"You Can't Fire Me For That – I Was Off Duty!"

Insights
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Employers learned long ago that it's wise to establish written policies which set forth the standards of conduct expected of their employees. These employers also know that the policies may not simply sit on a shelf (or on an intranet), but must be monitored and enforced in order to remain effective tools for encouraging or prohibiting certain behavior. But can you rely on your policies to discipline or terminate employees for engaging in legal conduct which occurred off-duty, especially if the conduct also occurred off-premises, and did not negatively impact the employee's performance of his or her duties or your business?

While you are probably familiar with laws which protect an employee's right to engage in what is sometimes referred to as "protected conduct" (e.g., making a charge of discrimination, complaining of wage and hour violations, whistleblowing, filing a workers' compensation claim, requesting reasonable accommodation of a disability, engaging in concerted union activity as defined in the NLRA) without fear of retaliation, other lawful activities may also be deemed "protected" by certain statutes, although not always without limitation. The following, which is by no means an exhaustive list, are some examples of off-duty conduct which may or may not be grounds for discipline or termination, depending on the state and the circumstances.

Medical Marijuana

In *Roe v. Teletech Customer Care Management* (2011), an applicant for a position as a customer-service representative for a telesales company was offered employment conditioned on her passing the company's reference and background checks and a drug screening policy. The applicant, who had already started attending training for the position, submitted to the drug screen, and tested positive for marijuana. The applicant informed the company that she suffered from debilitating migraine headaches and used medical marijuana at home, as prescribed by her doctor, which was legal under Washington's Medical Use of Marijuana Act (MUMA), and even offered to provide a doctor's note to prove it.

Unmoved, the company withdrew its offer of employment based on the applicant's failure to pass the drug screen, even though there was no evidence that the employee was under the influence of marijuana at work or that her work would have been affected in any way. The applicant sued, but to no avail. The Washington Supreme Court determined that MUMA, while providing an affirmative defense to criminal prosecution, did not create a private right of action for individuals to bring suit,

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nor did it establish a public policy which prohibited employers from hiring applicants who legally used medical marijuana.

But if the same situation had arisen in Arizona it would have yielded a different result. Unlike the Washington State statute, Arizona's medical-marijuana statute explicitly prohibits employers from discriminating against registered marijuana patients unless the employment of such patients would cause the employer to lose money or licensing under federal law (i.e., because medical marijuana use is not legal under federal law). Arizona does permit employers, however, to prohibit even registered users from possession of medical marijuana on company premises or from impairment while working. Rhode Island also prohibits employers from discriminating against medical-marijuana users.

Firearms

While most employers may prefer that employees not bring firearms onto company property, some states have laws which protect an employee's right to do so. For example, Florida expressly prohibits employers from asking employees about the presence of a firearm in a vehicle and from searching a private vehicle to determine if it contains a firearm. Similarly, Mississippi makes it unlawful for an employer to prohibit individuals from storing or transporting firearms in their own locked vehicles in company parking areas. A number of other states (including Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Minnesota, Mississippi, North Dakota, Oklahoma, Utah, Wisconsin) protect an employee's right, with some limitations, to possess a legal firearm on company premises.

Tobacco

In Massachusetts, a number of hospitals have established policies prohibiting smoking on company premises and some will even refuse to hire any candidate who tests positive for nicotine, on the theory that the hospital's mission to promote a healthy lifestyle is harmed by employees who act contrary to the hospital's message. Some employers in other industries have done the same.

In *Rodrigues v. EG Systems d/b/a/ Scotts Lawn Services* (2009), an applicant whose contingent offer of employment was withdrawn after he tested positive for nicotine, consistent with the company's policy not to employ smokers, brought suit against his employer claiming invasion of privacy and violation of ERISA. A federal court in Massachusetts dismissed the claims, reasoning that the employee had no privacy claim as it was no secret that he smoked, and had no ERISA claim as he was only a prospective employee and had no expectation of benefits under the company's ERISA plan.

Massachusetts has no state law which prohibits employers from establishing this kind of policy. But in many other regions of the country, company policies refusing to hire smokers would be expressly prohibited. For example, Connecticut, Washington D.C., Indiana, Kentucky, Louisiana, Maine, Mississippi, Missouri, New Hampshire, New Mexico, South Carolina, South Dakota, Tennessee,

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Virginia, West Virginia and Wyoming, among others, all have statutes protecting the rights of employees to smoke away from company premises.

Other Lawful Protected Activity

In addition to laws that protect specific types of off-duty conduct, some states have enacted laws which protect broad categories of off-duty conduct, or require, that an employer demonstrate some nexus between the employee's engagement in an activity and the employer's business before allowing the employer to take adverse action against the employee for engaging in the conduct.

In Colorado, for example, it is illegal for an employer to terminate an employee because that employee engaged in *any* lawful activity off the employer's premises during nonworking hours unless the restriction 1) relates to a bona fide occupational requirement or is reasonably and rationally related to the employee's employment activities and responsibilities; or 2) is necessary to avoid, or avoid the appearance of, a conflict of interest with any of the employee's responsibilities to the employer.

In Montana, an employer is prohibited from refusing to hire a job applicant or disciplining or discharging an employee for using "lawful consumable products" (such as tobacco or alcohol) if the products are used off the employer's premises outside of work hours, with certain exceptions for a bona fide occupational requirement or a conflict of interest, similar to Colorado's law.

In addition to the examples set forth above, a number of states also limit an employer's ability to use an applicant or employee's credit history as grounds for employment decisions, and prohibit employers from requesting access to the social-media accounts of applicants or employees. Moreover, public employers are even more restricted than private employers in that certain conduct engaged in by public employees is constitutionally protected by the First Amendment (free speech).

Unionized Workplaces

In unionized settings, where employers are usually required to prove "just cause" for termination, it is important for employers to show not only a violation of a company policy and an absence of statutorily or other protected conduct, but the impact which the employee's conduct had on the employer's business.

In Vista Nuevas Head Start, (2011), an arbitrator found that the employer, a Head Start program, had just cause to discharge a teacher for her Facebook page griping about her work, even though she posted comments off-duty, where her posts tended to undermine working relationships with the center administrator, classroom partners, and parents of children in classroom.

By contrast, in *L'Anse Creuse Public Schools*, (2008), an arbitrator held that a school district did not have just cause to terminate a teacher, even after photos of the teacher engaged in sexually explicit activity turned up on the internet, because the activity occurred off-duty, off-premises, and the photos were taken and posted without the teacher's knowledge or permission.

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The Bottom Line

As the above examples illustrate, employers must carefully analyze each situation before making the decision to refuse to hire a candidate or to discipline or terminate an employee for having engaged in lawful off-duty conduct, even if such conduct violates the employer's established policy.

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