# SOCIAL MEDIA CONSIDERATIONS FOR THE MODERN WORKPLACE

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# PROBLEMS WITH SOCIAL MEDIA AS A SCREENING TOOL

**Social media sites like Facebook or Twitter can reveal more personal information than an employer is typically privy to from a traditional application or interview, including:**

- An applicant's religion, disability, age, or some other protected characteristic under anti-discrimination laws (e.g., Title VII).

- An applicant's involvement in union organizing.

- Inappropriate/Offensive, but **lawful off-duty** conduct.
  - Some states, like NY, have "life-style" laws, that prohibit employers from taking adverse employment action against an employee for **lawful** off-duty conduct.


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# PROBLEMS WITH SOCIAL MEDIA AS A SCREENING TOOL

CONTINUED

- An employer who relies on this kind of information – consciously or unconsciously – opens the door to discrimination claims e.g., “failure to hire claims,” which can be hard to defend.

- Keep records of all information reviewed and used in any employment decision in case it later gets challenged.

- Employers should train decision-makers on what they can search for on social media networks and how to use it in the application process.


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# WHEN AN EMPLOYER USES THIRD PARTY TO CONDUCT A SOCIAL MEDIA SEARCH

- The Fair Credit Reporting Act ("FCRA") applies to employers when they hire an outside third party, known as a "consumer reporting agency," to perform credit and background checks on employees and prospective employees.

- This applies to any kind of search by a third party – not just credit report, but also criminal background searches and social media searches.

- FCRA requires the third-party agency to notify the applicant of the search and provide a copy of the results of those searches to the applicant if the applicant is not hired. The applicant must be given time to correct or dispute those results.


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# EMPLOYEE MISUSE OF SOCIAL MEDIA

**Can the employer fire this employee?**



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# YES. WHY?

## On-duty conduct and on employers' premises

- Social media posts that occur during work hours are afforded less protection.

## Violation of company policy

- Taco Bell issued a statement that the photo was part of an internal contest, and the shells were not served to customers, but the posting of the photo on social media was a violation of the franchisee's policies.

**The employee was fired.**


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# EMPLOYEE MISUSE OF SOCIAL MEDIA

## Can the employer fire this employee?



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# EMPLOYEE ON-DUTY SOCIAL MEDIA POSTS


**Employers can discipline or fire an employee for posts that are related to conduct:**

- That is "on the clock"
  - Employees should be working and can be legitimately disciplined for instead engaging in social media activity.
- Involve employer premises or employer property
- Violates company policy
  - **BUT** enforce violations of policies consistently. Allowing some social media posts to "slide" and not others will increase the employer's legal exposure.


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# EMPLOYEE ON-DUTY SOCIAL MEDIA POSTS

CONTINUED

- Does the off-duty conduct negatively affect the employee's job or the employer's business (such as employee morale, reputation, relationship with clients)?

- Even if the answer is "yes," there are some limitations.
  - We will address later in the presentation


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# NLRA PROTECTION OF OFF-DUTY CONDUCT

Multiple recent Unfair Labor Practice Charges filed against non-unionized companies for disciplinary action against employees who posted comments about their work environments online.

The National Labor Relations Board (NLRB) believes such communications are statutorily "**protected concerted activity**" and disciplinary action by a company constitutes an "unfair labor practice" under the NLRA.


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# NLRA PROTECTION OF OFF-DUTY CONDUCT

CONTINUED

- Section 7: “concerted activities” 29 USC § 157: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.”

- Section 8: “interference with Union Activities” 29 USC § 158: It is unlawful for an employer to interfere with those activities.


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# NLRA PROTECTION OF OFF-DUTY CONDUCT

CONTINUED

**Does the employee's post/tweet constitute concerted activity?** If it serves as part of the conversation between and among co-workers or is designed to initiate such collective communications, it will likely be considered concerted.

**Does the post constitute protected concerted activity?** If it addresses, either expressly or implicitly, the terms and conditions of the workplace (viewed broadly by the NLRB), then the concerted tweet or other social medial communication may be deemed protected.

**Is the post so "malicious, disloyal or reckless" that the employee loses the NLRA's protection?** If so, the employer is permitted to take adverse action on what would otherwise be protected concerted activity. The threshold is quite high. Do not rely on this exception.


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# NLRB: "CONCERTED" ACTIVITY

- NLRB: A "like" or retweets or comments = "concerted" activity.

- An employee's FB post complaining about the company policies, **even if vulgarly stated**, may turn into concerted activity to improve working conditions protected under Section 7 of the NLRA if other employees like it.

