GARDNER SKELTON
ATTORNEYS AT LAW

LEGAL NEWS FOR YOUR BUSINESS

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General Business Alert

IS YOUR EMPLOYEE'S SOCIAL MEDIA POST PROTECTED?

In today's age, nearly all Americans have some sort of social media account, whether that be Facebook, Instagram, Twitter, LinkedIn, YouTube, or TikTok. With this widespread use, employers are often faced with a myriad of challenges relating to their employee's social media accounts.

Employees will often post statements/videos/comments on their private accounts that may not align with the employer's beliefs and ultimately harm the employer's reputation. Many employees operate under the mistaken belief that their statements are protected under the First Amendment and that their employer cannot take any action against them for these statements.

However, the First Amendment only prevents the *government* from interfering with freedom of speech, not private employers. Thus, a private employer may take action against employees for their posts on social media.

There is, however, an important exception to this general rule. The National Labor Relations Act (NLRA) offers certain protections to employees regarding their right to communicate with one another about their employment. Generally, if employees are making statements on their social media about the terms and conditions of their employment (e.g., wages, hours, benefits, tips, management), in an attempt to rally co-workers in support of better working conditions, this speech could be protected "concerted activity" under the NLRA.

For example, in Hispanics United of Buffalo, Inc. v. Ortiz, the National Labor Relations Board (NLRB) found that five employees were wrongfully terminated because they engaged in concerted activity. In that case, employee, Lydia Cruz-Moore ("Cruz-Moore"), texted her colleague, Marianna Cole-Rivera ("Cole-Rivera"), that she was planning to discuss with the agency's director her dissatisfaction about other's work performance.

Cole-Rivera posted a screenshot of the text message to her Facebook page and asked how they felt about Cole-Rivera's criticism and said that she *"about had it!"* Four other employees commented on the post. Some of the comments included, *"What the F…Try doing my job I have 5 programs,"* and *"What the h***, we don't have a life as is*." All five employees, including, Cole-Rivera, were terminated for "bullying" and "harassing" Cruz-Moore. Ultimately, the NLRB said this was concerted activity under the NLRA, and the employees were reinstated.

On the other hand, the NLRB did not find concerted activity in Karl Knauz Motors, Inc. d/b/a Knauz BMW v. Becker. In that case, a car salesman was terminated for his Facebook post about a car accident at the dealership involving a minor. During the showing, the customer's minor child sat in the driver's seat while the car salesman sat in the passenger seat. The child stepped on the gas pedal and drove the car into a pond (no parties were injured). The car salesman posted pictures on his Facebook of the accident with a caption, *"This is what happens when a salesperson sitting in the front passenger seat (former salesperson, actually) allows a 13-year-old boy to get behind the wheel of a 6000lb truck built and designed to pretty much drive over anything. The kid drives over his father's foot and into the pond in all about 4 seconds and destroys a $50,000 truck. OOOPS!"* The NLRB said the Facebook post did not relate to the terms and conditions of employment and, the employee was not reinstated.

In a social media-dominated world, we recommend that all employers adopt a social media policy to address the issues that may arise with social media use and to set forth the employer's expectations. At a minimum, the employer's policy should include language that the employer does not tolerate any discriminatory or hateful statements, that the employees are prohibited from using their social media accounts to harass or bully any of their coworkers, and that employees can communicate about the conditions of their employment. It is also best practice to have employees sign an acknowledgment that they have received and reviewed the employer's social media policy and understand what is expected. The NLRA, however, makes even the process of adopting a social media policy somewhat legally treacherous, with the NLRA sometimes finding that common policy language and employer procedures have a "chilling effect" on employees' rights to act in concert with one another to better their working conditions. It is usually a good idea to start with a social media policy that the NLRB has approved and stick closely to that template.
If you have any questions regarding employer or employee rights as it relates to social media use or if you would like to have a social media policy drafted or reviewed, please contact any member of the Gardner Skelton employment team.

Healthcare Provider Alert

INSURANCE COMPANIES AND GROUP HEALTH PLANS TO COVER THE COSTS OF AT-HOME COVID-19 TESTS

As we continue to navigate through the unprecedented times of Covid-19, there have been many questions surrounding the costs of at-home Covid-19 tests, and whether private insurance companies should cover such costs.

In December, President Biden released a statement saying that we should expect to receive updated guidance from the Departments of Labor, Health and Human Services (HHS), and the Treasury (the "Departments") clarifying whether individuals who purchase at-home Covid-19 tests for individualized assessment and treatment would be able to seek reimbursement from their plan or insurer.

The Departments finally released their updated ***guidance*** on January 10, 2022. According to the updated guidance, beginning on January 15, 2022, insurance companies and group health plans will be required to cover up to eight (8) over the counter at-home (FDA approved) Covid-19 tests per covered individual per month. This means that covered individuals can purchase an at-home Covid-19 test at no cost or submit a claim with their private insurer to get reimbursed for the cost of the test.

However, it is important to note that this coverage is only for individualized diagnosis and treatment of Covid-19. It does **not** provide coverage for testing for employment purposes. Therefore, if an employer requires weekly testing in lieu of vaccination, such costs would not be covered under this guidance.

If you have any questions regarding coverage for at-home Covid-19 tests, please contact any member of Gardner Skelton, including ***Nicole Gardner****,* ***Erin Ball****, and* ***Jackie Kinni****.*

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