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Article

Labor Law Issues Concerning Social Media


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1. Introduction

With increased use of social media, including Facebook, Youtube and messengers such as Kakaotalk, there are more and more cases in which the employees' use of social media becomes problematic. In some cases, the materials which are posted on social media cause problems at the workplace. More recently, it has become possible to use Youtube for generating profits, and there are questions about restricting the employees' activities on Youtube. This article will examine how companies may restrict the employees' use of social media and what types of disciplinary actions may be imposed on the employees for their use of social media.[1]

2. Possibility of disciplinary actions for employees' use of social media and points of caution

A. Cases in which employees may be disciplined for activities on social media

Imposing disciplinary actions for the activities on social media alone would require that the activities of an employee reached a certain level to be deemed a violation of duty of good faith under the relevant employment agreement. For example, a prior court case recognized that an employer who

[1] Seoul Administrative Court decision 2015guhap5832 dated October 15, 2015 (appeal dismissed and finally confirmed under Seoul High Court decision 2015nu65140 dated April 28, 2016).

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reprimanded a trainee for constantly being on a smart phone to be a legitimate reason for refusing to hire the trainee.

In principle, the materials posted by the employees on their social media are in the private sphere. The prior court cases provide that an awry act or behavior in an employee's private life may be legitimate grounds for disciplinary actions in case such an act or behavior is (1) is directly related to business activities or (2) raises concerns of disparaging the reputation of his or her employer.[2] These standards of evaluation under the court precedents may apply to the disciplinary actions concerning the materials posted on social media. For example, either the act of disclosing on social media the information deemed as confidential of a company or the act of posting on social media the materials disparaging the reputation of the company may be deemed grounds for disciplinary actions. As to the concerns about disparaging the reputation of the company, the court cases provide that this does not require occurrence of any specific impediment to the business or loss of transactions but objective evaluation that the act had substantially significant and negative influence on the societal evaluation of the company.[3] Therefore, there may be grounds for disciplinary actions even if there is not specific evidence on the harm suffered by the company as a result of the social media post.

Imposing disciplinary actions on the ground of engaging in for-profit activities on social media as a violation of any agreement not to hold any concurrent position would require that the activities reached a level of interfering with the order at the company or causing encumbrances in the employees' provision of services to infringe upon the employer's interests. The court cases provide that even if personnel policies under the rules of employment stipulate holding more than one job position as the ground for automatic dismissal, any justifiable ground as set forth under Article 23

[2] *See* Supreme Court decision 93nu23275 dated December 13, 1994.
[3] Supreme Court decision 2000du3698 dated December 14, 2001.

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Paragraph 1 of the Labor Standards Act shall be recognized for such a dismissal to be valid. Therefore, in practical terms, the automatic dismissal may be allowed only in the event it is deemed that the employment relationship may no longer be maintained under the societal customs by the employee holding concurrent positions.[4] Further, there is also a court precedent finding that, where an employee privately operated a café business while being employed at a company, there was no evidence of any interference in the order at the company or in the performance of services, so this cannot be the ground for imposing any disciplinary actions.[5]

B. Points of caution in case of imposing disciplinary actions on ground of social media activities

Imposing disciplinary actions for maintaining the order as required in a company's operations shall be based on a justifiable cause or ground under Article 23 Paragraph 1 of the Labor Standards Act. Therefore, it is advisable to specify in the rules of employment the grounds, such as "any damage being incurred to the company by any awry or wrongful act of an employee committed outside of workplace" or "any trade secrets or information relating to the business operation acquired in the course of business at the company being disclosed to the outside".

Provided, however, an act of the employee in violation of the rules of employment and amounting to the ground for a disciplinary action would not automatically mean that the disciplinary action was lawful. The ground for a disciplinary action shall be lawful in itself. Therefore, a disciplinary action on an employee's activity on social media shall be carried out in a strict manner, so that only any such act deemed to be disclosure of the information relating to the trade secrets acquired from the performance of the services, or relating to the operation of the business, or an act deemed to be acquisition of personal profits by taking advantage of the same information or uploading

[4] Seoul Administrative Court decision 2000gu22399 dated February 15, 2001 (finally confirmed under Seoul High Court decision 2001nu4247 dated September 27, 2001).
[5] Seoul Administrative Court decision 2001gu7465 dated July 24, 2001 (finally confirmed under Seoul High Court decision 2001nu13098 dated July 4, 2002).