- Essential to distinguish between individual gripes vs. initiation of group activity.
  - This is where it is tricky because social media sites are not static, but constantly change. Ex: A single FB post can turn into wide discussion when comments or "likes" are involved.


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# *THREE D LLC D/B/A TRIPLE PLAY SPORTS BAR AND GRILLE V. SANZONE, ET AL.*

NLRB DECISION DATED AUGUST 22, 2014

A former employee of a bar posted the following on his FB account: **"Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money…Wtf!!!!"**

- This post was "liked" by the bar's cook.

One of the bar's waitresses commented on this post: **"I owe too. Such an a**hole."**

- Waitress and cook fired. They were told that they were fired for their decision to comment/like a "disparaging" comment about their boss. According to their supervisors, their behavior showed that they were not loyal to the employer.

**NLRB: unlawful discharge.** The "like" and "comment" were protected concerted activity within NLRA. Rejected employer's argument that comments were "disparaging."


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# NLRB GUIDANCE ON PROTECTED ACTIVITY

**If the social media post relates to "terms of employment" or working conditions, then it is protected.**

- **Note:** Includes "likes," "retweets," "comments," etc.

**Examples of protected posts:**

- Hours and pay
- The way a company conducts its business
- The way it generally treats its employees
- The company's culture/morale


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# WHAT OFF-DUTY SOCIAL MEDIA POSTS ARE NOT PROTECTED?

**NLRB: Posts that show/include:**

- Personal gripes
- Excessive obscenities or inappropriate racist/misogynistic/religious language
- Disclosures of trade secrets or highly private/confidential information

**An employee's use of social media to discriminate, harass, or bully others is not protected activity.**

- Because such conduct can be imputed to employers, they have an obligation to redress complaints of unlawful harassment or discrimination known to the employer where it is related to the workplace (even where the conduct occurs off duty).


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# UNPROTECTED OFF-DUTY SOCIAL MEDIA POSTS

**This teacher was fired from "the most ghetto school in Charlotte"**

A Charlotte, NC, teacher was recommended for firing by the superintendent after making some remarks that the superintendent perceived as racially insensitive. The teacher listed "teaching chitlins in the ghetto of Charlotte" in her "Interests" section and "I am teaching in the most ghetto school in Charlotte" in her "About Me" section.


**A waitress can't deal with a bad tip**

22-year-old North Carolina waitress [redacted] blasted two customers over Facebook for stiffing her on the tip and keeping her late. She also took the time to mention her workplace by name.

She was fired for breaking a rule about disparaging customers.


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# PUTTING IT ALL TOGETHER

**Does the off-duty conduct negatively affect the employee's job or the business of the employer (such as employee morale, reputation, relationship with clients)?**

**Does your Code of Conduct or Social Media Policy address this behavior?**

- Does your policy address the questionable behavior? Have you been consistent in implementation of that policy?

**Is there an applicable federal, state, or local law that protects the employees' off-duty conduct?**

- Seek legal counsel. An attorney can help you analyze the behavior in terms of applicable employment laws.

**What are the ramifications of applying this policy consistently? Think about what would happen if you uncovered the same behavior with your most productive, key employee. Would you take the same action?**


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# SOCIAL MEDIA POST #1

- A female supervisor claimed that certain non-union employees did not do enough to help clients.
- Another female co-worker posted on Facebook:

  *[Name of Supervisor], a coworker feels that we don't help our clients enough at [Employer's name]. I about had it! My fellow coworkers how do u feel?*
- Four other non-union employees responded to the post with:
  - "What the f… Try doing my job I have 5 programs"
  - "What the Hell, we don't have a life as is, What else can we do???"
  - "Tell her to come do [my] f… job n c if I don't do enough, this is just dum"
- Employer fired the five employees for "bullying" the female employee.
- NLRB? **UNLAWFUL DISCHARGE. Employees engaged in protected concerted activity because the initial post invited group discussion and talked about job performance. It was not harassment of the female supervisor**.


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# SOCIAL MEDIA POST #2

- A tenured first grade teacher made two statements on Facebook:
  - "I'm not a teacher – I'm a warden for future criminals!"
  - "They had a scared straight program in school – why couldn't [I] bring [first] graders?"
- The principal from the teacher's former school **forwarded** the Facebook comments to the teacher's **current** principal.
- The school district filed charges with the Commissioner of Education.
- The teacher argued she was addressing work conditions and it was a matter of public concern.
- ALJ and Ct. of Appeals: **LAWFUL.** The teacher "made a personal statement driven by job dissatisfaction."


