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What's Hot in Employment (and the COVID-19) World

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What Can You Do About an Employee's Off-Duty Social Media Posts?

American's likely now recognize that private sector employees do not have a "free speech" right that allows them to post whatever they want on social media without repercussions. The First Amendment only protects against the government's enactment of laws abridging free speech.

Yet, employees are generally posting on their personal social media pages and are often doing so outside of work time, which is often seen by co-workers and community-members resulting in complaints about these offensive comments. While sometimes the conduct is so severe that employers can easily determine the appropriate consequences, in other cases employers must balance a variety of legal requirements, employee and public relations concerns, and their own company values.

Can employers discharge employees for off duty conduct on social media or in person?
It depends. Some states prohibit employers from taking adverse employment actions against employees based on lawful off-duty conduct. Currently, California, Colorado, Louisiana, New York, and North Dakota ban employers from firing or retaliating against employees for any off-duty lawful activity, including speech. This may even include offensive content. But employers should be aware that even in these states, online speech that attacks immutable characteristics protected by law (age, race, sex, religion, etc.) or constitutes workplace harassment would not be protected under these laws.

Employers may not be in a position to police everything employees do outside of work, however, once someone complains to an employer or calls attention to an employee's off-duty comments or actions, it becomes the employer's concern. Employers should have policy language in the social media policy to address these issues.

Can employers discharge employees who make offensive political posts or engage in protests?
It depends. More than a dozen states and jurisdictions, including California, Colorado, Guam, Louisiana, Minnesota, Missouri, Nebraska, Nevada, South Carolina, Utah, West Virginia, Seattle (Washington), and Madison (Wisconsin), prohibit employers from retaliating against employees for engaging in political activities. New Mexico protects employees' political opinions. Employers should also consider whether or not the offensive post or speech is directly tied to an employee's political affiliation. Expressions of racism or other harassment are not political speech.

Can an employer be held liable for offensive social media posts on an employee's personal account?
Yes. An employer may face liability if it is aware of discriminatory harassment—even if it is done through an employee's personal social media use and outside of work hours—if the conduct creates a hostile work environment.

Can employees post social media complaints about their jobs?
Yes. The National Labor Relations Act (NLRA) and similar state laws protect employees' rights to communicate with one other about their employment. More specifically, employees have the right to engage in "protected activity" regarding their workplaces—sharing grievances and

organizing online in protected activity. Employees who are fired for posting online complaints about their wages, benefits, tip sharing arrangements, management, hours, or other work conditions could have a legal claim under the NLRA.

What factors should employers consider before discharging an employee for online activity?
Employers may wish to consider the impact of the employee's conduct on the company and its employees. Considerations include whether co-workers will be forced to work with someone who has made offensive, racist, discriminatory, or hateful comments about their immutable characteristics, like race, sex, or sexual orientation.

Employers should always:

- Reiterate the company's core values so employees know which behaviors violate its principles.
- Remind employees how to report inappropriate conduct if they experience or learn of it.
- Companies should implement or review and update social media policies to make clear that off-duty conduct that violates a company policy or harms the company's reputation may still trigger consequences at work, including termination of employment.
- Promptly investigate any reports of potentially problematic social media posts or other conduct.

Can employers adopt social media use policies?
Yes. Employers should consider adopting social media use policies that address inappropriate and offensive conduct and disseminating these policies to employees. Employers can tell employees that their personal social media accounts, online networking accounts, blogs, and other online communications may be reviewed, and that any inappropriate or offensive content could subject them to discipline up to and including termination.

As with all employment policies, employers can face liability if they do not enforce their social media use policies consistently. If employees are treated differently for the same or similar conduct without legitimate non-discriminatory explanations, employers could face a risk of employment discrimination claims.

Walk don't run to your conclusions.

Finally, it is important to conduct a thorough investigation before taking any action against an employee for allegedly engaging in inappropriate online conduct:

- Confirm the existence of the post itself
- Confirm that it was actually written by the employee in question.
- Consider how the post came to the employer's attention, for example, if complaints were received from coworkers or customers.
- Confirm that the contents of the post are objectively inappropriate or offensive.
- Interview the employee in question in order to try and understand the context of their post. There could be an explanation to the post which may not be apparent if not viewed in the context of the entire "thread."

