

EMPLOYEE DISCIPLINE AND TERMINATION ADVICE IN THE SOCIAL MEDIA AGE

Mobile Area Chamber of Commerce

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OVERVIEW

Importance of this Topic

Always

- Avoid Expense and Disruption
- Avoid Turnover and Recruiting
- Myriad of Land Mines in Today's Legal World

2011

- Recent increase in EEOC charges
- Economic need to reduce workforce

STEPS TO AVOID LAWSUITS FROM TERMINATIONS

- Consider Protected Class Status
- Check Documentation
- Consider Policies, Practices and Precedent
- Clear Articulation of Reasons for Discharge
- Conduct Termination Interview
- Use Caution with Post-Termination Issues
 - COBRA
 - References
 - Unemployment
 - Severance

CONSIDER PROTECTED CLASS STATUS

- Title VII
- ADEA
- ADA
- Worker's Compensation
- FMLA
- Whistle-blowing
- GINA

RETALIATION

- Employees who complain about violations or participate in Federal investigations under most Federal Regulatory statutes (i.e. OSHA), are protected from retaliation.
- Employees who make a claim for Worker's Compensation are protected from retaliatory discharge.
- Employees who complain about a company's violation of safety rules are protected from retaliatory discharge.
- Protection for close associates of whistle blower/complainer

DISCIPLINE AND COACHING

- If it's not documented, it didn't happen!
- If the write-up is not signed, they didn't get it.
- Use witnesses for serious counseling meetings.
- Make the consequences of further problems crystal clear.
- Be consistent in application of discipline but:
 Ok and good to give long-term employee more chances than new employees.
- Performance evaluation ratings should include and reflect disciplinary issues during the evaluation period.

REVIEW DOCUMENTATION

- Evaluations
- Warnings and Counseling Records
- Recent Merit Raises
- Accuracy of Documentation – dates, memos, names, etc.

REVIEW POLICIES, PRACTICES AND PRECEDENT

- Is decision consistent with policy
- Is decision consistent with past practices and precedents
- Are any inconsistencies justified by circumstances

TERMINATION PROCESS

- Reach consensus on articulated reason for termination
- Prepare termination documentation
- Prepare for termination Interview
- Make arrangements for cleaning out office
- Consider computer/building access issues

