Facebook Firings and Social Media Policies – What to Do? – Part 1

March 2, 2012 by Travis Crabtree

Surely you can fire someone who mouths off on Facebook about the company, right? After all, most employees (in Texas, anyway) are at will employees. You may even have a social media policy that warns employees not to say disparaging things about the company online. Unfortunately, it is not that clear.

The National Labor Relations Labor Board issued a memorandum that outlines recent cases gving some guidelines about what you should do.

You may be thinking the NLRB only applies to unions and we don't have unionized employees, so what do I care? You would be mistaken. The National Labor Relations Act makes it illegal to restrict, prohibit, or retailiate against employees for engaging in "protected activities" such as commenting on working conditions, or organizing collective action against an employer regardless of whether a union is involved. It is also illegal to institute a work rule or policy that would "tend to chill employees" in the exercise of their rights.

That's where social media policies and Facebook come into play. You may have read about some of these cases going both ways in the past, including this blog post from 2010 on whether to change your social media policy. In part one today, we will focus on whether you can fire someone. In part two, we will talk about the social media policy.

Can I fire them?

The NLRB does not give you an automatic checklist or even suggestions. From reading it, I will attempt to give you guidance, but you should really consider seeking the advice of an employment lawyer on the specifics of your case.

1. Is it an individual gripe of personal anger, or a more general gripe of common concern about working conditions?

If it is an individual gripe or venting, then you are likely able to take corrective actions. In one case, the employee simply posted: "[Expletive] company name!" Then, she later added that the company does not appreciate their workers. The employee's complaint centered on one interaction with her supervisor where she thought she was treated unfairly and not a complaint about overall working conditions applicable to all employees.

In other cases, simply complaining about other employees does not count unless the complaints are severe enough to affect the terms and conditions of employment. Even if the complaints may have some tangential effect on overall profitability or income, they must specifically affect the complainant's working conditions.

On the other hand, you can't fire someone for commenting on an ongoing discrimination complaint by another employee. It's not just personal anymore because it relates to company policy and the treatment of fellow employees. Likewise, you can't fire employees, if as a group [see below], they complain about a supervisor's attitude and performance that affects the overall working conditions.

2. Does the post rally the troops?

Surprisingly, whether co-workers are "friends" and how they respond matters. If there is absolutely no response, then you can likely get rid of someone because it is not a collective action. When it starts a conversation, it gets a little more tricky.

For example, in one case an employee complained about what she perceived as a demotion and an unfair overall policy [Yes, to the preceding question]. Fellow employees responded that the overall process was not fair and even suggested there should be a class action lawsuit. There begat the "protected activity."

In another case, the co-workers merely "liked" the post and never suggested taking any action or engaging in further discussions of working activities–no protected activity.

In the case above where someone commented on the ongoing investigation, or lack thereof, her fellow employees suggested she should take the complaint further. This satisfied the legal standard of whether they are engaged in "concerted activity for mutual aid and protection."

You have to be careful here because sometimes the original post may not be protected activity, but it can spawn into a group discussion about working conditions that can be.

3. Does it disrupt the workplace?

Even if the posting might be protected based on the first two questions, if it is extremely disruptive to the business, you may still be able to fire the employee. After all, many of these conversations are shared with the world.

In an older case dealing with the distribution of handbills with an intention to appeal to the general public, the NLRB ruled the activity lost its protected status. The NLRB has also ruled certain communications between employees and supervisors can be so disrputive (think of cursing out the boss) to undermine discipline that they, too, lose protetcion.

So, how do we apply these rules to Facebook? The NLRB has analogized many Facebook status updates and comments to a converstaion between co-workers that third parties happen to overhear as opposed to the distribution of handbills to a mass audience. The NLRB developed a new standard to consider not only the disruption to workplace disclipline, but also considers any disparagement of the company and its products to the public.

For most employees with a small Facebook following, their complaints are probably protected. If they tweet about it, make a YouTube video and a separate website that is meant to harm the company's reputation to the public, the employee may likely lose any protections.

As you can see, while there are some general relevant factors, there are no bright line tests. Therefore, you should consult with an attorney before taking action in response to an employee's social media behavior.

Next time, the social media policies.

- Tags: employment law, Facebook, social media policies