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Employers Should Handle Social Media Discipline With Care

By **Abigail Rubenstein**

Law360, New York (November 14, 2012, 10:10 PM ET) -- With a Wednesday report showing more than a third of businesses had disciplined employees for social media misuse, attorneys say it's more important than ever that employers be careful when taking action against workers, to avoid stepping into a legal minefield.

Nearly 250 multinational businesses responded to Proskauer Rose LLP's survey on employer social media policies and practices, and 40 percent said they believed it gave their business an advantage to let employees access social media sites while at work, for both business and nonbusiness uses.

But 35 percent of the employers told the firm they had needed to discipline employees over social media misuse — an area in which still-developing laws can unleash a host of legal concerns, attorneys say.

"As social media use continues to grow exponentially, it's raising a thicket of thorny legal issues for employers," Daniel Ornstein, the Proskauer partner who led the survey, said.

In many situations, employers may have legitimate reason to take employees to task, like when a social media posting exposes a company's confidential information or increases its exposure to litigation. But employers must still proceed with caution to avoid ending up in hot water themselves, lawyers told Law360.

The first step is to have a clear policy and to apply it consistently, they advise.

Having a social media policy that explains both acceptable and unacceptable usage puts employees on notice of what they can and can't do, potentially preventing missteps. And it also makes it easier for the employer to show that any disciplinary actions are taken lawfully, attorneys say.

"It's imperative [to have a policy], both in discipline and even in litigation, because it is much easier to justify what you are doing if you can point to clear, specific breaches of a particular policy," Ornstein said. "Likewise, in litigation you will get sympathy from a judge if you can say, 'We made it absolutely clear that this type of conduct was prohibited — look at Clause X of our social media policy.'"

Discipline stemming from social media activity is subject to the same scrutiny as any other action against an employee, if challenged. So consistent application of the policy is vital, attorneys say.

"The whole panoply of legal claims that the discipline [against different employees] is

disparate based on a protected category all can apply," Adam S. Forman of Miller Canfield Paddock & Stone PLC said. "Having a clear policy that is universally disseminated and applied can go a long way toward disproving claims that the application was biased or unfair."

But social media also throw some unique legal challenges into the mix, attorneys say.

One major issue to consider is whether employees' actions could be protected by Section 7 of the National Labor Relations Act, which gives workers the right to come together for mutual aid and protection.

Social media have attracted the National Labor Relations Board's attention, and its general counsel hasn't been shy about challenging employer policies and disciplinary actions that could be seen as trampling employees' Section 7 rights. There's no reason to expect this interest to ebb anytime soon, attorneys warn.

"It's a fine and blurry line at the same time, when it comes to what will pass the test for activity protected under Section 7 and what won't," Donald Schroeder of Mintz Levin Cohn Ferris Glovsky & Popeo PC said. "As more and more cases are developed, it will become clearer."

Although the board considers the specific facts of each case, the three reports the acting general counsel has issued seem to indicate that employers can safely discipline workers over social media posts that air general workplace complaints or individual gripes. But they could get hit with unfair labor practice charges if they penalize workers over posts where they come together to address wages or working conditions, Forman said.

Employers also must keep an eye on state and local laws, attorneys say. For instance, state privacy laws — those that directly address social media and those that don't — could come into play. And when an employee's social media activity takes place off the clock or reveals outside activities the employer doesn't like, state laws could prevent the employer from taking action over lawful off-duty conduct.

But even as businesses must be judicious to avoid running afoul of various laws, they must also be aware that in some situations, the law actually obliges them to act, attorneys caution.

"The employer needs to engage in disciplinary action where there is a breach of securities laws because an employee divulges financial information relating to stock or the company's performance, or if there is a violation of [the Health Insurance Portability and Accountability Act] because an employee shares personal health information," Schroeder said. "In those instances, the employer is compelled to do something because it is otherwise a violation of the law to allow it."

With the law itself rapidly changing as courts and enforcement agencies race to catch up to new technologies, lawyers say an employer's best bet may be to seek out their advice before taking action.

"I don't think employers should be trying to go it alone," Forman said. "There are a lot of risks and pitfalls and dangers, so employers would be well-served to seek experienced counsel when contemplating disciplining employees for social media."

--Editing by Kat Laskowski and Richard McVay.

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