

BLOGS

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Can We Learn Employment Law Lessons From the Hollywood Stars?

We increasingly live in an electronic world where entertainment news articles about movie and TV stars are featured adjacent to articles about important technology, political, legal, and world events. No star is in the limelight these days like Charlie Sheen, and his recent antics have the mainstream media telling us that Sheen can teach us a thing or two about how to conduct ourselves in the workplace in this increasingly electronic age.

This week, Charlie Sheen was fired from his hit TV show, and CNN.com posted an article stating that Sheen's conduct demonstrates the perils of publicly bad-mouthing your boss, particularly online. To read the article, visit:

http://articles.cnn.com/2011-03-07/living/cb.badmouthing.boss.sheen_1.facebook-page-charlie-sheen-boss?_s=PM:LIVING The article recounts numerous firings that have occurred based on an employee's online complaints and suggests that employees should have constructive, private discussions with management about concerns rather than venting online.

While I personally agree that it shows poor judgment to publicly air your complaints online, the article on the CNN.com site does not address, in any detail, the legal risks that employers can face in disciplining or terminating an employee for online comments. Because of these risks, employers should consider maintaining a carefully drafted policy on employees' online activities and use of social media. Employers should also proceed cautiously before taking negative action based on online postings. Some of the legal risks that employers may face and should address before acting include the following:

- An employer that accesses an employee's online postings could face privacy claims or claims under various electronic communications laws. Such risks should be smaller when an employer obtains data that is publicly accessible, such as through a public search engine like google.com, yahoo.com or an unrestricted social media site. If an employer searches on an online site with access restrictions – such as a social media site that the employee has restricted to only authorized friends – the employer should, however, consult with an attorney to ensure it accesses the restricted site through legitimate means. Employers should not access restricted sites in ways that might be found to be fraudulent, deceitful, or otherwise improper.

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- It should come as no surprise that not all data online is accurate and reliable. As such, employers should carefully consider and investigate the accuracy and reliability of online data before acting. To minimize the risk of defamation and privacy claims, employers should take care not to publicize false information about an employee and should keep personnel data and decisions as confidential as possible, sharing information on a need to know basis only for legitimate business reasons.
- Before acting, employers need to consider whether an employee's negative online posting may be legally protected in some way. If the employee is engaging in legally protected whistle-blowing, the employee may be insulated from any retaliation for the posting. In addition, some states have laws protecting an employee's consumption of lawful consumable products outside of work (such as alcohol or tobacco) or laws that more broadly prohibit adverse action based on any lawful activity outside of work. Such laws may, depending on the circumstances, cover the online posting. Accessing an employee's online postings may also cause the employer to gain access to other protected information about an employee that cannot be the basis for an employment decision, such as information about the employee's gender, religion, age, race, national origin, disability, or other protected characteristics or activities.
- An employer also needs to consider whether labor laws affect the employer's ability to act. As briefly mentioned in the article on the CNN.com site, a recent firing of a Connecticut employee for online postings prompted the federal National Labor Relations Board (NLRB) to file a case against the employer. In the case, the NLRB maintained that the employer's policy prohibiting online disparagement of the employer violated the employee's collective organizing labor law rights. That case was recently settled, and the employer apparently agreed to amend its policy.

In many circumstances, discipline or termination for online postings will be entirely justified and lawful. Given the above risks, however, and the ever evolving legal landscape, employers should act carefully to ensure legal compliance and should keep current on trends, best practices, and legal developments related to online data.