



Garfunkel Wild

Managing Social Media Use & Best Practices for Imposing Discipline

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WHAT IS SOCIAL MEDIA?

Any digital technology that enables people to use, create, and share content, opinions, and insights over the internet and through mobile devices.

This includes, for example:

- Facebook
- Twitter/X
- LinkedIn
- YouTube
- Instagram
- TikTok

No First Amendment Protection for Private Employees

Most Employees are Employed “At-Will” Absent a Contract

Neither State has Specific Laws Protecting Employees from Discipline by Private Employers in Response to the Employees' Comments

CONNECTICUT

1. Section 31-51q.

Liability of employer for discipline or discharge of employee on account of employee's exercise of certain constitutional rights or employee's refusal to attend employer-sponsored meeting or listen to speech relating to employer's opinion on political or religious matters. Definitions.

2. Exceptions:

“Except as provided in subsections (c) and (d) of this section, any employer, including the state and any instrumentality or political subdivision thereof, who subjects or threatens to subject any employee to discipline or discharge on account of (1) the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution..., provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages...”

NEW YORK

Labor Law 201-d(2)

Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:

- a) an individual's political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property, if such activities are legal, provided, however, that this paragraph shall not apply to persons whose employment is defined in paragraph six of subdivision (a) of section seventy-nine-h of the civil rights law, and provided further that this paragraph shall not apply to persons who would otherwise be prohibited from engaging in political activity pursuant to chapter 15 of title 5 and subchapter III of chapter 73 of title 5 of the USCA;
- b) an individual's legal recreational activities, including cannabis in accordance with state law, outside work hours, off of the employer's

Labor Law 201-d(1)(a)

“Political activities” shall mean (i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group.

Labor Law 201-d(1)(b)

“Recreational activities” shall mean any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material.

Safe Harbor Provision - Labor Law 201-d(3)(a)

The provisions of subdivision two of this section shall not be deemed to protect activity which:

- a) creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest

VARIABLES TO CONSIDER

- Do the comments constitute hate speech?
- Did the comments result in a hostile work environment or otherwise have a negative impact on the workplace or other employees?
- Do the comments constitute threats, including threats of violence?
- Do the comments negatively impact the employer's reputation and relationships with clients, customers, patients and community at large as the case may be?
- Do the comments actually give rise to criminal culpability?
- Do the comments violate the employer's written policies?

BEST PRACTICES

Create, Implement and Enforce a Social Media Policy

Provide Guidelines for Proper Use

Provide Clarity as to Forbidden Practices

Provide Training to Employees on the Appropriate Use of Social Media

PITFALLS TO AVOID

Wrongful Access of Employee’s Social Media Accounts

Interference with “Concerted Activity”

Hasty and Premature Judgments of the Facts



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Questions?

THANK YOU

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