1. Overview

This SmartTask is designed to assist both in-house and outside counsel in determining whether an employee may be disciplined or terminated for objectionable content posted via a social media site. For purposes of this SmartTask, it is presumed that the employee who engaged in posting objectionable content is a nonunionized employee \u2014 that is, the employee is not a member of a labor union and is not currently engaged in seeking union representation. This SmartTask is meant to serve as a general guideline on how to analyze whether discipline may be appropriate where an employee has posted unlawful or otherwise inappropriate content on social media. It is not \u2014 and is not intended to be \u2014 an exhaustive instruction manual.

2. Consider whether employee discipline may be appropriate for unlawful social media posts

From Facebook to Twitter to LinkedIn to Blogger, social media platforms are widely used by employees, both within and outside the workplace. From time to time, the nature of the content posted on social media platforms is not simply innocuous; indeed, it can be harmful or destructive for the individuals or businesses to which the content relates. When employees post objectionable or offensive content online, employers should take into account the following considerations before imposing discipline. Because regulation of employee social media activity is constantly evolving, it is imperative before acting to consult with a lawyer to determine that any employer action complies with pertinent federal, state, and local laws.

3. Analyze the content of the objectionable social media post

As a starting point, carefully analyze the nature of the content and the reasoning behind potentially imposing disciplinary action against the employee. For example, does the content constitute an unauthorized disclosure of confidential, intellectual property, or trade secret information? Or is the content false and defamatory, harassing, or offensive? Does the content amount to a violation of the employer’s social media policy, anti-harassment policy, or standards of conduct? Clarify the type of content that has been posted to determine if, and what type of, discipline may be imposed.

4.A. Determine whether a violation of the employer’s social media policy occurred

Social media policies and procedures will be key in determining whether an employee has acted inappropriately and whether discipline or otherwise may be appropriate. Thus, it is necessary to determine whether the employer has written social media policies or procedures. In reviewing any formal social media policy, consider the following factors:

- Was the policy disseminated to all employees?
- Is the policy readily available to employees?
- Were employees aware of the policy?
- Has the employer trained employees on social media practices in the workplace?
- Does the policy provide for specific disciplinary actions if violated?
- Did the offending employee acknowledge receiving the policy in writing or electronically?
- Is the policy regularly and uniformly enforced by the employer?

A well-drafted social media policy will be tailored to the unique business objectives and legal needs of the employer. An employer cannot prohibit all speech or otherwise issue a blanket rule that chills employee speech as such blanket prohibitions are in violation of the National Labor Relations Act ("NLRA"). Rather, social media policies and procedures must strike a balance between providing clear guidance as to what is acceptable in light of company culture and expectations without infringing on speech. A tailored and comprehensive social media policy will address the types of activities that are prohibited while acknowledging that certain speech is permitted and will incorporate examples to ensure clarity and compliance with various employment regulations. Specifically, evaluate the social media policy for compliance with the NLRA. In recent years, the NLRB has identified certain provisions as unlawfully vague or overbroad. These include language prohibiting disparagement, defamation, disclosure of confidential or proprietary information, or inappropriate and unprofessional conduct.

After reviewing the social media policy for potential red flags, determine whether the employee's misconduct violates a valid social media policy and, if so, what type of discipline may be imposed. Finally, if the policy is vague or overbroad, gauge whether the employer may lawfully impose discipline. If no policies exist, evaluate how the employer has addressed these types of situations with other employees. As discussed in Section 5 below, ensure that the employer imposes disciplinary action in a uniform manner to avoid a risk of a claim of discrimination.

4.B. Checklist: Topics to cover in a social media policy

This content will open in a new window. Click here to proceed to Checklist: Topics to cover in a social media policy.

4.C. Sample social media policy

This content will open in a new window. Click here to proceed to Sample social media policy.

5. Evaluate prior situations involving objectionable social media content; impose uniform response

Determine whether other employees have engaged in similar conduct on social media and assess how the employer handled each prior situation. Confirm that the employer responds to all such instances involving misconduct on social media in a uniform manner in order to minimize risk of discrimination claims. Various federal laws prohibit discrimination on the basis of "protected characteristics" and the employer's inconsistent application of discipline may give rise to a claim of discrimination. For example, Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination on the basis of race, color, religion, national origin, or sex, while the Americans with Disabilities Act ("ADA") prohibits discrimination on the basis of someone's actual or perceived disability.

The risk of a discrimination claim increases when the employer has issued discipline in an inconsistent manner, such as disciplining an Asian or disabled employee for an objectionable post, while declining to discipline a Caucasian or non-disabled employee who posted similar content on social media. If the employer addresses social media misconduct inconsistently, determine if the employer has legitimate, non-discriminatory justifications for such differentiation.

