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Can you punish workers for griping about their jobs on Facebook?

You might think that it's okay to fire or discipline employees who complain about their jobs on Facebook or other social media sites – especially if they start calling their supervisors names, or bad-mouthing the company in a public way.

But you need to be careful. In many cases, disciplining an employee for a Facebook rant could violate federal labor law, and result in a civil complaint being filed against you by the National Labor Relations Board.

That's true regardless of whether the employee belongs to a union.

In the past year, more than 100 formal complaints have been brought before the NLRB over "Facebook firings," involving employers ranging from giants such as Wal-Mart to local bars and car dealerships.

In about half the cases it reviewed, the NLRB issued a civil complaint.

In one of the first cases, a paramedic was fired after she called her supervisor a "scumbag" and a "17" (code for a psychiatric patient) on Facebook from her home computer. The ambulance company ended up settling the complaint with the government – and as part of the settlement, it agreed to revise its policy on employees' Internet postings.

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Why the problem?

The problem is that a federal law makes it illegal for companies to discipline workers for "protected concerted activity" – regardless of whether the worker belongs to a union.

That means that workers have a right to discuss their conditions of employment with each other, try to speak on behalf of other workers about workplace conditions, and attempt to improve things for other workers.

If a Facebook rant arguably falls into any of these categories,

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E-mail exchange can accidentally create a binding contract

A series of back-and-forth e-mails in which two people agree on the terms of a deal could amount to a binding legal contract, even though no formal, "official" contract was ever drawn up or signed. That's the word from a federal appeals court in Atlanta.

A company could wind up accidentally agreeing to a binding deal without realizing at the time the level of commitment it was making.

Author Rafael Vergara sued the Coca-Cola company, claiming that he had a copyright in the Spanish lyrics that were used in Coke's advertising during the World Cup soccer tournament. At some point, Vergara had exchanged e-mails with a Coke representative. Vergara said in an e-mail that his "only demand" to assign his copyright interest was that he receive credit as adapter and producer, and the Coke representative replied that this was fine and that Vergara should "count on the credits."

The two sides planned to draw up a formal written contract, but they never got around to it. Vergara later changed his mind and claimed that Coke had no right to use the lyrics.

But the court sided with Coke, saying the two sides had agreed on the terms and the e-mail "contract" was valid.

The case is important because it suggests that a company could wind up accidentally agreeing to a binding deal without realizing at the time the level of commitment it was making.

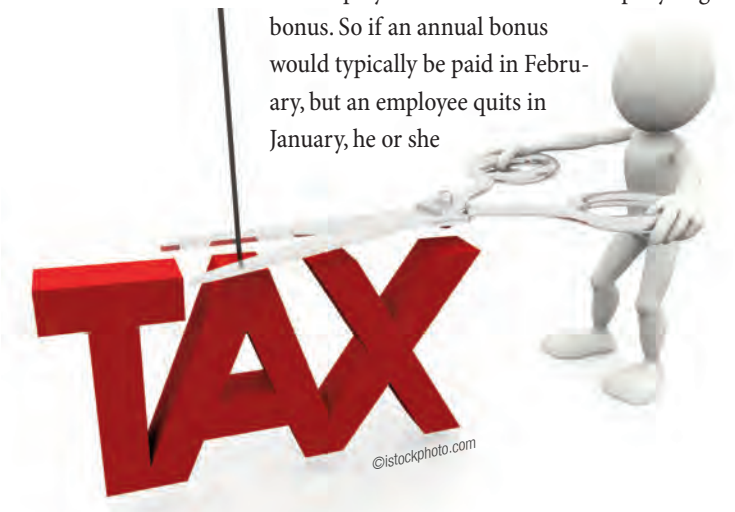
In general, all that's necessary for a contract to be valid are an offer, an acceptance, and an intent at the time to be bound by the terms. A formal written contract is always good to have, but you can be stuck with a "contract" even if you never signed on the dotted line.

If you're negotiating by e-mail and you want to be sure you don't sign off on something before you're ready, it's wise to avoid summary responses such as "correct" or "I agree" after the other side has laid out an offer. You might want to hedge with a response such as "subject to further negotiations" or "contingent on receipt of a fully executed agreement." These phrases might be clunky, but they do show that you don't intend your e-mail conversation to be the final word on the subject.

IRS makes it easier to deduct employee bonuses

Many companies pay their employees annual bonuses between January 1 and March 15. If it's done right, the company can take a tax deduction for the amount of the bonuses in the previous year (if it's a calendar-year tax filer), but the employee doesn't recognize the income until the year of receipt.

But here's a problem: Many companies also require that employees remain with the company to get a bonus. So if an annual bonus would typically be paid in February, but an employee quits in January, he or she forfeits the bonus.



In the past, such a "forfeiture" requirement was a huge issue for the IRS. Because it wasn't absolutely clear on December 31 how much would be paid out in bonuses (since an employee could always quit and forfeit the money), the IRS wouldn't allow the company to take a tax deduction in the previous year. It would require the company to wait until the following year for the deduction.

