You Auto Know©

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SOCIAL MEDIA UPDATE

As you know, in the past this author has written articles on social media. Recently, I received a call from an attorney in another state asking for advice on a problem where a salesperson was sending text messages to potential customers. Some issues arose regarding the context of the texts. Thereafter, we entered into a general discussion as to what safeguards this client had taken with his employees regarding parameters for usage of social media during and after work hours. As I have stated in prior issues of You Auto Know, 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, Equal Employment Opportunity Commission (EEOC) and National Labor Relations Board (NLRB) 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 on Facebook 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 group complaints truly 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. 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.

Recently, this author was involved in a customer dispute with a dealership. Basically, the dealership F&I manager made a minor mistake in a lease agreement. The F&I manager contacted the customer in order to have the customer come back and re-sign the lease agreement. At that time, it appeared that the customer was amenable to honoring the request. The customer did not show up at the scheduled appointment due to a business conflict. When the customer did not show up, the salesperson sent a very threatening text to the customer. In essence, the salesperson called the customer a "deadbeat" and if he did not re-sign the lease agreement, then the dealership would call the police and have him arrested for theft of the vehicle. The customer, a seasoned business executive, naturally contacted his legal counsel. When I talked to the customer's legal counsel, he indicated that there was derogatory communication from the dealership to the customer. Further, the customer will no longer do business with the dealership. I asked the general manager to talk to all persons involved in the transaction to see what communication was sent to the customer. I was assured that no derogatory emails were sent and that only the F&I manager had been in communication. When I communicated this to the customer's legal counsel, he stated that it was not an email, but a text from the salesperson. He provided me with a screen capture of the text. I provided the text to the general manager who, in essence, went ballistic. The dealership did have a social media policy in place and the salesperson was terminated due to the text. However, the damage had already been done.

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.

Note: Portions of this issue of You Auto Know originally appeared in a 2012 issue and have been updated for this version.

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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.