Insights, News & Events

A SUPERVISOR'S GUIDE TO SOCIAL MEDIA, PART ONE

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Over the past couple of years, we have seen hundreds of articles extolling the virtues and benefits of "social media" for every kind of business. We're told that Facebook, YouTube, LinkedIn, Twitter and other electronic resources will help our businesses reach more potential customers, improve the public's impression of the business, bond existing customers to the company, and improve overall customer satisfaction.

Unfortunately, little has been written to alert managers to the legal issues they may face in dealing with their employees' social media posts, particularly when the post involves provocative or insulting material related to the job, the managers or their employer. The following rules are designed to provide managers with some practical guidance about how to analyze their employees' social media posts and communications and how to avoid the legal pitfalls associated with them.

Space prevents us from including all ten rules, so we'll begin with four of the most important ones and conclude the article in our next issue.

RULE #1: DO NOT FRIEND YOUR SUBORDINATES

There are a number of reasons for this. First, it looks bad. If you "friend" some of your subordinates, but not others, it creates the appearance of favoritism. Second, it is never a good idea for supervisors to become too close to the people that they manage on a day-to-day basis. Third, if you visit a "friend's" page, you may find out things about the friend that you do not want or need to know: he just tested positive for HIV-AIDS, or she posted a picture of herself "smoking the ganja" while on vacation in Jamaica. If the employee with HIV was about to be fired for poor

performance, your new knowledge may mean that you have to change your plans. And will you drug test the returning vacationer?

Remember, too, that "friending" is a two-way street. If you post "interesting" things about your personal life, you can assume that they will be common knowledge throughout the dealership even among non-friends. That can easily undermine your role as a manager and perhaps make it more difficult to enforce the company's rules and otherwise manage your employees.

RULE #2: DON'T POST ANYTHING YOU WOULD NOT SAY TO YOUR BOSS (OR YOUR SIGNIFICANT OTHER)

Although you may think that your emails, posts and tweets will only be seen by your close friends, think again. They can easily be forwarded to others in an increasing larger circle. In addition, any recipient can print something out or forward it so someone you would not have sent it to in an effort to embarrass you. A sitting federal judge in Montana recently learned this when he forwarded a racist email about President Obama to six "friends" and it somehow found its way onto the internet.

Remember, too, that social media is archived, much like email. As a result, things that you post today may still be accessible years from now, long after you removed the post. If you are sued by a subordinate for discrimination, everything you have posted on Facebook, said in your tweets, or forwarded on your computer is fair game to the other side. A racist or sexist comment or joke posted or forwarded after a night of drinking can still come back to haunt you and provide the jury with telling insight into your character as a manager.

RULE #3: BE CAREFUL ABOUT CHECKING OUT AN APPLICANT ONLINE

Many articles have been written about the practice of checking an applicant out online to find out what kind of a person he or she *really* is. There are even companies that will do this for you. This would include accessing their Facebook page and other sources, as well as "Googling" their name. Be careful. Companies that do this have been warned by the FTC that such activity may be unlawful because they failed to comply with the Fair Credit Reporting Act.

In addition, what will you do if you discover that the applicant is suing a past employer for sexual harassment? What will you do if you discover other information which causes you to decide against hiring the individual? If you refuse to hire someone, you may have to explain the reason for your decision in court. So do not base your decision on information that might be viewed as unlawful retaliation or which might suggest some form of bias – sex, race, age, disability, religion, etc. Remember too, you can't believe everything you read on the Internet.

RULE #4: UNDERSTAND "PROTECTED CONCERTED ACTIVITY"

We have all read or heard of cases where an employee posts something critical of his or her manager on Facebook and is terminated. It has been so common that there is even a name for it: "Facebook firing." But it's a lot more complicated than that.

The National Labor Relations Act (NLRA) was originally passed in the 1930s to protect employees who were seeking to start or join a union. But the law is much broader. It also protects nonunion employees who simply discuss or complain about their "wages, hours or working conditions" with their fellow coworkers. So the law protects any non-managerial employee – whether involved with a union or not – who engages in "protected, concerted activity."

The "activity" is discussing or complaining about any aspect of their employment, including their supervisor or the owner of the company. It is "concerted" if two or more employees are involved or if only one employee is making the complaint, but is making it on behalf of coworkers or is seeking to rally them to the cause. Finally, it is "protected" as long as it is done in a reasonable manner. For example, employees are protected if two or more demand a meeting with their manager or the dealer to discuss their entitlement to higher wages, the way the Saturday schedule is being set, or the heat in the shop.

Concerted activity loses its protection only when the employee or employees cross the line and the conduct becomes, as the NLRB puts it, "so opprobrious as to forfeit protection under the Act." Exactly when and how it becomes "so opprobrious" that it crosses the line depends on a detailed analysis of a number of factors and will ultimately be made by the NLRB. Unfortunately, the current NLRB is extremely "pro-employee" and has signaled that it intends to allow employees to engage in a range of conduct that previously would not be permitted.

We saw a recent NLRB case involving a dealership where a nonunion salesperson posted on his Facebook page offensive comments about the food that the dealership had provided at a customer event. The NLRB found that the employee was engaged in "protected concerted activity" because the posted remarks, while sarcastic and offensive, were related to his concern that the quality of the food served by the dealership *might* affect the "brand image" and *might* ultimately affect his commissions.

In another dealership case, a sales employee met with the owner to discuss his complaint about the sales pay plan and their working conditions. The meeting went downhill, with the salesperson calling the owner a "f---ing mother f----ing", a "f---ing a--hole" and a "crook" and threatening to make the dealer pay. The NLRB found that even that language did not cross the line.

If this hasn't happened already, it will: You will see or learn about an employee's Facebook posting which criticizes or embarrasses you as a manager or which is highly critical of the dealership or which criticizes a business decision. What should you do about it? Well, it depends. The first step is to determine if it is a personal gripe or if it is "concerted activity." Purely personal gripes are not protected by the NLRA. However, if a coworker or two respond to the post in agreement, it has become "concerted activity." Suffice it to say, this is one of the more complicated areas of the law. Therefore, we recommend that you contact a labor and employment attorney who has studied the NLRB's recent cases and let the attorney help you make that determination.

We'll pick up with Rules Five through Ten in our next issue.

For more information contact the author at jdonovan@laborlawyers.com or (404) 231-1400.