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Global Employee Terminations In The Age Of Social Media

Law360, New York (August 26, 2011, 3:22 PM ET) -- When your employee advises his friends on a Facebook status update that "My boss is a wanker," can you terminate his employment? Can you terminate another employee who tweets to her Twitter followers that "the company is screwing the public again because of shoddy work?" What about the employee harassing a co-worker with off-duty emails, tweets or text messages, following the breakdown of a workplace affair? Or the employee posting cheerful vacation photos on Facebook while on a disability leave for depression?

The increasingly prevalent use of social media has created an ongoing tension between an employee's right to free speech and the employer's right to manage employees and operate the business. While griping about one's job or taking revenge for unrequited love is as old as working for a living, only in the last few years have we seen such a blending of personal and public lives through — or indeed because of — vehicles such as Facebook.

When can you fire an employee for his or her excessive or inappropriate use of social media? This area remains relatively new around the globe, and plays out very differently from country to country. A common theme appears to be, however, that terminations are more likely upheld when the employee's performance was severely impacted due to an employee's excessive social media use, or the employer's business operations or reputation are publicly attacked online. For singular, personal comments on Facebook and other social media sites, if the damage is contained and unlikely to be repeated, adjudicators are more likely to uphold employee freedom of speech.

United States

In the U.S., terminations are permissible at-will, that is, at any time with or without just cause. Terminations in the U.S. are limited by certain public policy statutes, which prohibit employer discipline or terminations due to protected characteristics or conduct by the employee. Accordingly, when it comes to an employee's improper use of social media, in the U.S., the focus of the inquiry is on any limitations to discipline or terminations based on public policy statutes. In contrast, outside the U.S., terminations typically require specific grounds, and the analysis thus needs to determine whether or not the employer has sufficient reason to terminate.

Against this backdrop, the main concerns regarding employee terminations due to excessive or inappropriate social media use in the U.S. are based on the National Labor Relations Act (NLRA), which protects employees' rights to engage in "concerted activity," including discussing their working conditions via social media. It comes as a surprise to observers outside the U.S., and even to some in the U.S., that the NLRA applies to any workplace, whether or not it is unionized. While the first publicized social media cases happened to involve unionized workplaces, many of the more recent cases occurred within worksites that have never been unionized, and situations not involving any attempts to unionize.

NLRA social media cases are based on two distinct causes of action under the NLRA, that is: terminations of employees for engaging in concerted activity under the NLRA, and violations of the NLRA due to policies that can reasonably be construed to chill concerted activity.

The most discussed of the social media cases is the 2010 American Med. Response of Conn. case, in which the National Labor Relations Board (NLRB) found an employer's policy prohibiting "disparaging, discriminatory, or defamatory comments when discussing the company or the employee's superiors, co-workers and/or competitors" to interfere with the employee's protected right to discuss their work environment with other employees.

While this case was ultimately settled (with the employer agreeing to narrow its policy), almost every regional NLRB now has pending social media cases, most of them involving allegations that the employer had an overbroad social media policy (thus potentially chilling concerted activity) or unlawfully disciplined or discharged an employee for discussing their working conditions in social media posts. After the early scare in American Med. Response, in some of the more recent cases (JT's Porch Saloon & Eatery Ltd. and Martin House, for instance), the NLRB found that employee complaints about their employment on social media sites were individual grievances or gripes rather than concerted activity, thus losing NLRA protection.

In addition to the NLRA, there are various other statutes in the U.S. that can render a termination unlawful. They include terminations that are alleged to be made in retaliation for a whistleblower complaint or terminations in violation of so-called lifestyle discrimination statutes that some states have adopted to limit an employer's ability to take action based on an employee's lawful activities outside of work. Finally, social media terminations can violate state law provisions like Section 232.5 of the California Labor Code, which prohibits an employer from disciplining an employee for disclosing information about the employer's working conditions.

Canada

In Canada, all employment relationships are based on contract, which can be either implied or express. The focus thus becomes whether the employer can show the required cause for termination, such as employee misconduct or breach of a workplace policy, either of which would be a breach of the employment contract.

The case law will usually turn on one of two issues: (a) whether the use of social media breached any workplace policies, such as the confidentiality, IT/computer use or anti-harassment policies; or, (b) whether there was any specific damage to the company.

In Lougheed Imports v UFCW, Local 1518, the British Columbia Labour Relations Board found that the series of comments and status updates posted by terminated employees on their Facebook pages egregious and offensive to the individual supervisors named (e.g., referring to his supervisor as a “Fixed Ops/Head Prick” and a “complete jack-ass ... not just half a tard”). Of additional concern was that certain of the posts were a direct attack on the employer’s operations and business reputation. For example, one of the posts recommended people not spend their money at his employer’s business, and suggested that the “greedy” employer was a “crook” that was out to “hose” customers. Given the number of friends each employee had on their Facebook account, the adjudicator held that they could not have had a serious expectation of privacy when publishing comments so damaging to their employer’s business. The adjudicator held that the employer had just cause to terminate the employees.

