

‘You are my Employer, not the Thought Police’ – Employee Online Activity in a Time of Turmoil

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A number of outlets have reported that social media use has significantly increased during the COVID-19 pandemic, as many are quarantined at home with time to kill. Meanwhile, just as social media use has spiked, the circumstances of George Floyd’s death have led to daily protests throughout the nation. In the midst of this perfect storm – as Americans take to their smartphones, tablets, and laptops to argue their views on complex societal concerns, a tricky issue has presented itself to employers – what to do if an employee posts racist or other objectionable content on his or her social media feed?

There are several issues at play with this quandary. First and foremost, as we have [previously reported](#), in contrast to public-sector workplaces, private employers are not bound by the First Amendment’s right to free speech. Public-sector employers have to tread more cautiously in dealing with employee expression issues. Unlike their public-sector counterparts, employees in the private sector do not have “free speech rights” at work as a general proposition. Nevertheless, as a best practice, employers should limit disciplinary action, including termination, for online conduct to scenarios in which the conduct violates the employer’s articulated policies. To that end, employers should ensure that the company’s anti-harassment policy specifically applies to online conduct, including postings on social media. Likewise, in this day and age, all companies should have social media policies that incorporate the company’s anti-harassment policy. If your company has a code of conduct, online conduct should be addressed there as well.

In addition to having policies that prohibit discrimination or harassment online, companies must enforce these policies consistently. In other words, if an employer learns that an employee used a racial slur online and disciplines the employee for this conduct, the employer will need to act consistently in similar situations that involve potentially discriminatory or harassing conduct. Likewise, an employer that has a history of terminating employees for obscenity, but does not similarly punish employees who disseminate racist statements (either online or in the physical workplace), may find itself on the receiving end of a discrimination claim.

Finally, depending on location, there are also state laws to consider when taking action against an employee for a social media post. For example, in [some states](#), “political affiliation” is a protected class, and thus, employers must be careful that the offensive post is not directly tied to an employee’s political affiliation. Likewise, some states prohibit terminating an employee for [lawful off-](#)

duty conduct. Online speech that attacks a protected class or constitutes actionable harassment, however, would not fall into that category.

These are tricky issues, often directly impacting an organization's core values. In addition to potential legal liability, an employer's approach to an objectionable employee posting can have wide-ranging effects in terms of employee morale and public perception. A decision regarding whether and how to best respond should be taken carefully, and should take all of these considerations into account, including the advice of legal counsel.

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