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# SOCIAL MEDIA POST #3

- Plaintiff was a nurse who had injured her back and legs at work. While on FMLA leave (in Mexico), the nurse  posted photos showing her:
  - Riding in a motorboat
  - Lying on her side holding two beers
  - Holding one grandchild in each arm
- Her supervisor received complaints from co-workers that the nurse was clearly misusing FMLA leave.
- When she returned to work, HR informed her that her employment was terminated pursuant to its Progressive Discipline Policy regarding employee dishonesty.
- The nurse filed a lawsuit alleging employer interfered with her FMLA claim.
- Result? **Lawful discharge.** The employer defeated plaintiff's FMLA interference and retaliation claim because it had an "honest belief" that the nurse had misused her FMLA leave.


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# SOCIAL MEDIA POST #4

- A sheriff's deputy "liked" the page of a candidate for sheriff other than the incumbent sheriff.
- When the incumbent sheriff was reelected, he did not rehire the deputy who "liked" his opponent.
- The deputy, along with other deputies who had not been rehired, filed suit for reinstatement of their jobs.
- The District Court? "Liking" a Facebook page was insufficient to merit constitutional protection and dismissed the case on summary judgment.
- Fourth Cir. Ct. of Appeals: **UNLAWFUL.** A "Like" = political sign in a front yard.


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# MONITORING SOCIAL MEDIA

## STORED COMMUNICATIONS ACT

- The Stored Communications Act prohibits **unauthorized** access to emails stored at an email service provider. (The SCA is a criminal statute with civil remedies).

- Covers 1) electronic communications, (2) that were transmitted via an electronic communication service, (3) that are in electronic storage, and (4) that are not public.

- Applies to social media accounts, including "non-public" posts to "walls" – *Ehling v. Monmouth-Ocean Hospital Service Corp.*

- **Best Practice:** Obtain a written consent from employees to monitor or access e-mail accounts.

- **BUT…**


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# STATE SOCIAL MEDIA PRIVACY LAWS

**Be careful about asking permission. More than 20 states prohibit employers from asking employees or applicants to provide usernames and passwords to social media accounts.**

Arkansas
California
Colorado
Connecticut
Delaware
Illinois
Louisiana
Maine
Maryland
Michigan
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
Oklahoma
Oregon
Rhode Island
Tennessee
Utah
Vermont
Virginia
Washington
West Virginia
Wisconsin


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# EXAMPLE: MARYLAND'S SOCIAL MEDIA PRIVACY ACT

First social media privacy protection in the United States (May 2014).

Prohibits employers from requiring or requesting employees or job applicants to disclose their usernames or passwords or any other means of accessing a personal internet account as a condition of employment.

**Exceptions:**

- Legal compliance investigations
- Investigations of misappropriation of employer proprietary information or financial data
- Access to employer's internal systems
- Non-personal accounts


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# TENNESSEE'S EMPLOYEE ONLINE PRIVACY ACT OF 2014

Tennessee Code Annotated § 50-1-1001, et seq.

"personal Internet account"

**Prohibits employers from:**

- Requesting an employee or job applicant to disclose a password for a "personal Internet account"
- Compelling an employee or job applicant to add the employer to a list of contacts associated with a "personal Internet account"
- Compelling an employee or job applicant to access a "personal Internet account" in the employer's presence in a way that enables the employer to observe the contents of the account
- Taking adverse action or failing to hire an employee or job applicant because of failing to disclose information or refusing to engage in any of the above prohibited acts (retaliation)


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# TENNESSEE'S EMPLOYEE ONLINE PRIVACY ACT OF 2014

CONTINUED

## The Act does not prohibit:

- Requiring an employee to disclose a username or password to gain access to an employer-provided electronic device or to access an account or service provided by the employer
- Disciplining or discharging an employee for transferring confidential or proprietary data to a personal internet account
- Investigating information on a personal internet account regarding compliance with applicable laws, regulations, or workplace prohibitions
- Restricting an employee from accessing certain websites using a company-issued device or using the employer-provided network or resources
- Monitoring, reviewing, accessing, or blocking electronic data stored on an electronic communications device supplied by or paid for wholly or in part by the employer, or stored on an employer's network, in accordance with state and federal law
- Complying with a duty to screen employees or applicants before hiring or to monitor or retain employee communications
- Viewing, accessing, or using information about an employee or applicant that can be obtained without violating Subsection (a) or information that is available in the public domain