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materials of defamation against the company, or the other employees, via social media, thereby disparaging the reputation of the company or interfering with the order at the company, shall become subject to any disciplinary action by the employer.

Furthermore, the determination of the disciplinary actions shall be at an appropriate level as well. A recent court case ruled that a disciplinary dismissal of an employee who repeatedly posted writing in mockery of the supervisor on social media was lawful.[6] However, the person subject to the disciplinary action in the above case had a history of being subject to three months of salary reduction from having engaged in a protest in front of the company for some reason which was relating to the company yet lacking any bases. Further, the person was imposed a fine for defamation for having posted false facts regarding the supervisor in addition to writing mockery on social media. Therefore, it would be advisable to first provide a warning or a light penalty and to notify in advance that there may be more serious disciplinary actions in the event the same act is repeated rather than immediately imposing serious disciplinary actions on the employee on the ground that the materials uploaded on the social media may be legally problematic.

In the event the materials the employee posted on social media concern labor union activities, there would be a risk that imposing disciplinary actions, or disadvantages, on the employee may be deemed unjust labor practices. Therefore, it would be important to carefully consider whether the employee is a member of a labor union or whether the posted materials which became problematic concern a labor union when determining whether to impose disciplinary actions or warnings.

3. Other labor law issues relating to social media usage

[6] Seoul Administrative Court decision 2019gu60233 dated November 14, 2019.

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A. Direct orders via social media by contractor with relations to illegal dispatch

There were cases in which an employee of a contractor continuously requested for the services in a group chatroom on social media involving the employees of both the contractor and the subcontractor. It is likely for such request to be deemed a direct order from a contractor to subcontractor's employees, which may then be seen as circumstances of an illegal dispatch.[7] Therefore, opening a group chatroom on social media for the purpose of orders and supervision should be avoided for the services via a subcontractor to be not mistakenly deemed a dispatch relationship.

B. Orders via social media outside business hours

Concerning the limit on the weekly work hours to 52 hours, the orders and supervision via social media, emails and phone are becoming problematic. As to the work-related contacts outside the business hours themselves, there were not any definite issues of labor law. However, there were concerns that this could lead to the overtime hours not intended by the employer. Therefore, it would be important for the purpose of managing work hours to prevent work-related contacts outside the statutory work hours by preparing guidelines and providing trainings for the employees.

C. Workplace harassment in the sphere of social media

The Ministry of Employment and Labor stipulated that the place of workplace harassment would not be limited to the place of business and could extend to the online sphere, including the internal messenger and social media, based on the premise that it would consider the totality of

[7] *See* Seoul Central District Court decision 2017gahap544834 dated October 24, 2019.

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circumstances as to whether an act would qualify as workplace harassment including the relationship between the parties, the place and the situation in which the act took place and whether the act was continuous.[8] In the event the employer recognized that the workplace harassment took place in social media, the employer should promptly investigate the matter and take the necessary measures as provided by the Labor Standards Act.

4. Advice: Need for social media guidelines for the purpose of maintaining order at workplace

The employees' use of social media is fundamentally in the sphere of the employees' private lives. Therefore, it is impossible for the employer to comprehensively prohibit the employees' use of social media. Further, such restrictions may raise objections from the employees. Therefore, the company should prepare guidelines concerning the use of social media as a way to avoid disorder at the company in advance. Provided, however, if the guidelines either impose additional, new matters to be subject to sanctions, rather than further clarifying the existing rules of regulations, or provide for disciplinary actions on the ground of the violation of the guidelines, such provisions may be deemed unfavorable changes to the rules of employment and therefore require undergoing the necessary procedures (under Article 94 Paragraph 2 of the Labor Standards Act). Further, in view of respecting employees' freedom in their daily private living, the contents of such a guideline should be on the basis of negative regulations, such that as an employee's activities on social media may be restricted only in cases of interfering with the services at the company, disclosing the confidential information of the company, and disparaging the reputation of the company, etc.

※ Jipyong provides legal advice relating to matters of labor law. If you have any questions, please do not hesitate to contact Mr. Kwang Sun LEE at kslee@jipyong.com or +82-2-6200-1787.

[8] Ministry of Employment and Labor, Workplace Harassment Determination, Prevention and Response Guidelines, February 2019, p. 10.

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