Mandating Flu Shot or COVID-19 Vaccination?

As clinical trials continue across the world for a COVID-19 vaccine, many employers are asking whether they will be able to require employees to take the vaccine when it becomes available in the United States. Like with so many questions surrounding COVID-19, the answer is not entirely clear. In general, employers *can* require vaccination as a term and condition of employment, but such practice is not without limitations or always recommended.

The U.S. Occupational Safety and Health Administration ("OSHA") has taken the position that employers can require employees to take influenza vaccines, for example, but emphasizes that employees "need to be properly informed of the benefits of vaccinations."

In March 2020, the Equal Employment Opportunity Commission ("EEOC") issued COVID-19 guidance specifically addressing the issue of whether employers covered by the Americans With Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII") can compel *all* employees to take the influenza vaccine (noting that there is not yet a COVID-19 vaccine). The EEOC explained that an employee could be entitled to an exemption from a mandatory vaccination under the ADA based on a disability that prevents the employee from taking the vaccine, which would be a reasonable accommodation that the employer would be required to grant *unless* it would result in undue hardship to the employer.

Additionally, Title VII provides that once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from taking the vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship to the employer as defined by Title VII, a lower standard than under the ADA.

It really is best practice to simply encourage employees to take the influenza vaccine rather than to mandate it. An employee may respond negatively to a vaccination requirement, with adverse reactions to the vaccine potentially leading to workers' compensation claims. Tread lightly.

Privacy and HIPAA Concerns

COVID-19 highlights the competing interests of ensuring the health and safety of employees and protecting employees' privacy interests. Most employers are not covered entities under HIPAA and therefore, privacy concerns generally are going to be governed by state privacy laws (i.e., GINA and the ADA). With respect to the ADA, employers have an obligation to maintain the confidentiality of employee medical records.

Given health and safety concerns, employers must strike a balance between an employee's privacy interests and other employees' reasonable need to be informed if they have been exposed to COVID-19. Without disclosing names or personal circumstances, it is appropriate for employers to notify employees when another employee in the workplace has tested positive for COVID-19 or may have been directly exposed to COVID-19.

Sample Message: "A person tested positive on [date] and is now self-isolating [difference between self-isolation and quarantine]. Their close contacts have been told and were asked to leave the

workplace and quarantine. If you were not already told you were a close contact, then we do not believe you were in close contact with that person. If you have questions about COVID-19 or your situation, please call your doctor and look at the CDC website. The company is here to support everyone during this difficult time, and we all send our best wishes to our team members who are affected."

Expense Reimbursement Laws: Work from Home

The answer varies from state to state, but states like Illinois and California, among others, require reimbursement of expenses incurred by an employee in performing tasks assigned by the employer. It is important for employers to have a written policy establishing how expenses will be reimbursed and establishing caps on reimbursable expenses, if permitted.

If you have not already done so, employers should establish a policy to allow employees to work from home tailored as a response to the coronavirus pandemic. This policy does not have to be – and should not be – implemented as a formal part of an employee handbook. It can be a stand-alone document or even an e-mail addressed to those who will be offered the opportunity to work from home. The policy should clearly address:

- Who will be allowed to work from home (as not all jobs are conducive to telecommuting);
- Employees' expected hours of work (i.e., start and stop times, and meal and other break periods);
- Any expected productivity standards;
- Connectivity and logistical issues (such as logistics for turning in work, conference calls, and online meetings); and
- Parameters for bringing work documents home, including employees' continued adherence to confidentiality and data security protocols.

For companies that are enacting a "work from home" policy for the first time or that are significantly expanding an existing policy, it may be important to clarify that the policy is being enacted solely as a response to COVID-19 (and perhaps future pandemic situations). To help avoid setting a permanent precedent, employers should make clear that:

- The telecommuting arrangement is temporary and based solely on the extraordinary circumstances presented by the COVID-19 pandemic;
- The policy will be subject to re-evaluation and modification at-will, in the employer's sole discretion;
- Once the pandemic subsides, the policy may be terminated, and employee attendance at the workplace will be considered an essential job function.

