

Employee Speech Considerations In The Age Of Remote Work

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The COVID-19 pandemic required most workforces to operate remotely. Consequently, computers and mobile devices have become the primary vehicles for workplace communication.

As employees spend more time in front of screens, they, often without filter, voice their opinions on social and political issues, express workplace complaints and even comment on ongoing company investigations.

It has become more common for employers to learn of their employees' concerns on a public social media platform instead of through traditional reporting channels.

Further complicating matters, employees may express themselves on social media in a manner that would generally not be appropriate in the workplace, and the public discourse may not accurately portray the employers' actions, which can harm an employer's business and brand.

This phenomenon also presents unique challenges in investigating complaints and addressing work place concerns. Employers may be inclined to reprimand employees for unprofessional social media activity, but before doing so, they should ensure that they are not running afoul of any laws that protect employee speech.

Social Media as a Platform for Employees to Discuss Social and Workplace Issues

The COVID-19 pandemic presented employers with countless unprecedented employee safety and employee relations challenges. Employees have used social media to publicly hold their employers accountable for their handling of the pandemic.

For example, we have seen employees speak out about their employers' safety protocols, availability of personal protective equipment, and return-to-work policies. Employees have also taken to social media to publicly criticize their employers' business decisions in light of COVID-19, such as layoffs and furloughs.

Employees have also been vocal on social media concerning social justice issues, particularly in light of the events of the past summer, which prompted a dialogue about racial inequality in the workplace and society more generally. Employees have used social media to raise social justice issues at work, including with respect to pay and promotion opportunities.

Additionally, employers who did not promptly or adequately support social justice issues on social media faced significant backlash by both employees and customers. This phenomenon is also known as cancel culture, and has demonstrated the power social media can have on an employer's brand.

Given the political climate, employees have also used social media to publicize their views on political candidates and events, including by posting their own commentary, reposting commentary of others, and endorsing or liking posts of others who have political views similar to theirs.

Social media has also provided a vehicle for employees to publicly share their experiences with discrimination and harassment, including by high-level executives.

In addition, employees are increasingly posting on social media about confidential workplace investigations into discrimination and harassment complaints. The fact that the investigations themselves are being conducted remotely, often via videoconferencing systems, has likely contributed to this trend.

Social media has also been an effective tool for unionizing campaigns, especially given that the COVID-19 pandemic has prevented employees from engaging in more traditional meetings and gatherings. Employers have been subject to social media backlash if they engage in any efforts to discourage unionization, even if those efforts are completely lawful.

Legal Impediments to Monitoring and Restricting Employees' Social Media Activity

Because social media is such a powerful tool for employers and employees alike, employers may be inclined to monitor and/or respond to employees' social media posts. There are generally three areas of law that should guide employers in this regard.

The National Labor Relations Act

Section 7 of the NLRA protects employees' discussions of wages, hours, and other terms and conditions of employment on social media. The NLRA protects both unionized and nonunionized employees, but it does not protect supervisors.

For social media activity to be protected by the NLRA, it must be concerted, i.e., involve more than one person. By definition, social media activity is almost always concerted, which means that employees' rights to post comments on social media about their terms and conditions of employment are protected.

Political speech that is unrelated to employment is not protected by the NLRA. For example, if an employee uses social media to encourage her co-workers to vote for a specific political candidate, that is not considered concerted activity. If, however, an employee encourages co-workers to vote for a candidate because the candidate supports an increase in the minimum wage, that could be protected under the NLRA.

The NLRA protects social media activity even if it is profane. Employers may only take action in response to social media activity that is discriminatory, threatening or defamatory, unless it violates lawful workplace policies. This may be a difficult line to draw, and employers will need to carefully consider the specific circumstances on a case-by-case basis.

Other Free Speech Protections for Employees

Contrary to popular belief, the First Amendment does not protect employee speech in the private workplace. Certain states, however, have extended specific free speech protections to employees by statute.

