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Sometimes a Bright Line Isn't

Compliance and Ethics



A few years back, CLEs addressing social media in the workplace were thick on the ground. Most featured a digital slide plastered with as many logos of social media and related entities as the author (or often a tech-savvy associate in the author's employ) could cram onto the page. The presenter would exhort attendees that their companies' HR policies must be updated to protect against untold woes that would befall the unwary. I came to think of these as recommendations for the Dr. Seuss "green eggs and ham" approach to social media policy ("you must not speak it on the street; you must not type it in a tweet"). These presenters meant well. The ills they sought to prevent are real, and the advice they gave could result in policies that prohibit problematic behavior, but the underlying message was that constant vigilance of the social media landscape was necessary just to keep up with the constant stream of new offerings.

Just when the topic had seemingly reached its saturation point, and folks were just beginning to wonder if the alarm wasn't feeling a bit like the Y2K panic, a fresh wave of presentations rolled in on the back of National Labor Relations Board (NLRB) activities, and we were warned that our implementation of all the detailed prohibitions we were told to incorporate could get us in trouble for suppressing concerted activity. This begat several "you can say this but not that" trainings, additional policy revisions, and nervous "what if" questions to outside counsel. Some advised that those thoughtfully constructed social media policies could be spared from the NLRB's wrath by appending an appropriate disclaimer (because employee morale soars upon reading phrases like "nothing in the preceding guidance shall be construed as prohibiting protected activity").

The "green eggs and ham" approach to policy wasn't born with the internet or with social media. Ever since there have been ways to goof off or be disruptive at work, there have been policies aimed at quashing those behaviors. The telephone begat paragraphs of guidance on the limits of acceptable use. Dress codes offer limitless opportunities to granulate boundaries (at what point does a permitted

sandal become a forbidden flip-flop?). I know of a place where donuts are specifically covered in the workplace policies, but only to exclude powdered ones from otherwise-permissible treats; I don't know whether cinnamon has been deemed a powder for purposes of that policy.

Why do HR departments often favor, and lawyers bless, such specific prohibitions and requirements when the rapid pace of change means there's always an update needed? Are general standards of conduct simply unworkable?

Frequently in the workplace, there's a tendency to equate discretion with risk, and to minimize its use in proportion to the distance from the president's chair. Sometimes discretion and judgment are discouraged or prohibited in people whose positions require them to exercise it. Check the job descriptions in your company, and not just those of management; see how often the requirements include some version of "exercises sound judgment and discretion." Square this with your workplace policies and see if you can spot where that job requirement is reflected there. You may have a tough time bridging that gap.

I suggest that a no-discretion approach can give rise to an irksome tendency to adhere to the letter of the law in an atmosphere free of much concern for, or understanding of, its spirit, and a workplace where the compliance hotline buzzes with reports of various technical fouls that might not even merit a sidebar with one's supervisor. We take the easy way out when we prefer no-discretion policies simply because they are easier for mediocre managers to administer and mediocre employees to follow. The approach is superficially appealing from a risk-avoidance standpoint, but our job is not to eliminate risk; it's to help our client see it, understand it, and balance it against business objectives. Policies with no room to exercise sound discretion can result in undesirable outcomes even when consistently applied over variable circumstances. To paraphrase Ralph Waldo Emerson, a foolish consistency can be the hobgoblin of underperforming teams. Holding employees and management accountable for the exercise of sound discretion is certainly more difficult, and failures — however well-intentioned — can create exposure to harm. But we owe it to our companies to consider discretion-reliant approaches to policy as a real choice in balancing the risk of liability with the reward of high performance.

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