

Social Media Posts Create Risk, Can Require Discipline

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Healthcare Risk Management

Healthcare Risk Management recently interviewed Woods Rogers Principal Mike Gardner for its November issue cover story on recent disciplinary actions against healthcare workers for offensive social media posts. These situations underscore the steps that healthcare organizations should take to protect their reputations and reduce liability.

Healthcare Risk Management wrote, “The killing of Turning Point USA founder Charlie Kirk while speaking to students at Utah Valley University in Orem, UT, prompted a spate of social media posts mocking his death and calling for more political violence. Employers in many industries took action against employees for offensive social media posts, but healthcare employers were under particular pressure to respond because the public questioned whether they could trust healthcare workers with their care after some of the more offensive posts.”

While many healthcare organizations are not bound by free speech, Mike provided guidance on how employers should address these concerns.

“Employees can jump up and down all they want about free speech rights, but the First Amendment is a prohibition against the government infringing upon your speech, not a private employer,” Mike told the publication. “I’ve dealt with this issue from all sides of the political spectrum... if you’ve got an employee who expresses things that you believe reflect badly on you as an employer, you can discipline, and that discipline can be anything from a verbal warning to termination, depending on the employer’s own internal decision on what they believe is an appropriate punishment.”

One exception, however, is Section 7 of the National Labor Relations Act, which gives employees the right to engage in “protected concerted activity,” according to Mike. The protected aspect is speech relating to the terms and conditions of their employment. The “concerted activity” aspect means that two or more employees are involved, perhaps working together or discussing the terms and conditions of their employment. In this case, the employer cannot take adverse action against them based on that speech.

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“Typically, that’s focused more on unionization activity, but it does play into this arena. There have been some decisions from the National Labor Relations Board that held that multiple employees who were wearing Black Lives Matter pins were engaged in protected concerted activity in their workplace when the employer asked them to take those off,” he says. “I don’t know that that’s going to hold universally true across the country. If you’ve got employees who are wearing Charlie Kirk pins, does that play into the Section 7 world? I think it would be a stretch to say that that’s protected concerted activity, especially with the current iteration of the National Labor Relations Board, but it’s not outside the realm of possibility.”

Mike advises employers who want to discipline an employee for social media posts to focus not on the political viewpoint expressed but on the offensive content of the speech.

“If you’re picking and choosing how you discipline employees based on the viewpoint rather than the offensiveness, you just open a can of worms that you don’t want to get into. They might not have a strict First Amendment claim against you, but if you’re treating employees differently because one employee says on social media something awful... that can be a problem,” he says.

Team

Michael P. Gardner

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