

TRIAL BY FIRE

Responding to Employment Issues During a 24/7 News Cycle

PRESENTED BY

September Rea, *Polisinelli*, and Ariella Steinhorn, *Lioness*



September Rea

ABOUT



September Rea is a seasoned litigator in Polsinelli's Employment Litigation practice with experience in all employment-related litigation forums including administrative, state, federal and arbitration. She routinely partners with clients as a trusted advisor to defend against employment-related action including age, religion, gender, race, national origin, disability, harassment, wrongful termination, discrimination, retaliation and FMLA. Her practice is particularly focused on advising employers in the entertainment, start-up, technology, and hospitality sectors. She counsels clients in all aspects of employment including compliance with both state and federal laws, wage and hour law, employee handbooks/ personnel policies, employee discipline, commission agreements, and employment contracts.

Founder & CEO, Ariella Steinhorn



LIONESS FOUNDER

Co-founded workplace rights organization, Simone, which guided thousands of employees through challenging work situations

Former Head of Public Affairs at Ford Motor Company subsidiary, Spin

Head of Public Affairs at WeWork subsidiary
Managed by Q, youngest member hired to Uber's public affairs team

Wrote speeches for Attorney General Eric Holder

The intersection of employment law and public relations

Why employees go to the press and what impact press can have on employers

Policies employers can use to protect themselves with respect to press-related issues

How employers can implement and communicate policies in a way that is consistent and not deemed performative or hypocritical

Why do employees go to the press?

They feel like they've exhausted all other internal channels in pushing for a personnel or policy change.

Issue has been dismissed or ignored

Several dead-end meetings with HR

Employee has been retaliated against for speaking up

Vague or amorphous plans for addressing the issue

The same experience has happened to multiple employees, and it has not been tangibly addressed by management, HR, or the CEO

Impact of press

Criminal or civil investigations into their activity (as it relates to employee treatment or another whistleblower/ethics issue)

Customer boycotts and decline in sales or app downloads

Stock price decrease

Employees voluntarily leave, or recruits are turned off by working there

Social media outrage, trending hashtags

Policies to Consider

- 01** Social Media
- 02** Anti-Harassment/Discrimination
- 03** Technology Usage
- 04** NDA
- 05** Open Door Policies



Social Media

POLICIES TO CONSIDER

Considerations for employer social media policy?

Should incorporate the Anti-Harassment/
Discrimination Policy

NLRA Section 7 and concerted activities

California Labor Code 1101

Prohibition on discipline for lawful activities
outside of work

California Labor Code § 1101

EMPLOYERS CANNOT PREVENT OR CONTROL
POLITICAL ACTIVITIES OF EMPLOYEES

No employer shall make, adopt, or enforce any rule, regulation, or policy:

(a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

(b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.

California Labor Code § 1102

EMPLOYERS CANNOT PREVENT OR CONTROL
POLITICAL ACTIVITIES OF EMPLOYEES

No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.

California Labor Code § 1102

The term "political activity" refers to the espousal of a candidate or a cause, and some degree of action to promote the acceptance of the candidate or cause by other persons.

EMPLOYERS CANNOT PREVENT OR CONTROL
POLITICAL ACTIVITIES OF EMPLOYEES

Includes:

- participation in litigation
- the wearing of symbolic arm bands or pins, and
- the “association with others for the advancement of beliefs and ideas”.

Employers Cannot Prevent or Control Political Activities of Employees

Employers are responsible for the acts of their managers, officers, agents, and employees. Cal. Labor Code § 1104.

These protections and prohibitions apply to job applicants. Cal. Labor Code § 98.6.

