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Set social media policies that protect your company instead of creating liability

Social media can be your organization's best friend or worst enemy. A lot depends on what limits you put on your own account. Setting the right, *and legal*, rules is crucial since a single negative viral post can bring down an organization.

However, what your employees say and do online matters too. Employers may also face backlash when employees' off-duty social media content is offensive, racist, misogynistic, or violent. Still, you must tread carefully and avoid getting into more trouble by inappropriately reprimanding employees who are legally protected.

Knowing how to respond when employees engage in inappropriate behavior on social media is crucial to survival in the modern age.

Off-duty social media posts

Generally, those who work for private organizations aren't protected by Constitutional First Amendment free speech rights. Even government workers only have limited protection. Thus, if a private employer wants to fire a worker who posts offensive materials online, there's no First Amendment bar. One caveat: A few states do extend protection for off-duty speech, including Connecticut. Always check your state rules.

There are many examples of workers fired for social media posts. Take the protest that turned violent at the

Capitol in Washington, DC on January 6. Some participants were quickly identified through their social media posts and outed to their employers. In turn, those employers faced pressure to fire the workers and many did. The same happened at the "Unite the Right" rally in Charlottesville, Virginia in 2017.

There is a distinction between media posts and participation in legal versus illegal activity. For example, a private employer can fire a worker for violent social media posts. But what about posting a picture of engaging in a legal protest? Or actually attending the protest? It gets tricky. California, Colorado, Louisiana, New York, and North Dakota bar firing for legal off-duty conduct such as attending a protest or rally. There is a question in those states whether firing someone because they posted a picture of their attendance is protected. Shouting racist slurs or carrying a hateful banner may or may not meet the standard for legal off-duty conduct. But certainly, crossing the line into illegal conduct can be punished.

Case examples

A federal appeals court ruled that investment banking company BNY Mellon did nothing wrong when it fired a senior analyst. The analyst posted a comment on an article she saw on Facebook about a man driving his car into protestors. It read, "Total BS. Too bad he didn't have a bus to plow through."

The post came to BNY Mellon's attention and it fired her. She sued, alleging discrimination, claiming others weren't fired for social media posts. The 3rd Circuit Court of Appeals upheld her discharge. It pointed out that the employer's social media policy allowed discretion on discipline. Exercising that discretion, the employer justified the decision by saying her post encouraged mass violence. (*Ellis v. BNY Mellon,* No. 20-2061, 3rd Cir., 2021)

In another case, a Texas teacher used social media to share feelings about teaching at a school with undocumented students. Georgia Clark thought she was sending a direct message to then-President Trump, but the comment went viral. In the tweet, she urged the president to "remove illegals from Forth Worth." She added that her high school was "taken over by them." The school district fired her for tweets that were "racially intolerant" under its social media policy. Shortly after, she was reinstated but the district appealed.

In March, Clark lost her case again. A state court said the district was within its rights to fire her for the tweets. No word yet on whether she will appeal further. (*Clark v. Fort Word Independent School District,* Travis County District Court, 2021)

In yet another case, a flight attendant for United Airlines dated a pilot. He took intimate photos. After the two broke up, he posted those pictures on Internet 'swinging" sites. She complained to United Airlines because the images were passed on to co-workers. United Airlines refused to discipline the pilot, concluding the conduct wasn't sexual harassment at work. She sued, and now the airline has agreed to pay her $321,000. In announcing the settlement, the EEOC said the airline will revise its sexual harassment rules. Those rules will now bar harassment conducted via social media that affects the work environment, whether on or off duty. (*EEOC v. United Airlines,* No. 5:18-CV-817, WD TX 2019)

Bottom line

If you anticipate disciplining workers over personal social media activities, make that clear. Try to stick with conduct that violates your workplace rules such as those against sexual and racial harassment and violence. If you can make the argument that social media posts contribute to a hostile work environment, you likely can discipline. For example, your policy could state "Social media posts that violate our sexual harassment and discrimination rules may subject employees to discipline, up to discharge."

Social media posts on the employer's site and personal sites

Different rules apply to social media posts on the employer's sites. Employers have far more control since they

own the account. Your policy should make that clear. It should remind workers they must protect the company's interests by not posting trade secrets and other confidential information. It should reiterate that sexual, racial, or other harassment is not allowed.

Beyond such common-sense rules, employers should tread carefully. Whether employees are posting on your sites or others, what they say about working conditions may be protected. The National Labor Relations Act (NLRA) allows workers to engage in concerted activity to improve working conditions. This includes commenting on working conditions on social media — both company sites and personal ones. The National Labor Relations Board (NLRB) administers the NLRA and often files unfair labor charges based on social media policies.

Over the last few years, the NLRB has gone back and forth over what social media behavior is protected. Currently, the pendulum seems to be swinging back to limiting when employers can punish employees for social media posts. At this point, the NLRB has adopted a balancing test that weighs the employer's interests against the employee's.

In January 2021, the NLRB weighed in on social media restrictions and found the following rules acceptable:

- "Do not disclose confidential or proprietary information regarding the company or your coworkers." This rule is allowed since it simply protects legitimate company interests.
- "Do not use the company name to endorse, denigrate, or otherwise comment on a person, product, cause, or opinion. You may not speak on behalf of the company unless you are specifically authorized to do so." In other words, the employee can comment, but must make clear he does so in his personal capacity.
- "Do not post photos of coworkers without their express consent." This rule protects privacy and prevents sexual and other harassment.
- "Do not share official employee compensation information. This rule does not prohibit sharing your pay with co-workers or others." This rule allows employees to discuss working conditions, including pay but *not* to share official company documents without permission. An HR clerk cannot download and post pay information she has access to in her job. She can talk about her own pay.

Bottom line

Tread lightly when social media posts discuss working conditions as some of that speech may be protected.