POST-TERMINATION ISSUES

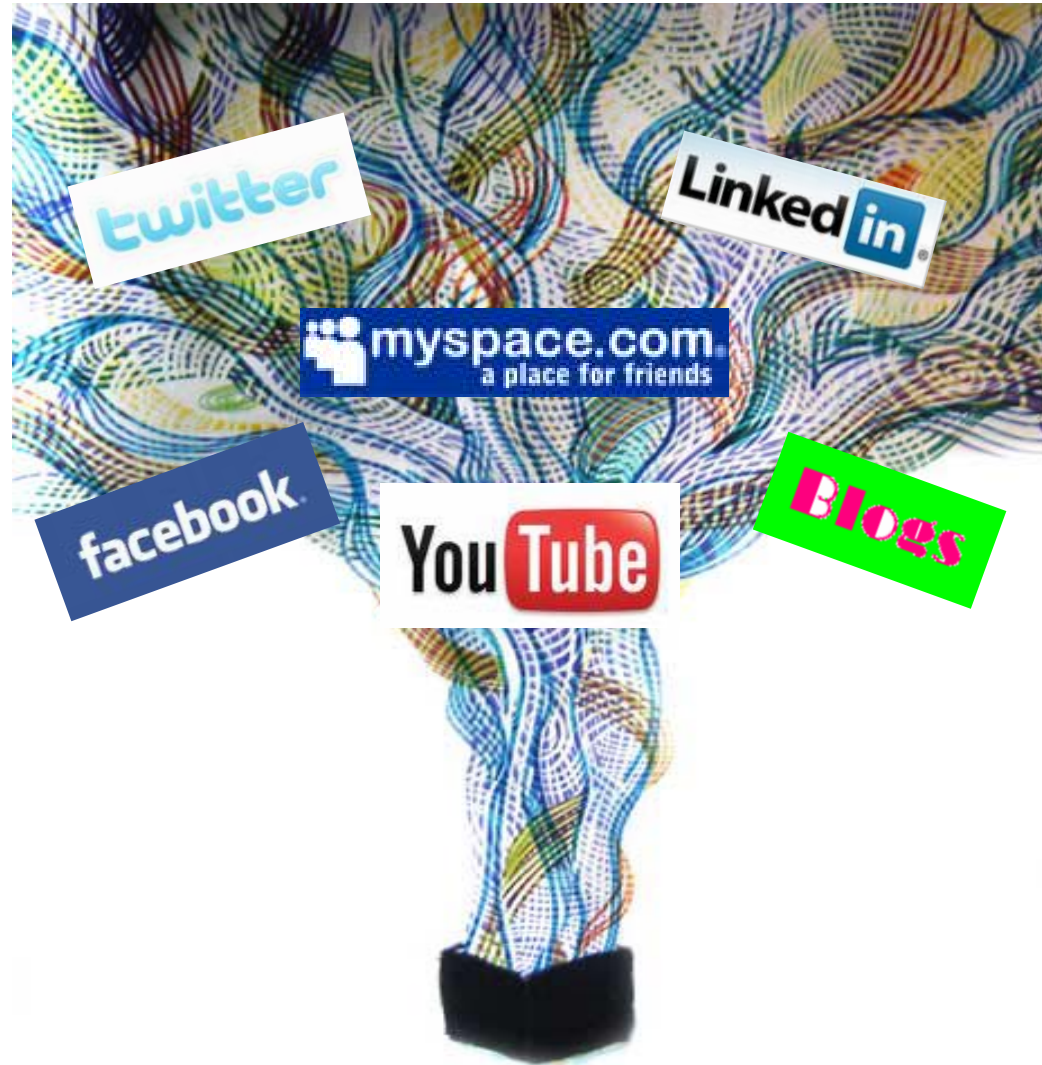
Severance

- Consider offering severance for release of claims
- Include OWBPA language for employees 40 or over
- EEOC Guidance on Waivers of Discrimination Claims in Severance Agreement
www.eeoc.gov/policy/docs/qanda.severance-agreements.html
- Check for state income tax exemption for severance payments

POST-TERMINATION ISSUES

- References
- Unemployment Compensation Claims

PANDORA'S BOX



POPULAR NETWORKING SITES

MySpace.com Social Network
Over 110million users

Facebook.com Social Network
Over 600 million users

Linkedin.com Professional Network
Over 100 million users

Twitter.com 140 Character Updates
Over 200 million users

Blogs Chit-Chat about
Whatever You Want

DISCIPLINE

LEGAL TRAPS

- Discrimination claims for inconsistent treatment
- Retaliation claims if posting involved complaints about violations of employment laws
- NLRA claim for interference with concerted activity for mutual aid and protection in communications regarding wages, hours and working conditions
- First amendment claim if ER is a public employer
- Beware of State Statutory Off-Duty Protection (Not Alabama)

NATIONAL LABOR RELATIONS ACT PROTECTIONS

Applies to union and NONUNION employers

High priority of NLRB

Cases pending in every district

2 General Counsel reports issued this year

NLRB going after these issues
as a show of force

NATIONAL LABOR RELATIONS ACT

Section 7

Employees shall have the right to...engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 8

It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7.

NLRA SECTION 7

Protected Concerted Activity

1. engaged in commentary with or on authority of other employees not solely on behalf of himself
2. commentary to initiate or induce group action
3. commentary designed to bring group complaints to management attention

Does Not Protect Individual Gripes

NLRA SECTION 8

Prohibits any policy that can reasonably be construed to restrict or prohibit protected Section 7 conduct

For example:

- Broad prohibition against criticizing company or its supervisors
- Broad prohibition against “inappropriate behavior or discussions”
- Restrictions on posting photos depicting company name or logo

WHAT YOU SHOULD DO

Consult with legal counsel before disciplining or terminating employee for social media activity.

Include disclaimer in your social media policy.

Nothing herein is intended to limit your rights under any Federal, State, or Local law, including any rights granted by the National Labor Relations Act.

SUMMARY

The Three C's

Consideration

- Careful consideration of documentation, policies, precedents and circumstances

Caution

- Cautious preparation in advance of implementation.

Compassion

- Compassionate implementation of decision.

QUESTIONS