For instance, Connecticut General Statute Section 31-51q prohibits employers from taking any adverse action against employees for exercising their First Amendment rights, provided that such activity does not interfere with the employee's job performance or the employment relationship.

This means that social media posts expressing speech that the employer may disagree with cannot form the basis of an adverse action, unless it violates lawful workplace policies or is threatening, discriminatory or harassing.

New York's off-duty conduct law, New York Labor Law Section 201-d, prohibits employers from discriminating against an employee because of their political activities or legal recreational activities outside of work hours, so long as they occur off of the employer's premises and without use of the employer's equipment.

For example, an employee's social media post reflecting participation in a political rally could not form the basis of adverse action in New York. The law does not protect activities that create a material conflict of interest related to the employer's trade secrets, proprietary information or other business interests. Similar laws exist in other jurisdictions, such as California, Colorado and Louisiana.

Restrictions on Monitoring Social Media

Given the prevalence of employees' use of social media, employers may be inclined to monitor their employees' social media activity, but they should be aware of the potential legal pitfalls of doing so.

The NLRA prohibits employer surveillance of employees' union activity or discussions of terms and conditions of employment if it will interfere with employees' exercise of Section 7 rights. Supervisors therefore cannot search the [Facebook](#) pages, photos and friends of union supporters, or solicit feedback from employees about a union's private Facebook group.

The federal Stored Communications Act affords privacy protections to certain electronic communications. Although the law was enacted before social media even existed, courts have applied it to protect unauthorized access of employee social media accounts.

Employers should therefore exercise caution before accessing employees' private social media accounts without their authorization or coercing employees to turn over information posted on social media. This law would likely not prevent an employer from obtaining information in the public domain about an employee.

A number of state laws also restrict social media monitoring. In approximately a half-dozen states, employers are prohibited from asking employees to change their privacy setting to make their social media accounts visible to their employer.

In more than two dozen states, including California, Illinois and New Jersey, employers may not require employees to provide their social media usernames or passwords, or divulge whether the employee has a social media account.

Best Practices for Employers in Navigating Social Media Issues

Adopt and disseminate clear, legally compliant social media policies.

Employers can and should adopt facially neutral social media use policies and disseminate those policies to employees. Employers should ensure that these policies do not prohibit concerted activity such as discussion of terms or conditions of employment or union organizing.

Employers should clarify in these policies that employees do not have the authority to post on social media on behalf of the company and may not use social media to discriminate against, harass or threaten other employees.

Employers should remind employees that these policies apply even in remote settings and that employees do not have any right to privacy on company-issued devices or accounts.

Social media policies should be updated frequently to reflect the current state of the law and may need to be tailored to account for different state laws. Employers may also need to bargain with unions over implementing or changing social media policies.

Train supervisors and employees on social media.

- Explain that social media posts are not substitutes for lodging complaints through the company's internal reporting process.
- Remind supervisors that discriminatory comments on social media can subject the company to liability, just as if the comment had been made in office.
- Explain that sharing or endorsing videos or posts on social media can result in discrimination/harassment complaints if employees are offended by the content.

Exercise caution in monitoring employees' social media activity.

- Consider whether to designate a specific person or team to monitor social media.
- Ensure any monitoring activity complies with federal, state and local laws.
- Conduct any monitoring pursuant to a written policy.
- Exercise greater caution when employees are engaged in union activity on social media or discussing terms and conditions of employment.

Respond to social media complaints.

- Treat employee complaints on social media as though they were made through the typical reporting channels and conduct a prompt and thorough investigation.
- Redirect the complaint to a robust, trustworthy internal reporting process.
- Ensure the investigation process is centralized and coordinated.
- Weigh potential damage to culture and reputation in any response.
- Evaluate the facts of each situation and consult with counsel before disciplining or terminating employees for any social media posts or activity.

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Related Professionals

- **Elise M. Bloom**
Partner
- **Noa M. Baddish**
Senior Counsel