While rolling out a telecommuting policy, employers must also consider disability accommodation issues. If an employee has a disability-related accommodation at work (e.g. taking additional breaks or using an ergonomic keyboard or chair), employers need to consider providing those same accommodations for an employee's work at home, subject to the same undue hardship considerations as exist with providing such accommodations when working in the office.

If an employer is not asking its workers to work from home, but an employee personally requests to do so because he/she has a health condition that could be negatively impacted by COVID-19, the Americans with Disabilities Act ("ADA") and Family and Medical Leave Act ("FMLA") could be triggered.

Tracking the Time of a Remote Non-Exempt Employee

Under both the FLSA and state law, an employer has an obligation to keep a record of time worked by non-exempt employees. Remember, some states such as Illinois, require that an employer track all time worked by all employees, including exempt employees. Prior to allowing a non-exempt employee to work remotely, there needs to be a clear understanding of assigned work hours, authorization for overtime, and how time is tracked. For example, many automated systems allow for log-in and log-out mechanisms. Those same systems can be used for purposes of time tracking when work is performed remotely. We would encourage employers to have a policy on remote working for both exempt and non-exempt employees.

ADA Considerations

Is COVID-19 considered a disability under the ADA or state laws?
COVID-19, like the seasonal flu, is generally considered a transitory condition and not a disability under the ADA. However, COVID-19 might cause significant impairments with respect to major life functions, including, most notably, breathing. A prudent course of action for employers is to treat COVID-19 as a disability when determining accommodations in the workplace.

What constitutes a disability-related inquiry and what are employers allowed to ask employees who are asymptomatic?
Generally, an employer cannot ask employees who are not exhibiting symptoms to disclose whether they have a medical condition. However, given the obvious health concerns implicated by COVID-19, employers may require employees to disclose if an immediate family member has tested positive for COVID-19, or if the employee has tested positive for COVID-19. This is basic information necessary to protect other employees in the workplace. Employers also have the right to ask basic information about other activities which might constitute an elevated risk to others in the workplace, such as an employee's travels to a Level 2 or 3 country. Like any other medical issue implicating an extended leave, an employer may require a doctor's note indicating that it is safe for the employee to return to the workplace after they have recovered from COVID-19.

What medical documentation can an employer require as a condition of returning to work following a COVID-19-related illness or an asymptomatic quarantine?
Many employers have policies requiring a physician's or clinician's note following an absence lasting a certain number of days. The purpose of the note is to ensure that it is safe for the employee to return to work. An employee may return with certain work restrictions which would be the focus of a possible accommodation discussion. Remember, some people are still testing positive even though a physician has indicated they are safe to return to work. Be sure you look at all avenues on return to work issues and seek legal counsel if you want to deny a return to work.

Can employers require employees who are "higher-risk" to stay home or direct them to leave the workplace once they have reported to work? Generally, no, this is not permissible under the ADA and other equal employment opportunity (EEO) laws, absent a directive from the CDC or state/local public health authorities that employers should take such measures. This is a complex issue and may require an analysis of the particular facts. We suggest consulting legal counsel before taking any act that requires an employee to leave the workplace due to a high-risk status.

School's out for the …?

The Families First Coronavirus Response Act (FFCRA) became effective on April 2, 2020 and is currently scheduled to end on December 31, 2020. The FFCRA applies to employers with fewer than 500 employees and provides for two types of leave: (1) Emergency Paid Sick Leave (EPSL), which is capped at 80 hours, and (2) Emergency FMLA (EFMLA) leave for childcare purposes. Under the EPSL provisions of the FFCRA, an employee may take up to 80 hours of job-protected leave for certain covered reasons, one of which is to care for a son or daughter whose school, daycare, or regular daycare provider has closed or become unavailable due to COVID-19-related reasons. An employee taking EPSL for such reason is entitled to be paid two-thirds (2/3) their regular rate of pay, up to a daily maximum of $200. EFMLA leave makes available up to 12 weeks of job-protected time off to employees who have worked at least 30 days for their employer and who require extended time-off to care for a son or daughter whose school, daycare, or daycare provider has closed or become available due to COVID-19.

