Dealership Update

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A Supervisor's Guide To Social Media, Part Two

By John Donovan (Atlanta)

In our last issue we began an analysis of the legal pitfalls managers can face when dealing with problems created by employees' use, and misuse, of social media like Facebook, YouTube and Twitter. We also offered some practical advice.

Space prevented including all the advice we would have liked, so we'll pick up in this issue right where we left off.

RULE #5: Supervisors Are Not Protected Like Employees Are

Although the National Labor Relations Act protects employees who post comments related to their "wages, hours and working conditions" from being disciplined or discharged, the Act does not protect supervisors. Therefore, a supervisor who complains about his job or his boss – whether in the break room or on Facebook – is not protected by the law. Furthermore, because most employers hold their managers and supervisors to a higher standard than rank and file employees, conduct that might be tolerated if an employee does it, need not be tolerated if a manager or supervisor does it.

RULE #6: Don't Go Where You Weren't Invited

There are cases holding that it is an invasion of privacy to access someone's account when you are not authorized to do so. So you could invade someone's privacy and subject yourself to legal liability if you pressure subordinates to give you their passwords, or access to their Facebook pages, so that you can then access the third party's account for yourself. The same holds true if you pose as someone else to get "friended."

The NLRA also prohibits employers – and their managers – from unlawfully "surveilling" the protected concerted activities of their employees. The idea is that employees should be free to discuss matters of common concern without fear of retribution or punishment by their employer. If employees have not given you access to their postings, your accessing them could constitute unlawful surveillance. It would be no different than asking an employee what was said at a meeting of employees called to discuss forming a union.

RULE #7: If The Posted Email Or Tweet Involves Harassment Of An Employee Or An Actual Threat, Deal With It Promptly

Your company's policy against harassment should explicitly cover all forms of harassment including electronic harassment. Therefore, if you learn that an employee has posted or emailed offensive comments or materials which would violate your no-harassment policy if done face-to-face or at work, then you need to address it as you would any other incident or allegation of harassment. It doesn't matter that the harassing comment or post was made at home on a personal computer and after hours. The only issue is: did the post or email violate the Company's policy?

Of course, before initiating an investigation, you will want to see the actual post or a printed copy. Be careful: harassment must be based on an employee's race, sex, age, national origin, religion, etc. Rude remarks that

do not implicate one of these bases is not "legal" harassment, but still should be addressed.

Most companies have policies against violence and threats. A threat made via social media is no different than a threat made face-to-face. Therefore, if you have seen the actual post or a printed copy and are convinced that a real threat has been made, then you should take appropriate action.

RULE #8: Watch Out For Retaliation

Retaliation is taking any kind of material adverse action against a subordinate because he or she engaged in "protected conduct." This kind of protected conduct is broader than that under the NLRA, because it does not have to be "concerted." So a single employee who posts a complaint about discrimination by a supervisor has engaged in protected conduct. Similarly, a single employee who claims that he was not paid for all his hours has engaged in protected conduct.

Such complaints, posted for all to see on Facebook, can certainly be embarrassing to a supervisor or manager. However, you may not take any adverse action against the employee as a result of the "protected" complaint. In addition, if you do discipline or terminate the employee following such a posting, you can expect a retaliation claim. So you will want to make sure that you can prove to a jury's satisfaction that the employee would still have been terminated even if he or she had not made the post.

RULE #9: If It Does Not Have A Tangible Impact On The Workplace, Forget About It

Most employees feel that what they do on their own time is not their employer's business. And that is generally true so long as that off-duty conduct does not later impact the workplace. So if two employees don't like each other and elect to send each other insulting emails or posts, it really is of no concern to their employer. After all, we can't make people like each other.

But if the two employees come to work and continue to insult each other in the workplace or act in a disruptive manner or refuse to work with one another, then a manager needs to step in and address the problem, even if it means terminating both employees. But you should wait to get involved until the problem manifests itself at work.

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Service Writer Update

By John Donovan (Atlanta)

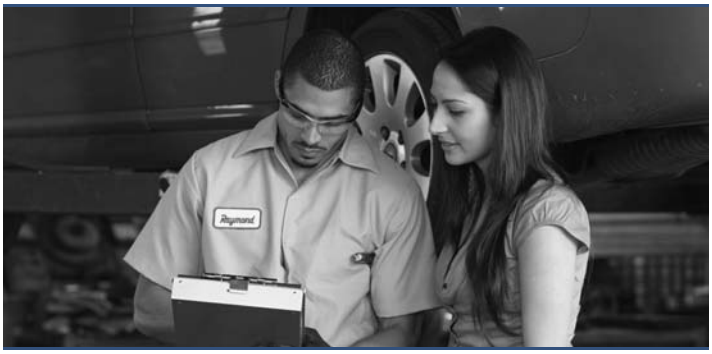
In April 2011, President Obama's Labor Department (DOL) announced that it was reverting to a position it had abandoned back in 1987. The DOL is again saying that service writers and service advisors are *not* exempt from overtime. The only problem with their "new" position is that it has been rejected by every federal court that has considered the question and, of course, the courts make the law, not the DOL.

However, favorable court decisions exist in only about fifteen states and those decisions are not binding on the other states. In an effort to prevent the DOL from attempting to enforce their position in those jurisdictions where courts have not yet ruled, Congress added a provision to the DOL's funding legislation for 2012 which stated that the DOL could not use any of the appropriated money to enforce their new position on service writers. Will DOL actually listen?

Yes, they actually did! We are aware of one investigation where the DOL investigated a service writer's complaint that he was not paid overtime. The DOL initially sided with the service writer. However, after checking with "higher ups" in the DOL, they closed their investigation and took no action. That's the good news.

The bad news is that all bets are off after December, 2012. So a prudent dealership will use this time to get its house in order. All you need to do to protect your dealership is to make sure that your service writers receive the majority of their compensation in the form of "commissions," ideally a percentage of the parts and labor hours they sell. Many service advisors are already paid that way and many others can qualify by just tweaking their pay plans a little. Then even if the service writer exemption is challenged at your dealership, your service writers will still be exempt from overtime under the other exemption.

Dealerships should also recognize that "internal" service writers are not exempt from overtime and never have been because they are not



selling parts and service to customers. So for those employees, it is critical that they be set up as "commission-paid" employees or paid overtime.

Do it now. Do not wait until December. If you would like information on how your service writer/service advisor pay plans should be structured, let us know.

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One exception to this is threats. Even if a threat is made off premises and after hours, it still violates most employers' policies. Therefore threats of any kind should be promptly addressed.

RULE #10: Ensure That Your Employees Understand The Company's Expectations

Many employees still believe that if they are not at work and not using the company's computers, they are free to say and do anything they want on the internet or on their Facebook page. Of course, that is not true. Therefore, it is important that companies adopt a social media policy that lets employees know that there are limits to what they can say and do after hours.

Be sure to make clear that your no-harassment policy and your threats-and-violence policy apply to social media, as well as your policy concerning the safeguarding of customer information. Most employees understand that their employer has a legitimate interest in protecting this information and will have no problem complying once it has been brought to their attention.

As you can see, the rules regarding employee use of social media are complicated and seemingly conflicting in many ways. Because there are so many different scenarios that can arise, it is difficult to cover them all. The bottom line is that even though most employees are employed "at will," managers or supervisors must still understand that there are limits on what they can do in response to an employee's social media communication.

That means that every manager should proceed cautiously and seek advice before taking disciplinary action based on an employee's social media activity.

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