The Guardian

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Social Networking: Harmful Comments and Discipline

The line between an employee's personal and professional life can sometimes get blurred. Disciplining employees for off-duty conduct is difficult and risky to do. With employees engaging in social activities such as office parties and happy hours, it has always been a tricky problem for employers to determine when discipline is appropriate and, at the same time, avoid infringing on an employee's privacy rights.

The problem is now further complicated by the advent of social media such as Facebook and Twitter. Can you discipline an employee for lawful off-duty conduct such as posting a negative or embarrassing comment about the company? Exercise caution in this area. In general, the decision to impose discipline comes down to whether the employer can establish a legitimate causal link between the employee's posting and *actual* loss or damage to the employer's reputation and/or business. At a minimum, the employer must be able to point to actual adverse consequences to the business that directly resulted from the employee's posting. If loss or damage to the employer's reputation is only speculative, however, the employer is facing a slippery slope in imposing discipline on the employee. Here are five points to keep in mind:

1. Focus on the effect on business rather than the conduct itself. Be able to point to a specific business reason for disciplining the employee.
2. Avoid restrictions against social networking. Such rules infringe on privacy rights. Instead implement a policy which prohibits any off-duty conduct which could bring disrepute against, or negatively impact, the employer.
3. Seek legal advice before disciplining an employee for legal off-duty behavior.
4. Always apply an even hand when disciplining employees for legal off-duty conduct and do not overreach.
5. Public employers are more limited due to constitutional restraints.

NEWS FLASH

In *City of Ontario v. Quon*, the U.S. Supreme Court recently upheld a *public employer* search of an employee's text messages sent on employer issued communication devices where the search was a non-investigatory, work-related search. In this matter, the City of Ontario noticed excessive texting charges on a police officer's work-issued pager. The City conducted an audit of the officer's text messages and discovered hundreds of personal messages, some of a sexual nature. The Supreme Court found the City's audit justified under the facts presented.

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