Where an employee suffers retaliation or termination as a result of their political activities, the employee has a private right of action to file a claim for wrongful termination. Cal. Lab. Code § 1105

Social Media Policy Elements

- Acknowledge risks and benefits - acknowledge that internet provides unique opportunities but also can pose risks to the employer's confidential and proprietary information, reputation, and brands, can expose the company to discrimination and harassment claims, and can jeopardize the company's compliance with business rules and laws
- Encourage responsible usage – decide whether the company wants to encourage employees to use social media to create business opportunities or promote the company or prohibit the company name in social media (which has NLRA Section 7 implications)
- Address business usage – if job requires use of social media, set forth protocols for approval and remind employees that the company owns all such information and content regardless of the employee that opens the account or uses it and will retain all such information and content regardless of separation of any employee from employment
- Address personal usage – either prohibit personal usage or use a permissive standard that allows occasional use of social media for personal activities at the office or by means of the company's computers, networks, and other IT resources and communications systems
- No expectation of privacy – reserve the right to monitor any and all usage on any company device or internet
- Remind employees of obligations – remind the employees that if social media activity would violate any of the company's policies in another forum, it will also violate them in an online forum. For example, employees are prohibited from using social media to:
 - Violate IT resources and communications systems policies
 - Violate any non-disclosure agreements or privacy policies
 - Engage in unlawful harassment
 - Circumvent policies prohibiting unlawful discrimination against current employees or applicants for employment
 - Violate copyright laws

Section 7 of the NLRA

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title.

POLICIES TO CONSIDER

NDA's

POLICIES TO CONSIDER

Want to draft a strong, legally enforceable NDA with a lawyer and have these reviewed at least annually.

NDA's

Why do employees break their NDAs to speak to the press?

POLICIES TO CONSIDER

SAMPLE RESPONSES

"I believe it will force personnel, culture, or policy change in ways traditional channels might not"

"A person in power has abused that power for far too long"

"I want justice for myself or for others in my workplace"

"The public needs to know about what is happening at a current or former workplace."

NDA's

POLICIES TO CONSIDER

08-11-20 | WORKPLACE EVOLUTION

‘How much is my silence worth?’: Amid a racial reckoning, women are rejecting NDAs

As the chilling effect of confidentiality agreements crystallizes, some employees are refusing to sign NDAs or breaking them to speak out, risking financial and legal consequences.

FASTCOMPANY

The press usually don't report on a one-off situation or any singular claim of a "bad boss" - it has to be a trend among workers and present detailed evidence (screenshots, emails, recordings) for reporters and their editors to believe it merits coverage.

Open Door Policies

POLICIES TO CONSIDER

Open door policies can reduce liability, but having it and not using it creates more liability

Training is key for executives and managers

It seems performative when an employee demands a discussion with the CEO, but is denied the opportunity because HR is concerned

In Response to Emily Weiss:

We have been made aware of Emily Weiss's response on the corporate blog and are frankly insulted by it. Unfortunately, we are all too familiar with such empty words. Her response neither addresses our demands nor promises to implement them. Please note that we've called for *transparency*, and instead our layoffs and this response were both buried in an obscure 'Company Blog', and not across social channels like the Black grant initiative. The email she included was one we deemed performative and insufficient when it was received in July, and its emptiness prompted the letter we published. We will continue fighting for the rights of future Glossier employees and anti-racist reform until our demands are answered and are eager to receive an adequate response.

Open Door Case Study: Glossier



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mollyrose @kickin_it_wit_kaylakay

2h Reply



mmkay Go work somewhere else! Better yet, open up your own beauty company @emilyweiss does not owe you anything! that's the beauty of America. You have choices! NO ONE IS FORCING YOU TO WORK THERE.

2h Reply

[View replies \(1\)](#)



aprilfinlay @ahobbs24

35m Reply

[View replies \(1\)](#)



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Employers Must Walk the Walk

Transparency in decisions can help the employer—but backfire if internal work isn't done in tandem

Social justice campaigns cannot appear hypocritical or performative



Technology

Mark Zuckerberg's effort to disrupt philanthropy has a race problem

Some Black employees at the Chan Zuckerberg Initiative, his \$80 billion philanthropic company, say his efforts are stymied by blind spots around race and the desire to appear bipartisan.



An Elite Consulting Firm Said 'Black Lives Matter,' But Staffers Never Got The Message

THANK YOU!

