRB's method for reversing discipline was to strike down employer social media policies after finding them too broad so that a reasonable employee would read the policy to prohibit protected concerted activity. For this reason, employers should take the following steps regarding social media discipline:

- Policy Implementation and Review: Employers should have a social media policy, and ensure their policy complies with the NLRB's directives on what can be and cannot be included in an employer's social media policy. It will be interesting to see what the NLRB will do under the Trump Administration as many believe the NLRB's hard line regarding social media policies will retract.

- Discipline: Prior to disciplining an employee for violating a social media policy, employers should look at the entire content of the conversation at issue, not just an isolated post, and determine if any part of the conversation discusses a protected topic or could otherwise be construed as concerted activity prior to taking any disciplinary action.

In the grand scheme of things, this is a fairly easy issue for employers to get their heads wrapped around. Communications that discuss work conditions or that register as complaints for discrimination or harassment would most likely be viewed as protected. Posts that: (1) disclose an employer's confidential information or trade secrets; (2) constitute hate, harassing or threatening speech; (3) constitute discriminatory, harassing or obscene speech; (4) admit criminal or unethical conduct; (5) are in violation of the employer's anti-discrimination or anti-harassment policies; (6) that threaten the employer's goodwill or reputation by complaining about customers; or (7) that indicate that the individual is not suited for their position, are not protected.

2. Following Employees

A host of issues can arise when managers/supervisors become friends or follow subordinate employees on social media and, similarly, when co-workers become friends or follow other co-workers. In the context of a supervisor following an employee, the supervisor (who represents the employer regardless of whether the supervisor is off-duty when engaging on social media) may see information about the employee that, if used in the wrong way, could constitute illegal discrimination or retaliation. The protected information at issue includes an employee's race, ethnicity, or national origin information; religious affiliation; medical history or genetic information; age; military status and other categories of protected information. While some of this information may already be known to an employer, some may not. In the event an employer disciplines an employee, the employee could claim the reason for the discipline was because of the protected information the employee's superior saw on via social media, regardless of whether the supervisor actually did.

The other issue is with co-worker/co-worker social media connections. Not only can these types of connections pit co-workers against each other due to the sharing of family information, political views, religions affiliates, and personal views, but co-workers are typically the first to turn social media content (typically screenshots) to an employer to get co-worker in trouble. This typically occurs when a co-worker misses work due to "illness" but makes social media posts that show the employee on vacation. In the current political climate, this also occurs when individuals make religious- or race-based posts concerning, for example, immigration or the NFL, that are easy fodder for a discriminatory hostile work environment. This is where social media "friends" turn into "frenemies". The news is full of employees being terminated for religious-, political-, and race-based social media posts. Case in point; remember the woman who was fired after a photo her giving the middle finger to President Trump's motorcade went viral.

3. Using Social Media in the Vetting Process

The same issues that arise when supervisors friend or follow subordinates also arise to a certain extent when employers use social media to vet applicants for employment. The concept is easy enough to understand; it is the same thing as Googling a blind date. A manager gets the name of an applicant/interviewee, and does an Internet search on the person. Plenty of interesting and legally-viewable information will likely surface, but there is a possibility that some protected

information will pop up as well, including the applicant's race, ethnicity, national origin, religious affiliation, genetic information, etc. Even if the employer does not use any of the information to make an employment decision, the fact that a social media search was performed and protected information became available to a decision maker provides the applicant a colorable argument that protected information was used as an exclusionary barrier to employment.

One case demonstrates the nightmare employers can face. In *Nieman v. Grange Mut. Ins.*, 2013 U.S. Dist. LEXIS 47685 (C.D. Ill. Apr. 2, 2013), an applicant sued Grange Insurance after he did not get further in the interview process. He argued that a decision influencer looked at his LinkedIn profile and (by looking at his graduation dates) determined he was over the age of 40. An applicant under the age of 40 was hired for the position and the applicant sued for age discrimination. The employer tried to get the lawsuit dismissed at the outset, but was unsuccessful because the applicant made a colorable claim. This forced that case to go on and onto the expensive process of full litigation, *e.g.*, depositions, discovery, summary judgment briefing, etc. At the conclusion of the expensive discovery, there was no evidence that anyone from Grange Insurance even viewed Mr. Nieman's LinkedIn profile and the case was finally dismissed. The nightmare for employers, however, is that the employer essentially had to prove that it did nothing wrong and go through the process of proving that the applicant had no evidence and instituted an expensive lawsuit based on nothing more than a concocted theory. It was a very expensive process for an employer who did not even conduct a social media background screen.

