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From Facebook to FMLA to Furry Friends—Frequently Asked Questions in Employment Law

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The questions we receive as labor and employment attorneys vary based on many factors such as organizational changes a business is experiencing, new laws or regulations that affect employer obligations, and certain trends in society or workplace culture.

Some questions, however, are common despite these factors due to unique situations that arise, such as when dealing with ADA or FMLA issues. Here are three of the most common questions that have come up over the past year.

1.) Can we discipline or terminate an employee who posted negative comments about the company online?

News travels fast, but bad news travels even faster. We often receive calls from clients and potential clients about how to address situations with employees who post negative content on social media. Navigating these situations is, of course, dependent upon the nature of the comment.

The key legal requirement that employers must keep top of mind is the National Labor Relations Act ("NLRA"), which protects employees' rights to discuss the terms and conditions of their employment, including wages, benefits, and disciplinary action. The NLRA prohibits employers from retaliating against employees for engaging in this "protected concerted activity," which can include posting online about an employee's, or their coworker's, terms and conditions of employment. Discipline and/or termination from employment based on an employee's use of social media, such as Facebook, may result in a charge being filed with the National Labor Relations Board (the regulatory body that enforces the NLRA). As such, employers should consult legal counsel before taking any type of disciplinary action against an employee related to social media or online posts.

Until this type of situation arises, employers can take several steps to stay ahead of the potential problem:

- Develop clear policies and appropriate standards on social media use in the workplace. Note that these policies cannot include a broad nondisparagement requirement, which would, by itself, run afoul of the NLRA. Instead, carefully crafted and legally compliant social media policies can help set expectations with employees without infringing on their legal rights.

- Educate employees on social media use through new hire or other training.

- Train management-level employees on the appropriate steps to take when they hear of unpleasant social media posts. Managers must avoid immediate reaction, which could result in unlawful action, and instead should immediately contact Human Resources or the appropriate internal resource who will help evaluate the appropriate, legally-compliant action.

2.) Can we terminate an employee when he or she does not return from FMLA leave?

Employers also are hesitant, and rightfully so, in what actions to take when an employee does not return from FMLA leave when expected. Again, the answer to this question heavily depends on the specific facts related to the employee.

Under the Family Medical Leave Act ("FMLA"), qualified employees are eligible for up to 12 weeks of job-protected leave within a 12-month period. If an employee does not return to work once his or her FMLA leave is exhausted, the employer should consider several factors before pursuing termination of employment.

At the outset, the employer must determine whether the employee's request to remain out of work is a request for an accommodation under the Americans with Disabilities Act ("ADA"). This will involve outreach to the employee and a request for medical certification so that the employer can determine whether a reasonable accommodation, such as continued leave, is available. Requests for discrete time periods of leave are typically considered reasonable accommodations under the ADA; however, the employer is not required to accommodate the leave under the ADA if it presents an undue hardship, such as when the leave is open-ended with no set duration. This requires careful analysis, and it is recommended that the employer consults with legal counsel prior to making the decision to grant or deny the requested leave accommodation.

Alternatively, if the employee desires to stay out of work beyond approved FMLA and it is not for disability or medical purposes, then the employer must consider whether it has allowed similar types of leave in the past. For example, if an employer has an unpaid leave of absence policy and has previously provided other employees with such leave, the employer must ensure it applies the policy consistently among employees. Otherwise, the employee requesting leave beyond FMLA could allege that he or she is being treated differently based upon membership in a protected class.

Of course, other considerations will depend on the particular situation, but the following are a few steps employers can take to stay ahead of this issue:

- Develop clear policies for how the employer complies with FMLA and ADA requirements. If the employer chooses to provide paid time off or other leaves of absences, these policies must also be clear and describe how they interact with other types of leave.

- Apply the policies as written and consistently among all employees. This includes ensuring that managers are trained to adhere to any approval process the employer has put in place, instead of arbitrarily granting or denying leave requests.

- Communicate in writing with employees who take extended leave under the FMLA, ADA or any leave of absence to ensure both the employer and employee understand expectations,

such as payment of benefits and return-to-work timing.

3.) What do I do if an employee brings an animal into the workplace?

A manager calls Human Resources stating that an employee brought a dog into the office and, while the dog is not bothering anyone at the moment, the manager is unsure what to do. How should Human Resources advise the manager?

First, since the dog was brought into the office, Title I of the ADA permits the manager to ask the employee whether the employee is a service animal or a pet. If the latter, then the employer needs to have a clear policy on whether pets are allowed in the workplace, and apply that policy consistently to all employees. If the former, and the employee states he or she has a need for a service animal, then the manager must engage in the interactive process under the ADA. As briefly described above, this will involve seeking appropriate medical documentation and evaluating whether the employer can accommodate the request without creating an undue hardship to the employer.

Generally speaking, service animals typically will be viewed as a reasonable accommodation under the ADA in the employment context. However, some confuse ADA requirements concerning service animals *in the workplace* as compared to service animals *in places of public accommodation*. For example, if the employer operates a place of public accommodation, such as a restaurant, it must train its employees on Title III of the ADA, which allows service animals to come into any such public place. If an employee is unsure whether an animal meets the definition of a service animal, the ADA allows the employee to ask the patron only two questions: (1) Is the animal a service animal required because of a disability? (2) What work or task has the animal been trained to perform? At no time can the employee ask the patron about his or her disability, or require showing of any documentation as proof of the animal's training. In the workplace, however, Title I of the ADA permits and actually requires the employer to engage in the interactive process with the employee to determine whether the animal will enable the employee to perform his or her job duties and whether that accommodation (*i.e.*, allowing the animal to be in the workplace) can be provided without undue hardship to the employer.

Best practices in dealing with service animals include:

- Develop a clear policy (yes, again!) on whether pets are allowed in the workplace.
- Train management-level employees on the appropriate steps to take under the ADA when they learn that an employee requests the use of a service animal.
- If the employer operates a place of public accommodation, train all employees on Title III of the ADA and the very limited exceptions of how they can approach a patron with an animal.

Conclusion, with a Caveat

My explanations of these three questions do not take into consideration other complications that often factor into an employer's dilemma. For example, what if the employee in those scenarios had recently filed a complaint with Human Resources about harassment? This would likely change the entire analysis. Even though the employer may have the intent to address the issue at hand, such as

whether to grant a request for accommodation, the employer's action could instead be considered retaliation in response to the employee's complaint. Therefore, seeking legal counsel in any of these situations is an employer's best first step.

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