

Viral Layoffs: How Cos. Can Avoid Bad Social Media Exposure

By **Scott McIntyre and Chrissy Kennedy** (August 14, 2024)

Social media usage remains ubiquitous in 2024, and a recent trend sees employees increasingly using social media to document their experiences with layoffs and disciplinary actions in the workplace.

For example, a TikTok user posted a video recording in January of a meeting with human resources in which she was laid off from Cloudflare, an internet infrastructure and security company.[1] The video went viral, as it shows the employee repeatedly asking for an explanation about her termination from two human resources officers she had never met before.

The video caused such a frenzy that, shortly thereafter, Cloudflare's CEO wrote a message on Twitter apologizing for the company not being "more kind and humane."

This video is just one example of many in which workers are recording interactions with their employers, ranging from videos of termination meetings to screenshots of communications from human resources, and sharing them on social media for all to see and comment on.

The prevalence of smartphones and social media means there is always a risk that interactions with employees are being recorded and shared to social media.

Employers need to be aware of possible avenues for damage control in case any employee interaction is recorded without the employer's consent, and must plan for the possibility of a recording when deciding how, when and what to communicate to employees.

The Potential Consequences of Posting: For Employees

Social media posts by employees implicate a number of serious legal questions.

First, employees recording employers without their consent could implicate both civil and criminal wiretapping causes of action.

Most states are one-party consent states, meaning only one party in a conversation needs to consent to recording the conversation in order for it to be legal. In such states, the consent of the employee would be sufficient to record.

The minority of states include two-party consent states, meaning all parties to the conversation must consent to a recording before it is legal. In these states, the employee's consent, without the consent of the employer, would be an insufficient legal basis to record the conversation.

Some states complicate the consent analysis by varying consent requirements depending on whether the conversation is in person or over the phone.



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Further complicating matters are concepts of jurisdiction. In the digital age, employers are not always communicating with employees in the same state. Indeed, the benefit of technologies like video messaging and cell phones is that we can easily communicate over state lines.

However, that simple benefit creates complicated legal questions in the wiretapping context. If the employee is in a one-party consent state but the employer is in a two-party consent state, which state's law applies?

The answer requires an analysis of the particular state law and case law at issue. In some states, the applicable law is that of the state where the words or communication is uttered, while in others it is the location of the recording device that matters.

It is safe to say wiretapping laws are complicated and very jurisdiction-dependent. Employers should consult counsel for specific analysis of wiretapping laws for particular circumstances.

Second, if an employee's post, comment, or video steps over the line from truth to falsity, it could implicate false light and defamation causes of action. Modern day technology gives social media users the ability to edit, caption, cut, or overlay recordings with information that could be misleading or even false.

Although social media is a platform that encourages free expression, that does not include the freedom to make false or misleading statements about an employer.

Finally, social media posts and comments could implicate breach of contract actions for any controlling nondisparagement clauses included in employment contracts, employee manuals, separation agreements and the like. Employers should review any relevant contractual relationships with employees in order to identify potential breaches of these clauses.

The Potential Consequences of Posting: For Employers

Even with these aforementioned protections, it is important to understand that a single unflattering post, video or comment by a former employee could have an immediate negative impact on the public perception of a company.

But by enforcing any legal option against former employees, employers could garner more negative publicity or face legal consequences itself.

First, employee recordings could be construed as protected activity under Section 7 of the National Labor Relations Act, especially those that are recorded for the protection of fellow employees, or those that capture unlawful or discriminatory employment action.

The National Labor Relations Board has found that certain employee recordings, even covert ones, are protected under Section 7 and preempt state wiretapping laws.

Employer policies that restrict employees' right to record in the workplace have been called into question by the board, which has stated that a no-recording policy, even if facially neutral, does not override the employee's right to engage in protected activity.

Employers should consult counsel and weigh the consequences of all potential legal actions before moving forward.

How Employers Can Prepare

Of course, the best way to avoid a negative viral employee review is to prevent the post from happening in the first place. Employers should operate on the assumption that meetings and communications with employees could end up on social media and need to prepare accordingly.

The following are considerations employers should contemplate in preparation for meetings with employees:

Location

Employers should consider the context and setting for conversations with employees, understanding that regardless of whether the meeting is in person or virtual, workplace news always travels fast.

Hybrid meetings generally allow more privacy for employees; however, in-person meetings can make it easier for the employer to control the situation.

Regardless of where the meeting occurs, employers need to have protocols regarding the return of company property and the security of online systems. These should be prepared before any termination meetings with employees in order to maintain the integrity of company property.

Invitees

Those delivering unfortunate news to employees need to be prepared to speak articulately regarding the termination and the process moving forward.

Employees may become emotional or frustrated during hard conversations with their employer, and employer representatives must be prepared to deliver tough news and answer questions from employees. The representatives should be compassionate, while refraining from becoming emotional or defensive themselves.

Two employer representatives should attend, including a representative who personally knows the employee, such as their direct manager, who can provide a more personable and informed tone to the meeting.

The representatives should be truthful and should focus on the task at hand; they must refrain from speculating, offering extraneous information and making unauthorized promises to employees.

Process

A structured offboarding process can help make such meetings as smooth as possible for the employee.

Consider providing representatives with clear talking points or best practices to help them feel prepared and stay on task. Using a strict script runs the risk of seeming robotic and unfeeling. Representatives should be prepared to explain next steps to employees and provide any relevant information or documents.

Conclusion

Navigating the employer-employee relationship is more and more complicated in today's digital world. Businesses would be prudent to carefully review policies and procedures related to employee discipline and terminations.

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[1] <https://www.wired.com/story/the-stark-realities-of-posting-your-layoff-on-tiktok/>.