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SOCIAL MEDIA

As you know, in the past year, this author has written two articles regarding social media. Recently, I received a call from an attorney in another state asking advice on a problem where a salesperson was texting to potential customers. Some issues arose regarding the context of the texts. Thereafter, we entered into a general discussion as to what safeguards his client had taken with the employees relative to parameters for usage of social media during and after work hours. As I have stated in prior *You Auto Knows*, employers can discipline employees for violations of a social media policy. However, there are multiple issues and a myriad of laws which can be broken by disciplinary action. Specifically, the EEOC and National Labor Relations Board complaints. Let's look at a couple of examples from some of the NLRB advice memos. In these scenarios, you can change the employee position and make it a salesperson or service person in a dealership.

In the first example, the owner of a restaurant terminated a bartender for Facebook complaints. The bartender was venting to his sister about how his night went, he had not received a raise in five years and he was doing waitress work without tips. The employer, taking his cue from the employee, the disgruntled bartender, sent a termination notice to the bartender's Facebook page. The NLRB got involved to try to determine whether there was a violation. It was determined there was no violation because the bartender did not engage in a "concerted activity." He did not discuss his issues with any other employees or co-workers and no co-workers responded to his posting. Further, he did not attempt to encourage other employees to form a group relative to his termination. The NLRB indicated its test for concerted activity is "whether the employee is engaged in, with or on the authority of other employees, and not merely by or on behalf of the employee, himself." Therefore, if other employees had joined in and concerns were expressed by other employees, this would be a collective activity, or where individual employees are asked to initiate and prepare for a group action. The key is, are there truly group complaints involved.

The second example involves a Walmart employee who posted a rant against his manager on his Facebook page. In this instance, the majority of his Facebook friends were co-workers and several responded to his rants. Walmart disciplined the employee for putting offensive material on Facebook about the manager and the employee was given a day leave and denied promotion for 12 months. Again, the NLRB general counsel stated that this was not concerted activity since the

employee's complaints were his own personal grievances, rather than a grievance which would apply to all employees.

The third fact pattern which may have similarities to a dealership involves an employee who put comments on her Facebook page during her night shift which included negative references about the business' clientele. It must be noted that none of her "Facebook friends" were co-workers; however, a former client of the facility saw the comments and complained to the employer about the negative comments related to the business. The employee was terminated, stating "the business is invested in protecting the people they do business with and not to use a customer's actions for personal amusement." In this case, again, since no other employees responded, nor did she attempt to induce or prepare for group action, there was no violation. However, the NLRB strongly recommends that before an employer takes action to terminate an employee for social media issues, the matter should be thoroughly discussed with legal counsel.

As I have recommended in the past, the dealership should implement a Social Media Policy to place restrictions on how, when, where, what and why an employee can use or create statements on social media. The dealership should have one primary individual who will handle any questions regarding what is or is not appropriate for social media communications. Further, that individual should have authority to analyze whether a particular situation is a violation and what the consequences should be. There should be restrictions as to when social media can be used, who is posting the comment, the comments should only pertain to company business and no other business, it should specifically list prohibited categories and the employee should not have his/her own individual page on the company's web sites.

Also, the company should monitor the social media activities of its employees. Obviously, it is difficult when someone is texting on a private phone; however, if the text deals with company business, then it can be argued that the employee has to follow the policies and procedures regarding social media of the Social Media Guidelines of a dealership.

If you have not already implemented a Social Media Policy, it is strongly urged that you do so as quickly as possible.

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As always, these are highlights of the law and are not to be construed as containing the entire law. This is not to be construed or relied upon as a legal opinion. If you are presented with this problem, contact your legal counsel for advice.

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Having been a Chevrolet dealer, Robert A. Poklar's business background and experience in the automotive industry aid him in his representation of numerous Ohio automotive dealerships. He also represents after-market service companies, trade organizations, dealers, advertising associations and corporations. Pursuant to certain ethical standards, this may be construed as advertising.