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# TENNESSEE'S EMPLOYEE ONLINE PRIVACY ACT OF 2014

CONTINUED

## What is a "personal Internet account?"

- "an online account that is used by an employee or applicant exclusively for personal communications unrelated to any business purpose of the employer; and includes any electronic medium or service where users may create, share or view content, including, emails, messages, instant messages, text messages, blogs, podcasts, photographs, videos, or user-created profiles"
  - Twitter
  - Facebook
  - Text messages
  - YouTube
  - TikTok

- "Does not include an account created, maintained, used, or accessed by an employee or applicant for business-related communications or for a business purpose of the employer"
  - An employee running their employer's Facebook page
  - Company-issued email address


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# NLRB STRIKES DOWN SOCIAL MEDIA POLICIES

- NLRB: Employees' rights to concerted action can be restricted by a social media policy that is too broad, containing provisions prohibiting employees from disparaging employers or from discussing wage/pay information with other employees.

- NLRB violation if the social media policy:
  - Expressly restricts the exercise of Section 7 rights
  - Was promulgated in response to union activities
  - Can be reasonably construed by employees to prohibit Section 7 activities


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# NLRA GUIDANCE BASED ON RECENT DECISIONS

- Guidance on how the regional offices should be reviewing and interpreting unfair labor practice charges involving employer handbook language, policies, and work rules

- Focus on the **balance** between a work rule's negative impact on employees' ability to exercise their Section 7 rights and the rule's connection to employers' right to maintain discipline and productivity in their workplace


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# NLRB RULES CATEGORIES

"**Category 1 will include rules that the Board designates as lawful** to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule."

"**Category 2 will include rules that warrant individualized scrutiny** in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications."

"**Category 3 will include rules that the Board will designate as *unlawful*** to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule."


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# NLRB ADVICE MEMO

COLORADO PROFESSIONAL SECURITY SERVICES

**Background facts:**

- An employee posted a 23-minute live Facebook video on his personal Facebook page during working time.

- The employer had a “Harm to Business Reputation” policy that stated that employees must refrain from engaging in conduct that could adversely affect the company’s business or reputation.


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# NLRB ADVICE MEMO

COLORADO PROFESSIONAL SECURITY SERVICES (CONTINUED)

## NLRB Analysis

- The Board classified this "harm to business reputation" policy as Category 2 under *Boeing* and found that the provision was overbroad and interfered with employees' exercise of their Section 7 rights.

- However, the Board ultimately held that the employee's termination was **lawful** because the Facebook video did not constitute protected concerted activity and that the employee's complaints were individualized "mere gripes."


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# NLRB ADVICE MEMO

PHARMACY

## Self Identification Requirement

- This provision required employees to identify themselves by name when discussing their employers on social media.

- The Board held that this provision fell into Category 2 under *Boeing*.

- The Board ultimately held this provision was **unlawful** because requiring an employee to self-identify in order to participate in collective action imposes a significant burden on the exercise of their rights under Section 7.


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# NLRB ADVICE MEMO

PHARMACY

## Restriction on the Disclosure of Employee Information

- The Board found that this provision also fell into Category 2, which required a balancing analysis of the employer's justification with the level of interference with the employee's exercise of their rights.

- The Board reasoned that employees could also construe the term "employee information" to include contact information, and that employees should be able to access the non-confidential information of other employees in order to discuss wages, or other terms and conditions of employment.


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# SOCIAL MEDIA POLICY EXAMPLE #1

WHOLESALE STORE

**Policy:** Employees should be aware that statements posted electronically (such as online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Employee Agreement, may be subject to discipline, up to and including termination of employment.

**NLRB:** **Struck down.** NLRB found employees would reasonably construe the policy as prohibiting NLRA-protected activity because protected communications were not excluded.


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# SOCIAL MEDIA POLICY EXAMPLE #2

RESTAURANT COMPANY

**Policy:** While your free time is generally not subject to any restriction by the Company, the Company urges all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company's business. This can be accomplished by always thinking before you post, being civil to others and their opinions, and not posting personal information about others unless you have received their permission.

**NLRB:** **Upheld.** The policy is clear that it is not the "job-related subject matter" with which the company is concerned, but the "**manner** in which the subject matter is articulated."


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# SOCIAL MEDIA POLICY EXAMPLE #3

BOCH IMPORTS, INC.

**Policy:** Employees prohibited from using the Company's logos "in any manner."

**NLRB:** **Struck down.** Too broad because it could be reasonably read to cover protected employee communications.

**Better Policy:** A policy which directs employees to "respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights" and to "not infringe on [company] logos, brand names, taglines, slogans or other trademarks."


