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Question of the Day: Responding to Inappropriate Online Employee Conduct

Legal Update

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Question

Should an employer respond to a report that an employee has made racist or other offensive remarks online?

Answer

Yes.

An upcoming election, a pandemic and continuing protests provide employees with plenty of controversial topics to discuss. As an employer, you may receive a report that an employee has made racist or other offensive remarks online. In this post, we provide some considerations for how to respond and investigate reports of inappropriate online conduct by employees.

Know the relevant laws

In most states, employers may impose discipline for online activity outside of work – particularly where that conduct involves other employees (i.e. the employee posting to Facebook friends with other employees) and violates the company’s anti-discrimination, respectful workplace or social media policies. However, some states prohibit adverse action against an employee for certain off-duty conduct or political speech. If the online remarks at issue are related to political ideology, exercise caution. Note, however, that hate speech is never protected and will violate nearly every social media or respectful workplace policy. When taking action, assess the situation and the applicable law and then document the decision-making process to mitigate any legal risk.

Do not abandon your normal HR policies

Given the increased focus on unfair treatment based on race, it may be tempting to disregard procedures in favor of immediate action. Take action, but resist the temptation to disregard your HR best practices. Interview the individuals involved,

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carefully review the relevant information and then make your decision to discipline based upon the results of that investigation. Be sure to memorialize the steps of the investigation, the results and the rationale for the action taken.

Consider placing the employee on leave

If an employee is accused of racist conduct, a leave pending the results of the investigation may be appropriate. Relieving the employee of duties ensures their availability to participate in the investigation. Leave also eliminates work-related contact between employees during a highly charged time period, reducing the potential for conduct that could lead to additional allegations or additional unacceptable behavior. Additionally, leave can send a quick message that this sort of conduct is taken seriously by the company.

Follow through

After completing your investigation and taking appropriate action, take the time to evaluate impact on the organization and other employees. If the allegation came from another employee who felt targeted, consider whether referral to an Employee Assistance Program or other supportive measures is appropriate. Review policies prohibiting discrimination and harassment and consider revisions to include off-duty conduct. This includes revamping respectful workplace, social media and anti-discrimination policies.

When in doubt about how to best prepare for responding to an employee's online or off-duty conduct, contact your Fredrikson & Byron Employment & Labor attorney.

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