In contrast, in Hydro One Networks Inc. v Society of Energy Professionals (Labatt Grievance), the adjudicator substituted the employee’s termination for a suspension. In that case, the employee and a summer student had developed a personal, but platonic, relationship and were “friends” on Facebook. When the student failed to show up for an after hours get-together because she was concerned the employee was wanting to develop a romantic relationship, the employee sent an angry message to the summer student through their Facebook email accounts. In the email, the employee suggested he would prevent the student from ever getting a full-time job at their workplace.

In Hydro One, the adjudicator held that while the Facebook message was highly improper, it was a singular event, the employee did not have a discipline history, and the employee showed remorse. Furthermore, the public was not involved and the incident did not compromise the employer’s reputation or operation in any manner. While the employee erred by turning a workplace relationship with a student into a threatening personal situation through Facebook, it remained essentially private, was a relatively mild incident and was not sufficiently improper to justify termination.

France

Like Canada, other non-U.S. jurisdictions are struggling with employee terminations in the social media age. To date, most reported cases come from the EU. For instance, in what is referred to as the first Facebook firing case in France, the labor court of Boulogne-Billancourt upheld the termination of two employees who criticized their leadership on their Facebook site, including for comments such as "club harmful." They were terminated for "inciting rebellion" and "denigrating the company."

The court sided with the company, finding that the discussion took place on a public forum, and the employee's right to freedom of expression under the French Labor Code should not undermine the employee's duty of loyalty. This tracks existing case law, which prohibits disciplinary action based on the employee's private life or the employee exercising her freedom of speech, but subject to justified and proportionate restrictions (during work hours) or prohibitions of "offensive, slanderous or excessive comments" (during nonwork hours).

Italy

To date, there have been very few reported cases on how social media use plays against the employee's right to the Workers' Statute of Rights, which generally prohibits employers from conducting investigations into an employee's private life and opinions. Labor disputes involving social media cases have now been reported in the news, however. For instance, in August 2010, an intern in the press office of the Parma football club was dismissed because he had published on his Facebook profile a photo of the football team that was referred to as "22 shits." The intern publicly recognized that the dismissal was fair and apologized to the club.

Also, in a case involving government employees, in May 2011 five employees of the local government of Bertinoro went under criminal investigation for having used the employer's IT systems to access Facebook and download pornographic materials. Since the employees are civil servants, the public prosecutor indicated his intent to charge them with embezzlement of public resources.

United Kingdom

In the United Kingdom, courts will look at whether the termination was "fair." In Preece v JD Wetherspoons PLC, the Tribunal upheld a termination for improper Facebook comments about customers made during work hours, because the employee was aware that she had violated the Internet/e-mail policy and the comments were made in a public domain.

The employee was a shift manager in a bar, and felt she was subject to abuse by customers. Aggravated, she posted complaints such as “f***in moaning old hag“ on her Facebook page. The court balanced the right to freedom of expression under Article 10 of Human Rights Act against the employer’s interest in protecting its reputation, and held that the employer's interest prevailed.

While this case involved an employee's posting during work hours, in Gosden v. Lifeline Project Limited, a U.K. Tribunal upheld the dismissal of an employee for gross misconduct who was terminated for sending offensive emails from his home computer to colleague’s home computer, outside of work hours.

Australia

To date, few Asian jurisdictions have reported social media cases. In Conoor / Outdoor Creations Pty Ltd, however, an Australian court held that excessive use of social media during work hours can be a valid reason for termination. The employee had chatted online 3,000 times in a three-year period.

Also, while this issue has not yet reached the courts, Australian employers did have to deal with the issue of "planking," that is, individuals taking pictures of themselves lying face down in an incongruous place and posting such pictures on their social media sites. While planking itself is a nonvirtual activity, it has only gained phenomenal popularity around the world because of the ability to publish the quirky photos online.

Recently, two Australian workers of Santos were reportedly dismissed for planking on two smoke stacks 60 meters in the air, and eight Woolworth employees were dismissed after photographs were published of them lying on top of meat grinders, among others. The general guidance is that if planking involves serious safety issues, it can constitute a valid reason for dismissal, provided dismissal is not harsh, unjust or unreasonable.

Conclusion

In conclusion, social media remains a developing area of law, and employers should carefully monitor trends as they develop. In the meantime, it is crucial that employers draft and implement carefully crafted social media policies. Throughout various jurisdictions, employers have been able to defend terminations due to social media use because they were able to rely on a company policy that contained clear language limiting such use from both a technical point of view (e.g., limited time on social media sites) and from a substantive point of view (e.g., no online harassment of co-workers).

Finally, as with any global policy, employers should ensure to not only carefully craft the policy, but also properly implement it, including obtaining employee acknowledgement or consent where required, implementing employee training sessions, addressing employee co-determination rights, providing translations where recommended or required or incorporating policies in any legally mandated work rules or internal regulations.

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