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Stop Trouble Before It Starts With A Refusal Of Service Policy

Maureen Minehan | Employment Alert (Approx. 3 pages)

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16.1♦ A restaurant owner asks a member of the Trump Administration to leave her restaurant. A fast food worker refuses to serve a police officer. A store manager declines to help a customer because he's wearing a hat with an acronym she finds offensive.

Employers across the country are inadvertently finding themselves on the front lines of political protest as some employees make decisions about service based on their own beliefs. Depending on the nature of the interaction and the presence of witnesses (and smartphone cameras), these incidents have the potential to go "viral" and put the employer in the national spotlight as both sides of the political divide seek to use the employee's action as evidence of good or of evil.

Employers in control

Adam Chotiner, an attorney with Shapiro, Blasi, Wasserman & Hermann in Boca Raton, Florida, says employers generally do not have to permit such behavior. "Are there any federal or state laws that require employers to allow employees to refuse service in circumstances like these? The short answer is 'no.' "

"Florida, for example, is an at-will employment state and employers can discipline or terminate employees for anything except actual unlawful discrimination or retaliation. 'Freedom of speech' is not applicable to private employers," he says.

Legal considerations

Seth Ford and Matthew Anderson, attorneys with Troutman Sanders, note that in some circumstances, employers may have an obligation to require service or face charges of discrimination. "When it comes to the issue of refusing service to customers, the best place to start is the Civil Rights Act of 1964. This federal law prevents businesses that are public accommodations (i.e. open to the public, like a restaurant) from discriminating based on membership or association with a protected class: race, gender, religion, etc. The Americans with Disabilities Act also affords these same protections to disabled customers."

"There are some states that have enacted Restoration of Religious Freedom Acts, which attempt to give employers the right to refuse service based on religious grounds, but these laws are coming under judicial scrutiny, the Masterpiece Cakeshop case notwithstanding." (In the Masterpiece Cakeshop case, the U.S. Supreme Court issued a narrow decision regarding a baker's right to refuse service

to a gay couple based on his religious beliefs. The decision was widely seen as inapplicable beyond the specific case. [[Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n](#), 138 S. Ct. 1719 (2018).]

Develop a policy

Ford and Anderson recommend employers create a refusal of service policy to establish their expectations. "Using these laws, all employers who operate public accommodations should have a policy as to when and why an employee may refuse service and require employees to adhere to the policy." Federal, state and municipal laws must be considered when drafting the policy and it should be reviewed by legal counsel.

Once drafted, refusal of service policies "should be applied as even-handedly as possible," Chotinery says. "If an employer decides to discipline one employee for engaging in such behavior but not another employee who engages in similar behavior, then the employer might be exposed to a claim of discrimination by the employee who was disciplined. Simply put, if the employer's policy is that such behavior is not permissible, then it can and should discipline any employee who violates the policy."

Protection from abuse

The policy also should be crafted to protect employees. "Any refusal of service policy should also cover instances where the employee is a target of abuse or discrimination. If a patron enters into a shop and begins hurling offensive and demeaning slurs at an employee, the policy should permit a refusal of service," Ford and Anderson say. "This should not be limited to discriminatory behavior by a customer. It should also include behavior that makes the establishment unsafe for customers and/or staff, is disruptive, or even violates health code."

"This policy, however, does not give employees unilateral control over when to refuse service. There is still a policy in place upon which the employer can fall back if service is refused," they note.

Be prepared to act

If, despite these precautions, employees refuse service to someone in violation of the policy, their employers must be prepared to act. "The employer shouldn't wait until it becomes a media story. Ideally, once the employer learns of any such behavior it should immediately investigate and take prompt action. Chances are, an employee who engages in such behavior will be terminated, and from a PR standpoint such a termination should occur before it becomes a media story," Chotiner advises.

If an employee asks for permission to refuse service, Ford and Anderson say employers should consider a number of factors before deciding. "The employer should consider its customer base, and how they will react to news of a refusal. Another question the employer should ask: what sort of media attention will the refusal cause? Employers should also document any incidents where service is refused in detail. Lastly, should the employer need to refuse service, it should consider using law enforcement to remove the customer (think drunken, rowdy bar patron)."

The bottom line

Prudent employers will establish, communicate and enforce a refusal of service policy as publicity about denial of service incidents inspires others to do the same. As Ford and Anderson says, "it is the employer who must dictate the grounds for refusal of service based on state and federal law, and few, if any, laws grant employees the

right to reject a customer independently. Employers who do refuse service must do so lawfully and only after considering all the potential repercussions of doing so.”

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