6.A. Evaluate the applicability of the National Labor Relations Act

Before imposing any discipline, evaluate whether the National Labor Relations Act ("NLRA") will be applicable to the employee's social media post. The NLRA is a federal law recognizing private sector employees' right to join or not join a union and protects employees' right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. &sect 157. "Concerted activity" encompasses situations where an individual employee pursues or attempts to provoke or prepare for collective action. Enforcement of the NLRA is under the purview of the National Labor Relations Board ("NLRB"), which investigates and prosecutes unfair labor practices. Section 7 of the NLRA extends rights to all employees covered by the NLRA, whether or not they are represented by a union. For example, discussion about pay and benefits, and complaints to or about management regarding working conditions would be covered under Section 7.

The NLRA has long safeguarded employee speech regarding terms and conditions of employment and therefore, employers should be careful before disciplining for "insubordinate" comments or behavior, especially information gleaned from surveillance of an employee's social media. Over the years, the NLRB has held that monitoring and surveillance of employees engaged in concerted activity qualifies as an unfair labor practice, even if employees are unaware that the surveillance is taking place. Because of the rise in social media usage, the NLRB has expanded its enforcement in this area and certain employer actions may give rise to potential liability under the NLRA. For example, Facebook postings containing employee complaints may be protected activity under specific facts and circumstances. If an employee is terminated for engaging in concerted activity via social media and is able to

establish that the termination was the result of a social media posting that equaled protected concerted activity, he or she could file an unfair labor practice charge against the employer.

6.B. Determine coverage under the National Labor Relations Act

As an initial matter, in furtherance of 6.A, ascertain whether the employer is covered under the National Labor Relations Act (\u2018NLRA"). The NLRA applies to most employers, including any person acting as an agent of an employer, directly or indirectly, unless exempted or excluded from the NLRA's coverage. 29 U.S.C. &sect 152(2). Certain categories of employers are exempt from coverage by virtue of NLRB regulations, Supreme Court precedent, and the NLRA's jurisdictional limits. For example, religious schools and foreign registered ships have been exempted from coverage by the Supreme Court. Under the NLRA's jurisdictional limits, state and local governments are enterprises exempt from the NLRA's statutory definition of an employer. Additionally, the NLRB may decline to exercise jurisdiction over certain categories of employers due to various standards and precedents. Over the years this has included religious organizations and real estate brokerages. For certain other enterprises, the NLRB has elected to exercise jurisdiction when certain commerce thresholds are satisfied. For example, the NLRB has found that certain retail enterprises with gross annual revenues of at least $500,000, such as hotels, restaurants, private clubs, and stock brokerages are covered by the NLRA.

Next, it is important to ascertain if the employee is covered under the NLRA. The NLRA extends coverage to any individual who performs work for an employer. However, certain categories of workers are excluded, including agricultural workers, independent contractors, domestic servants, supervisors, and managers. An employee does not have to be a member of a union to receive the NLRA's protections.

6.C. Determine if the post qualifies as concerted activity

It is important also to ascertain if the social media post at issue falls under or otherwise qualifies as a concerted activity. The NLRA protects employees when engaging in "protected concerted activity." Specifically, the National Labor Relations Board ("NLRB") has concluded that protected concerted activity includes activity that an employee "engage[s] in or with other employees, on the authority of other employees," or to bring attention to concerns expressed by a group of employees collectively. *Meyers Indus., Inc.*, 268 N.L.R.B. 493 (1984), 1983-84 CCH NLRB ¶16,019.

In the context of social media, an employee's posting would qualify as concerted activity if it concerned the terms and conditions of employment, attempted to initiate, induce or prepare employees for group action, discusses topics of mutual concern with other employees regarding terms and conditions of employment, or raises truly group employment concerns or complaints to management's attention. *Meyers Indus., Inc.*, 281 N.L.R.B. 118 (1986), 1986-87 CCH NLRB ¶18,184. For example, the NLRB has found that "liking" a coworker's Facebook post about

a company payroll error will qualify as protected concerted activity. *Three D, LLC (Triple Play Sports Bar and Grille)*, 361 N.L.R.B. No. 31 (Aug. 22, 2014), 2014-15 CCH NLRB ¶15,855. As a general matter, the NLRB will review a social media post for substantial evidence that the post concerned the terms and conditions of employment and were intended for, or in response to, the posting employee's coworkers. However, protected concerted activity does not include individual action for purely personal concerns or complaints, even where other employees may benefit or have an interest in the subject of the employee's complaint.

