

TIPS FOR EMPLOYERS EVALUATING THEIR SOCIAL MEDIA POLICIES

Many high-profile employers have been in the news recently for taking action against employees who have published social media posts with the employee's own opinions and views on a wide range of social and political issues. Social media is far reaching, and internet users are more skilled than ever at finding the personal identity and details of posters whom they disagree with, including their employer. So, what should employers do when an employee makes a social media post that causes waves, either online or in the office?

As is true for most employment issues, there is no bright line rule or universal approach. Employers need to take into account a number of facts when considering what rights they do (and do not) have when determining whether to take action against employees for what their personal posts on social media.

The specific analysis an employer needs to undertake when dealing with an employee whose public speech has become an issue depends upon many factors, but most importantly, upon whether the employer is a private or public entity. Public employers, and potentially quasi-governmental employers as well, must consider additional laws and regulations. Some topics that private employers should consider when determining how to address employee use of social media, include:

- **Handbook or other Policies** – Employers should be sure they know and follow their policies and any other handbooks or guidance issued to employees. As is true when considering any decision about the terms and conditions of employment, employers should take care to follow their current policies and understand how any procedures differ from the as-written policies. If handbooks or other guidance is inconsistent with policies, it may lead to allegations of unfair or discriminatory treatment. If an employee is challenged by their employer for a social media post, it is likely that the first thing the employee will consult will be the employee handbook.
- **Prior Response** – If an employer has previously terminated (or issued discipline) to an employee in the past for posting on social media, they should consider the realities and risks of acting consistently with the former action this time around. If a situation has occurred before, employees are likely to hear about it. If they do not, their attorney is

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likely to find out during discovery in litigation.

- **Potential Risk of Litigation** – While private employers are allowed to engage in what is called “viewpoint discrimination” differently than public employers, who are held to a different standard as government actors, employers should still consider whether or not the speech at issue is problematic regardless of the employee’s position. Employers should consider, however, the impact on the employee’s coworkers. If an employee is posting hateful or seemingly discriminatory statements online, it could impact their co-workers’ opinions of how that employee treats them, both at and outside of work. And, as the employer, you may be alleged to be responsible for that conduct through a number of theories of employer liability. It is not uncommon for discrimination and hostile workplace allegations to come from interactions that employees have together outside of work, and that may remain true when the contact is online. Of course, if an employer *does* take action against the same employee, it is always possible that another employee will take issue with that alternative decision. Employers need to work with legal counsel to analyze each set of facts as they come, as courts are also going to apply an individualized, factintensive analysis of the situation.
- **Harm Posed** – Employers should also consider the threat of harm posed by the employee’s public speech or social media post. A social media post that disparages coworkers or reasonably causes someone to feel unsafe in the workplace may carry different weight (and may violate policies) as opposed to a post regarding the employee’s personal opinion about a public issue or figure. However, it goes without saying that it’s highly subjective whether or not a post is harmful.

Having a well-thought out policy in place with specific guidelines for employees identifying their workplace on social media may be a good idea for some employers but may not be tenable for others. The culture of each workplace will have an impact on this analysis, as the legal analysis is less than clear. Employers certainly have some level of interest in what their employees post on social media.

Employers always benefit from regular consideration of their policies and procedures to ensure compliance and consistency, making decisions about the terms and conditions of employment in as consistent a manner as reasonably possible, documenting all key communications, and avoiding one-size-fits-all rules for social media.

Armstrong Teasdale’s team of lawyers can help employers tackle topics like social media use by employees. Please contact your regular AT lawyer or one of



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