Steve Cattolica <scattolica@scadvocates.com>

The Times Today They Are A Changin' - bob dylan

Steve Cattolica <scattolica@scadvocates.com> Thu, Aug 13, 2020 at 4:35 PM
Draft

Good afternoon.

Carothers DiSante and Freudenberger LLP is an employment law firm with offices throughout California. It is the firm that, as an employer, AdvoCal used occasionally.

The firm regularly distributes newsletters such as the one attached. This one addresses a very important subject that any employer must be concerned with. In my words, the issue is employer and employee rights as they pertain to off duty conduct and any real or perceived detrimental effect the conduct may have on the employer's business.

Here, CD&F distributes an extremely well-written and thorough discussion. It is relatively quick to read and serves as a primer on a subject that most employers will, these days, tackle sooner than later - or already did and experienced a legal backlash because of not considering all the variables and the implication of each.

While it may not be true on a strict basis, it is easy to understand how small physician practices up to and through much larger practices and management companies can easily become a victim of either side of a wrong decision on this question. This latter point is also covered by the essay in an easy to understand manner.

Oh, we've all heard by now that the next iteration of the MLFS is poised for distribution via a second "Forum" rather than beginning the formal rulemaking process. If true, that's probably a good move and could indicate the Division's willingness to make further changes if it has not fully and appropriately addressed concerns it received last month. Well, maybe....

Carothers DiSante & Freudenberger LLP
COUNSEL TO CALIFORNIA EMPLOYERS™

California Labor & Employment Law Blog

The Challenges and Risks When Private Employers Regulate Employees' Off-Duty Conduct in California

Topics: Discrimination, Harassment & Retaliation, Employee Hiring, Discipline & Termination, Legal Information, Social Media

By: Erin A. Owen, Dalia Z. Khatib, Mark S. Spring

Social activism pervades our daily lives more today than it has at any time in the last fifty years. With the broadcasting capabilities afforded by social media platforms, many people voice their viewpoints through Twitter, Reddit, Instagram, Snapchat, LinkedIn, TikTok and Facebook. Others are out in the streets protesting, or engaging in a silent protest by refusing to wear a mask or socially distance. Still others aggressively assert their political views in public, while being videoed, resulting in their outbursts being shared on Twitter, YouTube, and other social media platforms.

Culturally, we find tolerance and intolerance occupying two sides of the same coin, palpably polarizing people who hold differing points of view and few are holding back when it comes to articulating their feelings. Suddenly, personal perspectives on what were once viewed as the most personal of topics are offered up for public consumption, often prompting, if not provoking, reactions from their viewing audiences.

The potential effects of such social media posts and other activism, may prove challenging for many employers, whether because the employer does not want to be seen as having voiced any one particular viewpoint whatsoever, or because an employee's posts advance statements that are antithetical to the employer's guiding principles or public image and/or might offend the customer or client base of the employer and potentially damage the employer's business as a result. Employers are increasingly concerned that if one of their employees engages in activism that is offensive, the employer may become a target on social media, even if the activism was not authorized by the employer. This is particularly concerning in today's "cancel" culture. So, what's an employer to do when employees author or disseminate political, social, religious, or incendiary posts on social media, or make their views known in other ways that might offend some?

First, can an employer even lawfully monitor an employee's off-duty conduct, and if so how can it do so legally? Second, can an employer lawfully make employment or discipline decisions based upon an employee's off-duty conduct? If so, what legal limitations exist? These questions figure prominently at the intersection of an employer's brand value and its employees' social activism.

Recently, companies like Franklin Templeton, Ted Todd Insurance, and Sports 1140 KHTK publicized their answers to these initial questions after their now former employees displayed what they deemed to be socially unacceptable behavior.

At Franklin Templeton, a viral video showed their employee, Amy Cooper, making a report to the police, from New York's Central Park, that an "African American man" was threatening her. The video merely showed a bird watcher, Christian Cooper, asking Ms. Cooper (no relation) to place her dog on a leash per Central Park rules. Ms. Cooper's police report created an uproar on social media, with many accusing Cooper of fabricating the report based on racist motivations. The entire incident quickly caught Franklin Templeton's attention. Ms. Cooper's conduct had nothing to do with her job duties or performance of work for Franklin Templeton. Nevertheless, Franklin Templeton swiftly decided to terminate her employment citing that the Company has "zero-tolerance for racism."

Ted Todd Insurance also found itself dealing with an employee's off-duty behavior caught on video. In Florida, a bystander tweeted a video of Daniel Maples, a Ted Todd Insurance employee, depicting him threatening and intimidating an elderly woman after she questioned his failure to wear a mask inside a Costco store in violation of store rules. Again, the video was shared widely on social media and sparked all manner of commentary from the public. After it went viral, Ted Todd Insurance terminated Maples' employment, stating that intimidating and threatening behaviors are contradictory to the Company's objectives.

Finally, in Sacramento, Sports 1140 KHTK's long term sports radio personality, Grant Napear, tweeted "All Lives Matter" in response to an NBA player's question on how Mr. Napear felt about Black Lives Matter. Once again, this sparked a venomous reaction from Twitter participants, with many calling Napear a racist and ignorant. Under apparent social pressure, Sports 1140 KHTK ended Mr. Napear's employment relationship, stating that his tweet is not reflective of the company's beliefs or values.

These well-publicized adverse employment decisions provide examples of how some employers are responding to employee off-duty conduct, by terminating employees for conduct unrelated to job performance. These highly publicized terminations lead many to believe that it is perfectly permissible for employers to fire employees for engaging in off-duty conduct they don't like. However, it is not always that simple.