6.D. Assess whether the employee forfeited protections under federal labor law

Despite the broad definition of "protected concerted activity," employees may lose the protections of the National Labor Relations Act ("NLRA") under certain circumstances. In order to determine if an employee has forfeited this protection by posting objectionable content, the National Labor Relations Board ("NLRB") assesses the following factors under the totality of the circumstances:

- When and where the social media activity at issue took place;
- The substance of the social media activity;
- To whom was the social media activity at issue directed;
- If the social media activity was in response to the employer's unfair labor practices;
- Who observed the social media activity at issue;
- Whether the conduct was impulsive or deliberate;
- Wwhether the employer maintained a rule prohibiting the content contained in the post;
- Whether the employer had considered similar content to be offensive; and
- Whether the discipline imposed was typical for similar violations or proportionate to the offense.

As the NLRB's analysis of when social media activity forfeits the protections of the NLRA is still evolving, there is no bright line rule for this determination. However, the NLRB has relied on principles under its traditional forfeiture analysis to assist in making such determinations. For example, an employee's social media post may be deemed unprotected activity under the NLRA if:

- The employee engages in communications that "mak[e] a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's product"; *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)* 346 U.S. 464, 471 (1953), 24 LC ¶68,000.
- The employee's communications amounted to a deliberate or reckless untruth about the employer and

caused actual harm; *Linn v. Plant Guards Local 114*, 383 U.S. 53 (1966), 53 LC ¶11,061.

- The employee's communications amount to "obscene insubordination"; *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979), 1979-80 CCH NLRB ¶16,338.
- The employee uses "sufficiently opprobrious, profane, defamatory, or malicious language" when communicating with co-workers; *Honda of Am. Mfg.*, 334 N.L.R.B. 746, 747-748 (2001), 2001-02 CCH NLRB ¶16,254.

Be aware that even under these various standards, an employee typically does not surrender the NLRA's protections by posting vulgar, offensive, or derogatory statements on social media unless the employee engages in extreme or threatening conduct that is inherently dangerous or unlawful. For example, the NLRB has held that employees participating in an expletive-ridden Facebook discussion, including by "liking" a post disparaging the employer were engaged in protected concerted activity. *Three D, LLC (Triple Play Sports Bar and Grille)*, 361 N.L.R.B. No. 31 (Aug. 22, 2014), 2014-15 CCH NLRB ¶15,855. Though the social media postings were laced with profanity, the NLRB found that such activity was not sufficiently disloyal or defamatory so as to lose federal labor law protection. Id. However, the NLRB has held that a group of employees' obscenity-laced comments on social media that discussed their detailed plans to break rules, disobey orders, and refuse to perform work, forfeited the protection of the NLRA. *Richmond District Neighborhood Center*, 361 N.L.R.B. No. 74 (Oct. 28, 2014), 2014-15 CCH NLRB ¶15,879. Before imposing any discipline on an employee, analyze whether such social media communication is a form of protected concerted activity and if the employee has forfeited the protection of the NLRA.

7.A. Assess whether state law prohibits employee account access

Identify how the employer came across the offending or objectionable post. For example, was the post publicly available or did the employer access the employee's account? Certain states regulate the ability of an employer to obtain access to and/or login information for employees' social media accounts. Generally, there are two types of restrictions on employer searches of applicants' social media accounts.

In many states, there are specific restrictions on employer actions that prohibit an employer from requiring, requesting, suggesting, or causing employees or applicants to do any of the following: disclose a username or password; add an employee, supervisor, or administrator to employee's contacts; change privacy settings; or access personal social media in the presence of the employer. A few states have more general "gain access restrictions" where an employer may not require employees or prospective employees to provide any password or related account information to gain access to the individual's account or profile on a social networking website (also referred to as personal accounts or services). If the employer requested an employee's social media login information and only then uncovered the objectionable post, there is risk the employer violated state law. Before imposing discipline on an employee for social media activity, confirm the employer complied with all relevant state

social media access laws.

7.B. Checklist: State laws prohibiting employers from asking employees or applicants for social media passwords

This content will open in a new window. Click here to proceed to Checklist: State laws prohibiting employers from asking employees or applicants for social media passwords.

