Facebook Firings and Social Media Policies – Part 2

March 5, 2012 by Travis Crabtree

In the last post, we talked about whether you could fire someone for their Facebook posts. We used the NLRB's recent social media memorandum discussing 14 cases as a guideline.

Today, we discuss social media policies. Why should I have one and what should I have so they don't get me in more trouble?

Why Have One?

I previously wrote an entire post answering why you should have a social media policy.

In short, you can reduce your risk by showing that you are taking reasonable steps to prevent the mishaps that come along with employees engaging in social media. It's better to go into court or respond to a governmental inquiry explaining that you had a policy that you shared with your employees to prevent the mishap, but this one employee simply violated it. In other words, "we tried" is better than we simply, "ummmm, I don't know."

It could help you in an employment law dispute as well. Better than that, however, it's also good business to explain to your employees what you expect from them.

So, what should my social media policy say — or not say?

The legal risk is not so much what to include, but what NOT to include. The law prohibits employers from implementing rules that "would reasonably tend to chill employees in the exercise" of their rights to discuss their working conditions with their co-workers. Those rights are discussed in more detail in part one of this series. A discharge based on an overly broad rule is illegal if the employee engaged in the protected activity.

Blanket restrictions prohibiting employees from discussing working conditions is considered illegal. For example, the NLRB has ruled the employer went to far with its rule that prohibited the employee from "making disparaging comments about the company through any media."

Even more ambiguous policies can run into trouble if employees would reasonably construe the language to prohibit protected activity. In one case, the policy stated employees should generally avoid identifying themselves as employees [LinkedIn becomes useless] unless discussing the terms and conditions of employment in an appropriate manner. The NLRB said the difficulty in determining what was appropriate or inappropriate would chill the employees' right to disucs working conditions.

The NLRB also frowned upon:

* prohibiting “disrespectful conduct” or “inappropriate conversations.”

* prohibiting “unprofessional communication that would negatively impact the Company’s reputation or interfere with the Company’s mission”

* prohibting “unprofessional/inappropriate communication regarding members of the Company’s community.”

* blanket prohibitions on the dissemination of non-public information concerning the company with anyone outside the company without more guidance or examples as to what type of information the company is trying to protect.

* prohibiting the publishing of any representation about the comapny without prior approval.

* requiring social media posts to be done in “an honest, professional and appropriate manner, without defamatory or inflammatory comments regarding the employer.”

* requiring all employees to identify that all comments are their personal opinions and not those of the company because it would prevent employees from acting collectively and burden them when exercising their rights.

* prohibiting the use of the company’s names or marks without the prior approval of legal because complaining about working conditions could be a fair use of the company logo.

* prohibiting employees from making “discriminatory, defamatory, or harassing entries about specific employees, work environment, or work-related issues.”

On the other hand, the NLRB pointed to these allowed policy statements:

* the use of social media to post comments about coworkers or supervisors that are vulgar, obscene, threatening, intimitating, harassing, or a violation of workplace discrimination policies.

* requesting employees to confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws. The policy then cited examples such as confidential or proprietary information, personal health information and launch and release dates of products for the pharmaceutical company. The NLRB said the extra examples made it clear to the employees that talking about working conditions would not be covered.

But my policy is smart and says we aren’t violating the law!

I thought of that, too. It’s called a savings clause. Such a clause would say something to the effect of “this policy will not be interpreted or applied so as to interfere with an employee’s right to self-

organize, form, join or assist labor organizations, to bargian collectively, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities." Is that clear to you? The NLRB did not think so either and said it did not provide any guidance to the employees and would therefore discourage employees from exercising their rights.

Is it too late?

You can amend your policy today. But, if you stumbled upon this post with a problem employee and an outdated overly broad policy in place, you may not be out of luck. The NLRB's memo states: "An employer will not be liable for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference was the reason for the discipline."

Good Examples

As you probably detect by now, you should probably stay away from blanket prohibitions. At the same time, there is nothing wrong with warning the employees, they can be responsible for stupid behavior. I've cited to Coca-Cola's "Online Social Media Principles" before. It states:

You are responsible for your actions. *Anything you post that can potentially tarnish the Company's image will ultimately be your responsibility. We do encourage you to participate in the online social media space, but urge you to do so properly, exercising sound judgment and common sense.*

It does not prohibit the employee from speaking, but warns of possible consequences. Our law firm's is a little different with a similar theme. If you would like to see it, send me an email.

- Tags: employment, Facebook, social media policies