

A DEALERSHIP'S GUIDE TO SOCIAL MEDIA, FREE SPEECH, AND THE ELECTION

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You just learned that one of your employees expressed their opinion about the election on social media. Their unfiltered post includes slurs, and it is inflammatory at best. Had they made these same comments while at work, immediate disciplinary action likely would have followed. But since the employee made the post after hours and on a site unrelated to your dealership, can you take the same disciplinary action?

THE SHORT ANSWER

To the surprise of no one, the answer is "it depends." Generally, an employer has the right to limit speech that is harassing, discriminatory, disruptive, insubordinate, incites or threatens violence, or could negatively impact the dealership's reputation and community standing and otherwise violates dealership policy, even if that speech occurs in social media posts. There are, however, several factors that determine the extent to which you may limit employee speech.

LEGAL CONSIDERATIONS

One factor that private employers do *not* have to consider is the right to free speech guaranteed by the First Amendment to the Constitution. The First Amendment protects citizens against *government* action limiting speech. For that reason, free speech protection is afforded to government employees and not to employees of dealerships or other private employers.

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But even free speech protection under the First Amendment is not absolute, as demonstrated by a recent appeals court decision upholding the termination of a government employee for her social media posts related to the 2016 election. In that case, a government employee made Facebook posts after the election in which she used racial slurs and criticized those who did support her favorite candidate. After her termination, the employee sued her former employer alleging a violation of her free speech rights.

In upholding the termination, the court determined that the workplace disruption caused by the posts and the detrimental impact on her working relationships with her coworkers outweighed her free speech right to make those posts. The court added the employer's right to terminate the employee was strengthened by the fact that the posts indicated the employer's identity without a disclaimer that the views expressed were hers alone and those posts negatively impacted the employer's image.

Even with free speech protection off the table, other limitations exist that may restrict a private employer's options in responding to employees' posts. For example, some states restrict employers' rights to discipline employees for engaging in legal, off duty conduct. Most posts made during off hours, even those that are controversial, will be considered legal conduct. Posts threatening criminal acts or violence may fall outside the scope of legal conduct.

HIDDEN LANDMINE: THE NATIONAL LABOR RELATIONS ACT

Another consideration is the National Labor Relations Act, the law that protects the rights of nonsupervisory employees – even those in nonunionized work environments – to discuss with each other the terms and conditions of their employment. In today's world, that "discussion" often occurs through social media posts. In fact, the National Labor Relations Board and the courts recognize social media "the 21st-century watercooler." Before responding to employees' posts, you should keep this restriction in mind and consider whether the social media conversation could be a legally protected discussion about terms and conditions of employment.

BOTTOM LINE: WHAT SHOULD YOU DO?

In addition to the legal restrictions that may be applicable, you should apply your policies in a consistent manner and follow their normal disciplinary procedures. As in all situations, the inconsistent application of the rules can give rise to claims even when the rule violation is admitted. Likewise, an employer's response or lack thereof to knowledge of an employee's offensive or inflammatory social media post could be viewed as the employer's agreement with sentiments expressed in the post – and could impact your dealership's reputation in the community.

If your employees are using their personal social media in their jobs, as many are encouraged and, in some cases, required to do (such as salespersons advertising vehicles), your dealership has additional reasons to implement and enforce constraints on the postings. At a minimum, employees who use their personal social media sites for business reasons should be required to include a disclaimer that any personal views they express on that site are their own and not the dealership's.

Little doubt exists that the election and the election results will trigger an avalanche of social media commentary regardless of the outcome. It's not too late to implement or review and update your social media policy. Your dealership should be prepared to respond appropriately if your employees' speech violates their policies. Your Fisher Phillips attorney can advise and assist you if needed.