8. Weigh the pros and cons of imposing discipline

Before imposing discipline on an employee for an objectionable post, analyze whether the content implicates considerations under federal anti-discrimination, anti-harassment, and whistleblower laws. For example, does the post contain information about unlawful discrimination, harassment, or retaliation? Such content may warrant an internal investigation to address these concerns prior to any discipline being imposed. A social media post may put an employer on notice of potentially harassing conduct in the workplace, and an employer's failure to address such a concern can trigger liability under Title VII and other anti-discrimination laws. Other laws that protect certain whistleblowing type activities, such as the federal Dodd-Frank Wall Street Reform and Consumer Protection Act and the Occupational Safety and Health Act, along with various state whistleblower statutes, prohibit employers from disciplining or terminating employees who bring forward concerns about potentially unlawful activities under these statutes. If an employee's social media post raises concerns about workplace safety or securities law violations, employers should be cognizant of the protections extended to whistleblowers under these laws before imposing discipline.

Additionally, many states have now enacted laws protecting an employee's right to engage in certain lawful, off-duty activities. For example, over twenty-five states and the District of Colombia have statutes that prohibit discrimination or retaliation based on employees' participation in off-duty recreational or leisure-time activities. Some of these state laws protect employees from discrimination or retaliation for tobacco use; using consumable products; and a broader range of lawful off-duty conduct (which may include protection for tobacco use or use of other consumable goods and certain online conduct such as blogging or posting on internet message boards). To illustrate, the New York statute prohibits discriminating against any individual for engaging in political activities, legal recreational activities, legal use of consumable products, and union membership during non-working hours, off-premises and while not using the employer's equipment or property. N.Y. Lab. Law &sect 201-d. North Dakota enacted a similar law that protects employees engaged in "lawful activity off the employer's premises, during nonworking hours" except when the activity is "contrary to a bona fide occupational qualification that reasonably relates to the employment duties of a particular employee or group of employees, rather than to all employees of that employer or in direct conflict with the essential business-related interests of the employer." N.D. Cent. Code &sect&sect 14-02.4-01 and 14-02.4-08.

Employers that take adverse employment action against an employee for a social media post that concerns lawful off-duty conduct may face liability, even in states that have not enacted a statute specifically protecting this conduct. Several states, such as California, Washington, Maryland, and Virginia recognize the tort of wrongful termination in violation of public policy and an employee in one of those states may argue that his or her discharge for engaging in lawful activity violates state public policy. If the employee's objectionable social media post contains content involving a "lawful activity" that the employee engaged in outside of the workplace, the employer should be cautious about imposing discipline.

With this in mind, evaluate whether the employer should impose discipline on the offending employee. Consider the context and substance of the post and what specific harm it has caused the employer. Was the employee commenting about the terms or conditions of employment such that it would constitute protected concerted activity under the NLRA? If so, imposing discipline increases the risk of an unfair labor practice. However, if the employee's post directs harassing or abusive statements towards another employee, the employer may opt to impose discipline in order to provide a harassment-free work environment. Additionally, if an employee's post improperly discloses confidential information or trade secrets, discipline may be warranted so that the employer does not waive its rights to protect its proprietary information.

9. Evaluate potential avenues for removing the objectionable post

When an employee posts objectionable content on social media, the employer's natural inclination is to react immediately. While the content may be upsetting to see, consider whether the content is actually unlawful \u2014 and whether the potential legal risks warrant expending the time and effort required to remove it. Though the employer's knee-jerk reaction may be to demand that the employee immediately remove the objectionable post, understand that efforts by the employer to do so may run afoul of various federal and state laws. As discussed above, under the NLRA, for example, if the objectionable post was deemed to be protected concerted activity, the employer's attempts to have such post removed may constitute interference with the employee's rights to engage in such activity under the NLRA. Furthermore, the employer's efforts to have the post taken down, exclusive of any discipline imposed, may be seen as retaliation against the employee for engaging in such rights.

If the employee had a legally protected right to post the objectionable content, such as under a state's lawful activities statute, any effort by the employer to remove the post may constitute unlawful interference or retaliation. In a similar vein, an employer who attempts to take down a social media post that contains concerns about harassment or discrimination in the workplace is at risk of engaging in unlawful retaliation against an employee under federal and state anti-discrimination and anti-retaliation laws. Most anti-discrimination statutes, at both the federal and state level, contain anti-retaliation provisions that prohibit an employer from taking adverse action against an employee for asserting his or her rights under theses statutes. Furthermore, an employer who inconsistently demands the removal of objectionable posts, such as demanding that only minority employees' objectionable posts be removed and taking no action against non-minority employees for similar posts, may be at

risk for a discrimination claim.

After analyzing the potential risks, if the employer elects to require that the objectionable post be removed, consider the different options for removal. Depending upon the relationship between the employer and the employee, the employer may elect to simply request that the employee remove the post. If the employer's simple request is unsuccessful or if the employer elects to take a stronger course of action, for example in a situation where trade secrets have been disclosed, the employer may send a cease and desist letter demanding that the post be removed. Finally, the employer may initiate legal action, either through injunctive relief or claims for damages against the employee.