The first two weeks of EFMLA leave may be unpaid unless it runs concurrently with EPSL for the same reason, but the remaining 10 weeks of EFMLA leave are paid at two-thirds (2/3) the employee's regular rate of pay, up to a daily maximum of $200. Remember that EFMLA leave is an extension of FMLA. Thus, an employee's total FMLA allowance, including EFMLA leave, is 12 weeks.

The Department of Labor (DOL) recently clarified the use of FFCRA leave for daycares/schools closed in the fall/winter in their updated informal FFCRA guidance, explaining that any FFCRA leave allotment that was not already exhausted remains available for employees to use through the expiration date of the FFCRA but employers may request updated documentation of the new or renewed need for leave.

Just when we thought we had it together, a federal court in New York rejected four key provisions of the FFCRA regulations in a way that could require all employers to rethink how they use FFCRA leave. The district court's decision is not clear as to whether its decision will be the law on a broader, nationwide basis. Thus, employers should consult legal counsel before making any decision as to whether or not to deny FFCRA leave.

In its decision, the Court rejected the following:

1. The DOL's requirement that FFCRA leave is available only where the employee had work available to be performed;

2. The healthcare provider exemption, which allowed a health care employer to decide which of its employees would be eligible for FFCRA leave;
3. The requirement that employees and employers agree on the use of intermittent leave for certain reasons; and
4. The timing of documentation supporting the need for FFCRA leave.

Work-Availability Requirement

One of the key preconditions for taking FFCRA leave is that the employer actually has work available for the employee to perform. If the employee is not scheduled to work — whether it's due to a furlough or business closure for example — there is no work schedule from which to take leave. So, in a normal world, no FFCRA (and no FMLA).

Nevertheless, the Court determined that DOL could not require that employees actually be working in order to take FFCRA leave. The Court's decision to strike these work availability requirements opens the door for claims for leave by employees who are furloughed or temporarily laid off or whose employers that have had to temporarily cease operations under state or local orders, or due to economic circumstances during the pandemic. This is contrary to the DOL's FAQs 23-28, which deal with the employee's inability to take FFCRA leave when there is a business closure or reduction in hours.

Employer Consent Not Required for Certain Intermittent Leave Reasons.

In its final rule, the DOL limited intermittent leave for both EPSL and EFMLA to avoid or limit the risk that an employee might spread COVID-19 to other employees: (1) that the employee and employer agree to the use of intermittent leave; and (2) such use is limited to the employee's need to care for a child whose school or place of care is closed, or where childcare is unavailable. In doing so, DOL eliminated the use of intermittent leave for any of the other five reasons with the idea that if an employee is absent due to COVID-19 symptoms or diagnosis or is taking care of an individual in a similar predicament, it is not acceptable for the employee to take intermittent leave due to the "unacceptably high risk" that the employee might spread COVID-19 to other employees. In these situations, DOL said that the employee must continue to take continuous paid sick leave each day until the employee either exhausts paid leave or no longer has a reason for leave from work.

In the case of telework, the DOL indicated that employees can take intermittent leave but only if the employer and employee can agree. DOL contemplated that the employee and employer will "agree on an arrangement" for intermittent leave "that balance the needs of each teleworking employee with the needs of the employer's business."

The Court held that the DOL had "utterly fail[ed] to explain why employer consent is required for the remaining qualifying conditions." Essentially, the Court determined that the DOL had no reasonable reason for its decision on intermittent leave.

Employers Cannot Require Documentation Before Leave

The final rule obligated employees to submit documentation to their employer prior to taking FFCRA leave that indicates the reason for and duration of the leave, and where relevant, the

authority for the isolation or quarantine order qualifying them for leave. The court did not agree, finding that documentation is not required before an employee takes FFCRA leave. However, the court did not change the final rule's overall documentation requirement to support the need for leave.

The Court Strikes the Definition of Health Care Provider

In the final rules, the DOL allowed an employer to exclude from FFCRA leave any health care providers and pretty much anyone associated with a health care provider. It is incredibly broad. Despite the DOL's argument that maintaining a broad definition of "health care provider" is necessary to "maintaining a functioning healthcare system during the pandemic," the court disagreed.

We think that it's likely this will apply to employers across the country. And, while there is not only the question of applicability, but also a question of retroactivity (we doubt it), we suggest seeking legal counsel as you re-evaluate your use of FFCRA leave.