



Protect Your Reputation

Formalize your workplace social media policy

by: Greg Goldberg, BTA General Counsel

Near the top of the list of HR headaches for business owners are employee separations. Whether an employee resigns, is laid off or is fired for cause, the risk of facing an employment lawsuit is uncomfortably high. As a first line of defense, employers often utilize separation agreements — contracts that provide a defined amount of compensation in exchange for a full release of all potential claims against the employer.



Although separation agreements are generally effective, departing employees are not legally required to sign them. Moreover, these agreements can create the problem of appearing to reward undeserving employees. As a second line of defense, it is important for business owners to carry employment practices liability insurance — a policy that covers legal defense, settlements and judgments arising from employment cases.

Broadly speaking, employers are all too familiar with terminations resulting from poor performance on the job. Increasingly, however, they are also faced with terminating employees who engage in conduct detrimental to their companies outside of work. For example, employees who create social media posts that celebrate violence, spread conspiracy theories, or amplify hateful or threatening content may harm employers sufficiently to justify dismissal. In other words, although employees may assume that “personal” speech online exists in a realm insulated from professional consequences, this is simply not the case.

When business relationships are built on trust like they are in the dealer channel, individual business transactions take a back seat to the overall confidence, consistency and reliability of knowing that the customer’s needs will always be met. In this context, a single social media post by a rogue employee has the power to destroy something that may have taken years to establish.

Whether it starts from a personal Facebook post or LinkedIn comment, sometimes all it takes for an employer to be harmed is a link to the employer in an online bio or a reference to the employer’s business. Regardless, bad news travels much faster than any formal corporate response seeking to do damage control. Screenshots circulate. Customers complain. Competitors whisper. Internal morale deteriorates.

Many employees assume that the U.S. Constitution — specifically the First Amendment — protects them from employment consequences arising from political speech. It does not. The constitutional guarantee of free speech restricts government action, not that of a private company. Privately owned

companies retain broad discretion to terminate employees whose conduct harms the business, undermines workplace culture or jeopardizes customer relationships.

In this context, it is important for employers to ensure the termination process does not run afoul of discrimination or retaliation laws.

Terminated employees are quick to argue that disciplinary enforcement for online conduct is selective, inconsistent or pretextual. An employee terminated for politically charged posts may claim that similarly situated coworkers expressing opposite viewpoints are treated more favorably. Others may allege religious, national origin or disability discrimination, or retaliation tied to unrelated workplace complaints. In other words, controversies that start on social media can result in the same traditional employment law claims stemming from ordinary workplace misconduct.

Business owners should consider formalizing workplace social media policies, even if employees’ social media usage has evolved informally. A carefully drafted social media policy distinguishes between personal and professional social media accounts while recognizing that public conduct can still affect legitimate business interests. Policies should prohibit harassment, threats, discriminatory commentary, disclosure of confidential information, and conduct reasonably likely to damage customer relationships or workplace safety. Employers should also define expectations for identifying affiliation with the company online, clarify whether employees may speak on behalf of the business and establish procedures for investigating complaints consistently.

Policies must also be enforced uniformly. If an employer disciplines one employee for offensive political speech but ignores comparable conduct from another employee whose views management finds more agreeable, the company may inadvertently create evidence supporting a discrimination claim. Consistency — not ideology — is what courts and juries examine most closely.

Above all, a robust social media policy will help avoid the worst possible result: being forced to pay off a former employee whose undisciplined online behavior harms the employer’s reputation. ■

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