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10. Identify potential litigation risks

In some instances, legal action may be appropriate. Before taking legal action, however, weigh the pros and cons. Pros include: managing the employer's reputation; possibly removing the unlawful content; protecting the employer's intellectual property rights; and/or potentially recovering damages. Cons, on the other hand, include: expending resources that are disproportionate to any benefit (or, similarly, detracting from important business matters); potential liability for interference or retaliation under the NLRA or federal or state laws; becoming involved in protracted and expensive litigation; or needlessly drawing attention to content that is otherwise not reaching an audience of any significance.

The employer also should consider the risks for its actions (or lack thereof) against the offending employee. For instance, there may be a risk of legal action against the employer for failing to discipline an employee who posts potentially harassing content online. If the objectionable post contains trade secrets, the employer's failure to act may be viewed as a failure to protect such proprietary information and may impact future litigation on trade secret misappropriation.

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11. Consider these scenarios

Can a Facebook posting constitute a "complaint" for purposes of asserting an FLSA retaliation claim?

Issue: Lilli, an employee with your organization, was terminated after she posted a complaint on her Facebook page, claiming that she was never paid the overtime wages she was owed. She is now suing your organization alleging that it unlawfully retaliated against her in violation of the Fair Labor Standards Act (FLSA) when it fired her because of the Facebook posting. Will she be successful?

Answer: Probably not. In a case with similar facts, a federal district court in Florida ruled that an employee who

complained on her Facebook page that her employer did not pay her overtime did not file a "complaint" within the meaning of the FLSA. Citing the US Supreme Court's 2011 ruling in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 161 LC ¶35,886, the court noted that while the statutory requirements for asserting an FLSA complaint may be satisfied via informal workplace procedures, a complaint must give the employer fair notice that the employee is alleging that it has violated the FLSA and is not "just letting off steam." The employee in this case never lodged a complaint with her employer; she merely "voiced her disagreement" with the employer's pay practices on Facebook. This fell far short of FLSA-protected activity, the court found, dismissing the employee's retaliation claim.

Source: *Morse v. JP Morgan Chase & Co.* (MDFla 2011), No. 8:2011cv00779, *Employment Law Daily*, June 27, 2011.

Did a former employee's social media posts violate non-solicitation agreement?

Issue: After one of the regional vice presidents left your organization to work for a competitor, he posted information about his new employer on Facebook, touting his professional satisfaction with that company's product. Since his departure, he has been actively posting information relating to his new employer on his personal Facebook page, and his Twitter account has generated invitations to your associates to join the social networking site. Believing that his social media activity breached your company's non-solicitation agreement, your organization is seeking to enjoin his Facebook and Twitter activities. Will it be successful?

Answer: Probably not. In a case with similar facts, a federal district court in Oklahoma ruled that an employee's ongoing posts to his personal Facebook page relating to his new employer did not constitute solicitation under the terms of his former employer's non-solicitation agreement. There was no evidence that the employee either intended to or had solicited anyone other than a single colleague to leave. As a result, the employer could not show that it was likely to succeed on the merits of its breach-of-contract claim regarding the Facebook posts or that it would suffer irreparable harm if the employee was not enjoined from posting to his Facebook page. Specifically, there was no evidence that the Facebook posts resulted in any flight from the employer to the employee's new establishment. Moreover, the non-solicitation agreement lacked specificity as to the conduct the employer wished to prohibit. Had it wanted to prohibit the social networking activity, it could have provided for that in its non-solicitation agreement, the court observed.

As for the employee's Twitter invitations to his former employer's sales associates, there was no evidence that the individuals were targeted to "follow" the employee on Twitter or that his Twitter feed contained any information about either his former or new employer. Moreover, contrary to the employer's assertion that the employee may have sent out an email blast, there was evidence that the invitations were self-generated by the social media site on behalf of the employee. Thus, the employee's social media activity did not violate his former employer's non-solicitation agreement.

Source: *Pre-Paid Legal Services, Inc. v. Cahill* (EDOkla 2013) No. 12-CV-346-JHP, *Employment Law Daily*, March 1, 2013.

12. Conclusion

Overall, there are a variety of inherent risks involved in disciplining employees for their social media activity. Be aware that objectionable social media posts are unique situations as such activity often occurs outside the workplace and thus require the above analysis at a minimum, and consultation with counsel, before imposing discipline or taking other action.