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# NLRB: DON'T(S) ON SOCIAL MEDIA POLICIES

**Don't:**

- Broadly reference communications which could "embarrass," "harass," or "defame" companies and/or staff
- Reference communications which "lack truthfulness" or could "damage the goodwill" of a company and/or its employees
- Prohibit postings "that could be construed as inappropriate"
- Ban "false statements" (only "maliciously false" statements are prohibited)
- Include overbroad anti-harassment rules
- Discourage criticism or "disparaging comments" about employees' supervisors, or other members of management
- Include an overbroad ban on the use of company logo

For more examples of impermissible policy language: see https://www.nlrb.gov/guidance/memos-research/general-counsel-memos


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# NLRB: DOS ON SOCIAL MEDIA POLICIES

**Do:**

- Offer **examples** of the types of information an employee is not permitted to post on social media.
  - If prohibiting posting confidential information, provide an example of what would constitute confidential information.
  - Give examples of harassment or bullying behavior.

- Restrict employees from discussing "embargoed information" under securities laws, trade secrets, "personal health information," etc.

- Articulate the need for the employer to place restrictions on an employee's social media use.
  - E.g., To protect employees from harassment, bullying, or other unlawful conduct.


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# NEW: NLRB DECISION ON MCLAREN MACOMB

An employer lawfully made pandemic-related layoffs.

As part of the layoff process, the employer proposed that each union-represented employee sign a severance agreement.

The NLRB scrutinized some of these provisions and held that they violated the Act.

**Examples:**

- Exiting employees cannot disclose confidential, proprietary or privileged information
- Exiting employees may not disclose the terms of their agreements with the former employer to a third person, spouse, or as necessary to professional advisors
- Exiting employees cannot make statements to current employees or the public disparaging the employer or harming its image.


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# A Final Example: Charlie Kirk

- On September 10, 2025, Charlie Kirk was assassinated while speaking at a Turning Point USA even in Orem, Utah.
- The assassination spread over social media like wildfire, leading many to be strongly outspoken about the event.
- Employers contacted by co-workers or by viewers of the employee's social media post calling for termination of the employee for making the divisive post.
  - **Should** I take action?
  - What **type of action** should I take?
  - What are the **consequences for my business** in making this decision?



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# What Should I Do?

- Tennessee is an at will state
  - Termination at any time for any reason that is not discriminatory or legally protected

- Generally, an employer who finds an employee's speech or conduct to be problematic, regardless of whether it was during work hours, may terminate the employee.
  - **There are caveats and restrictions to this general rule**


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# Caveat 1: Delegated Public Functions

- Mostly an issue for private employers that are government contractors
- If a private employer has a contract with the federal government delegating a "public function" to the private employer normally reserved to the government, the employer's conduct may be given public treatment.
  - This means that First Amendment protections could extend to the company and its employees even though the company is not a traditional "public sector" employer.
- Must involve a power "traditionally exclusively reserved to the state."
- Can also occur where the government has forced the employer to take a particular action by compulsion.


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# Caveat 2: Piggybacking off Title VII

- "Associational discrimination" – the discipline is a de facto violation of Title VII protections
- Title VII prohibits employers from discriminating against employees on the basis of "protected classes," which includes race, gender, religion and national origin.
- A prime example: employer disciplines employees for wearing "Black Lives Matter" facemasks.
- The employees may attempt to argue that the discipline for exercising their political speech was inconsistent with company policy in a way that targeted or disparately treated employees of a certain race.


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# Caveats 3 and 4: The NLRA and Restrictive State Laws

- The NLRA rears its head again
- Some states have more restrictive employee protections than Title VII
- For example, certain states have enacted legislation that prohibits an employer from interfering with an employee's political activity. (California, Illinois, Washington D.C., etc.)
  - This protection is typically limited
    - Conflicts of interest with the political activity
    - Disruption to the employer's operations


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# Best Practice? Social Media Policy

- Activities outside of work that affect job performance for an employee or their colleagues, or the employer's business interests, may be governed by social media policies

- Clearly communicate your expectations to employees
  - Excluding mention of employer from personal social media profile
  - Disclaimers on posts that may be perceived to reflect the employer
    - "The postings on this page are my own and do not necessarily reflect the views of my employer,"

- What are your goals?
  - Civility?
  - Conflict prevention?

- **Get legal counsel to write and/or review policies**


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# Q&A DISCUSSION

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# THANK YOU!

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