In California (and other states), there are laws that protect employees' right to engage in lawful off-duty conduct, and provide monetary remedies to employees whose employment is adversely affected in violation of these laws. However, it is important to understand that these laws do not provide complete protection for all types of off-duty conduct. Off-duty conduct that harms or potentially harms the employer's business interests and/or involves a crime may validly be the basis for termination of employment. As is often the case with employment decisions, the individual facts must be considered along with competing legal and business interests.

In terms of applicable laws, let's start by debunking a popular misconception—that the First Amendment protects the free speech rights of all citizens and, therefore, it must be illegal for an employer to fire an employee based on something he or she said. Not true. The First Amendment generally does not apply to private employers. However, there are some other laws that do apply to private employers in California:

California Labor Code section 96(k) provides protections for employees who are terminated for "lawful conduct occurring during nonworking hours away from the employer's premises." This sounds pretty broad, but generally has been more narrowly interpreted by courts as applying to lawful off-duty political activity. Given its broad wording, however, it is possible that courts may expand its applicability to other types of lawful off-duty conduct.

The California Labor Code also has other provisions that expressly protect employee rights to freedom of political association. Labor Code section 1101 prohibits an employer from making, adopting, or enforcing any rule, regulation or policy forbidding or preventing employees from engaging or participating in politics, or from becoming candidates for public office, and from controlling, directing, or tending to control or direct, the political activities or affiliations of employees. Labor Code section 1102 prohibits an employer from coercing or influencing, or attempting to coerce or influence, employees through or by means of threat of discharge or loss of employment to adopt or follow, or refrain from adopting or following, any particular course or line of political action or political activity. Effectively, then, these two provisions prevent employers from interfering with or directing the political activities of its employees. This does not mean employers are without the ability to implement and enforce limits on the use of company equipment for political purposes and does not mean that employers may not limit political and other non-work-related activity in the workplace. Employers may do so. Employers also may prevent employees from posting content in forums that lead viewers to believe that the employee is speaking on behalf of the employer and/or in the employee's capacity as an employee. Employers also may take action based on observed unlawful conduct (even when it occurs off-duty).

Employers also should be aware that Article 1, Section 1 of the California Constitution gives each citizen an "inalienable right" to pursue and obtain "privacy." Additionally, section 980 of the Labor Code protects employee privacy in their personal social media accounts by prohibiting employers from asking employees for their social media log-ins and passwords (with limited exceptions). Thus, this law provides some privacy protection for employee social media accounts. However, this does not mean that there is privacy protection for an employee's public behavior or public social media posts. An employee understandably may waive any privacy by publicly posting content beyond a limited group of private followers.

In addition to California state law, employers should be aware that the National Labor Relations Act ("NLRA") protects certain types of employee conduct, whether or not the employees are unionized. Under the NLRA, employers cannot interfere with an employee's right to engage in protected concerted activity. This protection allows employees to communicate with each other about workplace issues (e.g. wages and terms and conditions of employment) without fear of reprimand, even if the communication occurs on social media. Thus, employers should keep in mind that the NLRA may view employee Instagram posts, direct messages, group texts, tweets, Snapchat groups, Facebook posts, sub-Reddit threads, etc. as concerted activity by employees who are communicating with each other for the improvement of pay or working conditions. However, not all social justice posts or political posts may be deemed sufficiently related to the workplace to be protected by the NLRA.

Questions Employers Should Ask Themselves Before Taking Adverse Action Against an Employee Based on Social Media Posts or Other Off-Duty Conduct

The reality is that most, if not all, employees have a social media presence. Many are making their views known in these forums. Others are caught up in angry tirades that are video or audio recorded and later disseminated, with or without their knowledge or consent.

An employer's decision to make any sort of policy or employment decision based on social media posts or comments, or other political activity, needs to be carefully considered in light of potentially

applicable laws and competing areas of litigation exposure and/or effects on business. Employers also need to consider whether they have consistently applied company limitations on the challenged conduct in the past. Allowing some forms of similar conduct while disallowing other forms may lead to an increased chance of employee success in a legal action challenging an adverse employment decision as unlawful. With this basic understanding, before taking action, employers should ask themselves:

- Will this employee's posts/comments/activity affect my business, and why do I believe it will? (There is a difference between actual harm to your business and simply disagreeing with another's perspective.)
- Does the activity violate a company policy?
- Have I consistently enforced this company policy in the past?
- Is the policy "current," meaning is it still legally compliant and does it still fit the times we are in? (If not, you may want to reevaluate your policies.)
- What is the employer's investigation policy?
- How did the employer learn of the employee's off-duty conduct? Was it done in a way that could be considered an improper invasion of privacy? What actually is the specific activity that is potentially problematic? (Be sure to document the investigation and the decision-making process.)
- What is the company's discipline policy with regard to employee policy violations and what is the next action indicated by that discipline policy?
- What are my choices for responding?
- How will any adverse employment decision (or a decision to take no action) affect my company morale and potentially the reputation of my company?
- How will this employment decision be perceived by the general public and our customer base if it goes viral?
- How important is it? Meaning, how do I weigh the importance of each of these issues to my organization, and what is my risk tolerance for potential diminished morale and exposure to litigation?

Disciplining employees for off-duty conduct has become increasingly challenging. It creates legal risks, morale risks, and other business risks, including the potential loss of customers/sales. However, sometimes NOT disciplining employees for such conduct exposes companies to the same risks. These guidelines should help in the decision-making process. Before taking action or coming to a final decision related to an employee's off-duty conduct, California employers should consider reaching out to their legal counsel for advice on how to proceed and consider all of the surrounding issues.