

## Discipline of Employees for Conduct Outside the Workplace: Social Media

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Most human resources professionals are comfortable issuing discipline to employees who engage in workplace misconduct during the workday; simply consult the handbook and determine the appropriate course of action based upon the nature and level of the offense. The situation becomes considerably more fraught, however, when employees engage in inappropriate conduct outside of the workplace. Employers must balance the potential for bad publicity and negligent retention litigation for failing to address behavior with laws that protect aspects of an employee's personal life from discipline.

Further complicating the issue are the numerous exceptions to the Employment At-Will Doctrine, which theoretically allows an employer to terminate an employee for a good reason, bad reason or no reason at all. Termination for conduct outside the workplace may fit within the at-will doctrine, but in our increasingly regulated society, employers must be aware of the laws in their jurisdiction which limit the ability to take an adverse employment action based on conduct outside of work.

### Social Media and the Workplace: More Information, More Headaches

In our highly connected, technology driven world, we have more access to information about our employees than ever before. Much of the workforce is highly active on social media, and many employees "friend" their co-workers or even managers and supervisors. Combined with the lack of discretion many individuals display in social media posts, this has resulted in an explosion of "too much information" for managers. Once a manager has knowledge of the employee's personal life, or opinions about the workplace, what, if anything, should be done? Not only do managers have access to information about their employees, but the employee's network does too. Employers may rightly be concerned about harm to the brand if an employee engages in inappropriate behavior online that "goes viral" on the internet, especially if it reflects poorly on the business.

### Employee Social Media use Can Lead to Harassment or Discrimination Claims

The EEOC held a meeting in 2014 about the growing use of social media and how it impacts the laws that it enforces.

A topic of discussion at the meeting was employer use of social media to screen applicants in a way that could be discriminatory. For example, if an employer monitors employee social media, and obtains personal information about an applicant that relates to the applicant's protected status under one of the many equal employment opportunity laws, it could lead to legal exposure for a discriminatory failure to hire.

In addition, an employee's social media post could violate a company's anti-harassment policy. If an employer is aware that an employee is harassing another employee, it should be investigated, as there is potential exposure under the discrimination law. Further, if an employee uses technology provided by the employer to make a harassing post, this too could lead to liability.

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## The NLRA and Social Media Policies

The National Labor Relations Act (NLRA) provides both union and non-union employees the right to engage in "concerted activities." In recent years, the NLRB has taken an aggressive approach to employer social media policies, including in non-union workplaces, and has found that many policies improperly chill the employees' rights to engage in concerted activity. The National Labor Relations Board (NLRB) has taken the position that certain language in employer social media policies is overbroad and vague under the NLRA. According to the NLRB, employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal law, such as discussion of wages or working conditions. (NLRB Office of General Counsel Memorandum dated 1/24/12).

If you have questions about discipline of employees for conduct outside the workplace or other employment law matters, please contact Tanya Salgado (215.864.6368; [salgadot@whiteandwilliams.com](mailto:salgadot@whiteandwilliams.com)) or any member of our Labor and Employment Group.

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