Now, however, the IRS has given employers a way around this problem. It says that a company can take a deduction in the previous year, if it's willing to reallocate any departing employee's bonus among the other employees in the bonus pool.

In other words, if a company determines by December 31 either the total dollar figure that will be paid out, or else a formula to determine how much will be paid out (based on final year-end results), it can take a deduction in the earlier year – even if it doesn't know for sure exactly *which* employees will be dividing the spoils.

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it may be protected.

For instance, the paramedic was unhappy about being reprimanded earlier for a customer complaint, and made the "scumbag" comment during an online discussion with other employees. The NLRB decided that discussing a supervisor's actions with co-workers was "protected concerted activity."

As a general rule, as long as workers are commenting on workplace issues with each other or hoping to improve work conditions generally, they can even call supervisors names or disparage the company in certain ways – although they can't make verbal or physical threats.

On the other hand, if workers are just griping to their friends outside of work about something that only affects them personally, and they aren't trying to improve general conditions or speak for other employees, they aren't protected.

The NLRB also says that employers can punish name-calling that goes too far, although it hasn't been very clear about what kinds of insults cross the line.

Some recent examples

In one case, a Frito-Lay warehouse worker was fired after saying on Facebook that he was "a hair away from setting it off" in his workplace. The worker claimed that he was just venting about the company's sick-leave policy, but the NLRB sided with Frito-Lay and said the company could reasonably have interpreted the comment as a threat to cause physical harm.

On the other hand, a non-profit organization in Buffalo, N.Y. was ordered to reinstate five workers it had fired after they complained online about a co-worker who had criticized their work ethic. One wrote that "[I've] about had it!" and another said, "Tell her to come do [my] f—-ing job." According to the employer, the co-worker felt so threatened by the comments that she had a heart attack. But a judge found that the workers' speech was protected, and didn't amount to a specific threat.

Another case involved a Chicago bartender who complained on Facebook that his company's tip-pooling policy "sucked." While the complaint was about a workplace issue, the NLRB sided with the employer because the bartender directed the gripes only to his friends and didn't bring up the issue with co-workers.

Also in Chicago, a BMW salesman was fired after he made two sarcastic posts on Facebook. One mocked his employer for serving hot dogs and bottled water at a sales event for luxury cars. Another showed a picture of a customer's 13-year-old son driving an SUV into a pond.

The result? A judge found that the hot-dog post was protected (because other employees were also complaining online about the sales event, which could hurt their commissions), but the salesman could be fired for the pond photo, because it had nothing to do with his working conditions.

We'd be happy to discuss these issues with you, and help you craft or update a social media policy that addresses your concerns while not restricting employees in a way that creates legal problems.

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Ideas for negotiating a commercial lease guaranty

Defaults by commercial tenants are on the rise, so more landlords are asking for a guaranty as a condition of a lease. This can be a real burden for a tenant, and can sometimes endanger a deal.

However, a guaranty doesn't have to be an "all-or-nothing" proposition. Often, a tenant can negotiate a partial guaranty that is more easily doable and still satisfies the landlord.

Some common tenant counter-offers include:

- A guaranty that expires after a certain time, such as three years, if the tenant hasn't defaulted.
- A guaranty only up to a certain dollar amount or certain percentage of the tenant's obligations.
- A guaranty that covers the tenant's debts, but doesn't include the tenant's non-financial obligations.

Landlords are also sometimes willing to waive a guaranty if the tenant puts up a larger security deposit, or agrees to pay for some of the improvements that would normally be provided by the landlord.

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You might not own your employee's Twitter account

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More and more companies are using Twitter and other social media sites to promote their businesses. Often, an employee or a group of employees will have the job of tweeting regularly about the company's products and services.

However, this raises the question of what happens if an employee with a Twitter account quits or is fired.

The issue came up recently when an employee named Noah Kravitz started tweeting for his employer, a company called PhoneDog.com. As part of the company's efforts to drive traffic to its website, Kravitz sent his followers his opinions of new mobile phones on the market, as well as some other topics. Kravitz proved to be very popular, and eventually attracted 17,000 followers of his tweets.

When Kravitz quit his job, he changed his Twitter handle, but he kept the same account and password, effectively taking all 17,000 followers with him.

PhoneDog then sued him for "misappropriation of trade secrets," claiming that the account and the password were confidential, proprietary information, similar to a customer list. PhoneDog demanded $340,000 in damages.

Kravitz fired back, arguing that the 17,000 followers weren't "secrets," and that a Twitter passwor by itself has no "independent economic value."

Who's right? It won't be clear unless the case goes to trial, but if you have employees who use Twitter tc expand your business, you might want to adopt a pol icy or add a clause to your employment agreements clarifying the rights to the accounts and passwords i the event that an employee leaves the company. Such a policy or clause might not prevent all disputes, but could be very helpful if one does arise.

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