To avoid some of these issues, employers can affirmatively put policies in place regarding social media vetting prohibiting managers, HR representatives, those in the interview process, and decision makers from conducting social media background searching on employees. Alternatively, employers may conduct social media background screens legally by setting up a documented process of review. Such a process should include a person to conduct the check and derive a memorandum of legal information that can reviewed for employee; decision makers who are completely walled off from the search process; and a formal written process outlining the scope of the screen.

Legal social media snooping on applicants is mainstream, so it is important that employers get it right. In fact, according to a 2017 CareerBuilder survey, 70 percent of employers use social media to screen candidates before hiring, which is up significantly from 60 percent in 2016. In addition, there are a number of Tinder-like apps employers and applicants can use to connect via social media, including Switch and Jobr, which employ the swipe and match Tinder model.

Social media can be a good way for employers to find applicants and to screen applicants, but employers must be cautious of the risks and plan ahead to avoid them.

4. Responding to Workplace Complaints Made on Social Media

Federal and state law protects employees from being subjected to a discriminatory, retaliatory, or harassing environment. These register in the form of hostile work environment, sexual harassment, and retaliation cases, but they do not necessarily always manifest or originate in the physical workplace. Sometimes the illegal behavior includes offending statements that occur off-duty, off-site, and virtually. Social media has certainly blurred the lines between personal and private and, because of this blurring, the off-duty, off-site, and virtual nature of the harassment or the complaint about harassment does not make it any less actionable. This is why employers must remain vigilant and cannot ignore an issue once they become aware of it, even if it occurs purely in social media.

If an employer becomes aware of inappropriate conversation on social media between employees, or if the employer becomes aware that an employee has complained about workplace harassment or discrimination on social media, the employer should respond just as if the conversation had occurred in the physical workplace.

Debord v. Mercy Health Systems of Kansas, Inc. 737 F.3d 642 (10th Cir. 2013), is a case that demonstrates the proper steps for employers in responding to online sexual harassment complaints. In *Debord,* the employee took to Facebook to complaint that her supervisor "needs to keep his creepy hands to himself…just all around d-bag." The employer immediately investigated the matter, which included interviewing the employee who made the post. The problem, the employee would not cooperate with the investigation and repeatedly took steps to undermine the investigation. The employer terminated her for failing to cooperate with its investigation and, in turn, the terminated employee sued. The court found that while the employer was conducting its investigation, the employee lied about whether she made the Facebook posts, and further interfered with the investigation by sending inappropriate messages and texts during the investigation and rightfully terminated her.

The moral of the story is that social media is a new technology and a new form of communication, but the same laws apply. If an employer learns of a complaint on social media, whether directly or indirectly, the employer should investigate just as it would had the offending conduct occurs in the physical workplace.

5. Failing to Preserve Evidence

Lastly, if a workplace issue arises on social media or if communications regarding a potentially illegal issue are made over social media platforms, those posts/communications are relevant evidence. As soon as the employer has any anticipation that there could be litigation and that social media evidence may be relevant, the employer must preserve it.

The easiest way to do this is to send a litigation hold to all relevant employees instructing them not to destroy, modify, or otherwise affect any social media post, communication, or message to/from/between relevant individuals or regarding certain subject matters. While screenshots are not the best form of preservation, they are better than nothing (though they do not include helpful

metadata that can be used to identify the timing and location of a post/picture/video). Ultimately, if social media evidence is properly preserved, it is preserved in its electronic form with all metadata intact.

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