



## Legal danger zone: ‘Friending’ your boss – or your employee

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*(Editor’s note: Curtis Smolar is a partner at Ropers Majeski Kohn & Bentley. He submitted this column to VentureBeat.)*

**A reader asks:** I’ve friended a few employees on Facebook, but I’m seeing them admit to a few things in their status updates that, while legal, are clear violations of company policy. Can I discipline or fire them for that conduct, even if it didn’t happen at the office?

**Answer:** This is one of those areas where it’s best to proceed with great caution. Under California statutory law, an employee cannot be disciplined for “lawful conduct occurring during nonworking hours away from the employer’s premises.” However, a company may require applicants to sign an employment agreement that protects the employer from “any conduct that is actually in direct conflict with the essential enterprise-related interests of the employer” if that conduct “would actually constitute a material and substantial disruption of the employer’s operation.”

Applying such a standard is no easy task and should rarely be undertaken without assistance of an employment specialist. That said, here are five guidelines for both employers and employees to keep in mind:

**Employees: Use common sense** - Employees at start-ups are often friends with their employers in real life. So, 'friending' each other on social networks seems natural. That has led to a number of problems for employees.

For example, it's hardly uncommon for someone to call in 'sick' after a night on the town. But too many employees forgetting that they have friended their boss, then post pictures of the previous night's festivities. Not surprisingly, this has led to numerous people losing their job.

Beware the nature of those pictures, too. There are several cases of employees who have posted photographs of themselves writing obscenities and other pictures employers found offensive, which have led to their dismissal based on an employer's hate speech rules.

Another example: A status update reading "I just smoke marijuana for medicinal purposes." Smoking marijuana and other drug use can be grounds for dismissal in many companies, but if state laws allow for its medicinal usage, things get complicated. That being said, an employee who posts pictures of themselves consuming drugs often risks termination.

**Employers: Don't spy** - If you're going to be watching what your employee is doing, be sure you aren't spying. Such activity is often called "pretexting," which occurs when an employee gets a friend request from a person who is pretending to know the employee. The employee accepts the friend request based on that false representation. The fake friend then monitors the employee's behavior.

Although it might not be specifically illegal, the acts are probably unethical. For example, the Philadelphia Bar Association has come out with specific rules prohibiting attorney pretexting. This can also lead to lawsuits flowing from the employees right to privacy.

**Employers: Don't squelch an employee's rights** – The hardest balancing act with regard to these issues is to carefully balance the employee's rights to free speech, privacy and concerted activity with the employer's right to protect its own legitimate interests. The National Labor Relations Board recently sided with an employee who was [criticizing an employer on Facebook](#) with other employees. The problem with the case is that it did not give a bright line rule that employers could follow.

**Employers: Don't discipline the employee online** – This seems obvious, but there is a case of an employer who actually fired an employee on her Facebook page. It was not only rude, it needlessly gave rise to potential liability for the company.

**Employers: It ain't a one-way mirror** – Facebook and other social media platforms not only allow an employer to see what an employee is doing, they also let employees keep tabs on their boss. This could lead to potential liability or other consequences. For example, statements you make on your way could wind up as evidence in a lawsuit.

Overall, friending a employee can be a quagmire. If you get the request, be sure both parties realize the inherent risks in doing so.

**Startup owners: Got a legal question about your business? Submit it in the comments below or email Curtis directly. It could end up in an upcoming "Ask the Attorney" column.**

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