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EMPLOYMENT LAW ALERT

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Caught on camera: Can employees be disciplined for criminal activities?

The recent widespread acts of theft at shopping malls, warehouses and distribution centres in Gauteng and KwaZulu-Natal have created extraordinary challenges for many businesses – businesses which have already sustained significant setbacks in an economy struggling to withstand the impact of the COVID-19 pandemic. Footage of many who took part in these activities is readily available. This raises the question – can an employer discipline and potentially dismiss employees who are shown to have participated? As with many legal questions confronted by employers, the answer depends on the facts of each individual case.

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Caught on camera: Can employees be disciplined for criminal activities?

Generally, an employer does not have the right to discipline employees for conduct outside of the workplace and outside of working hours.

The recent widespread acts of theft at shopping malls, warehouses and distribution centres in Gauteng and KwaZulu-Natal have created extraordinary challenges for many businesses – businesses which have already sustained significant setbacks in an economy struggling to withstand the impact of the COVID-19 pandemic. Footage of many who took part in these activities is readily available. This raises the question – can an employer discipline and potentially dismiss employees who are shown to have participated? As with many legal questions confronted by employers, the answer depends on the facts of each individual case.

Employers have the right to discipline employees for misconduct that occurs at the workplace or during the course and scope of employment. Generally, an employer does not have the right to discipline employees for conduct outside of the workplace and outside of working hours. However, this is not a blanket prohibition. There are instances in which employers may have the right to discipline and potentially dismiss employees who engage in misconduct outside of the workplace and outside of working hours. Whether this is permissible in principle will depend on whether the conduct impacts on the employment relationship and whether the employer has a sufficient and legitimate interest in the conduct.

In relation to the recent activity in KwaZulu-Natal and Gauteng, it is not necessary or expedient for an employer to await the decision of a criminal court before considering disciplinary action.

In any event, the fact that an employee has a criminal conviction will not justify discipline and dismissal in every instance.

Where available footage shows employees involved in criminal activities

Our courts have found that employees may be dismissed for criminal acts committed outside the workplace if it can be shown that the criminal act affects the employer's business or impacts on its reputation.

If an employer is contemplating disciplining employees for partaking in the recent unrest, the employer will need to consider whether it can establish a link between these activities and the employment relationship. This will depend on factors such as the nature of the employer's business, the seniority of the employee and the level of trust placed in the employee, and whether the employee can be identified as an employee or as being associated with the business.

Social media has resulted in an increasing number of cases in which employees are dismissed for acts of misconduct committed outside of the workplace. Perhaps the most infamous of these are the ones that involve racist remarks made on social media. Where employers have been able to show sufficient linkage between the employee and the employer, the employers have been able to establish a basis to discipline and dismiss.

Caught on camera: Can employees be disciplined for criminal activities?...*continued*

If an employer is contemplating disciplining employees for partaking in the recent unrest, the employer will need to consider whether it can establish a link between these activities and the employment relationship.

If an employer is able to show that even if an employee was not wearing a company-branded uniform while engaged in illegal activities, the employee is well known to customers and is associated with the brand, this may justify taking disciplinary action. Similarly, if, for example, an employee who participated is employed as a security guard in a retail store, an employer may be in position to establish that the employee's participation in the unrest gives rise to the employer no longer being able to trust the employee.

While an employer will not be able to establish a right to take disciplinary action and potentially dismiss an employee in every instance, there may well be instances in which, given the relevant circumstances, it is able to do so.

Gillian Lumb and Mbulelo Mango



AN EMPLOYER'S GUIDE

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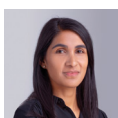
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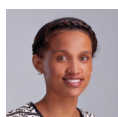
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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