



# **“Can We Do That?” Kentucky Employers Should Tread Cautiously When Regulating Employees’ Off-Duty Conduct To Reduce COVID-19 Spread**

Insights

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As coronavirus cases continue to surge across the United States and the Commonwealth of Kentucky, wary employers are revising their policies and response plans to mitigate against potential outbreaks in the workplace. Such policies and plans are critical to keep workers safe and to comply with the deluge of federal, state, and local workplace safety guidelines that have been issued since the beginning of the pandemic.

What occurs in the workplace, however, is only half the battle – and many employers are concerned that employees are increasing the risk of workplace exposures because they are not following CDC recommendations while off-duty and away from the work site. While laudable, Kentucky employers must approach their efforts to regulate off-duty conduct with caution. Here are some of the key issues for you to consider when drafting and enforcing off-duty policies during the COVID-19 pandemic.

## **Can We Prevent Employees From Traveling To Certain High-Risk States?**

Perhaps. Certain states prohibit employers from interfering with employees’ lawful off-duty conduct. As explained in more detail in a [recent Fisher Phillips legal alert](#), these laws are generally interpreted to apply to lawful off-duty conduct involving political activity and may not necessarily restrict action based on conduct that harms or has the potential to harm the employer or the workplace. The language of these laws, however, can be broadly worded, such as in states like California, and could be interpreted to encompass personal travel.

Kentucky has no such law preventing employers from regulating an employee’s off-duty travel, but you should still exercise caution when contemplating such restrictions. Infringing on an employee’s ability to travel could trigger discrimination claims under federal and state law, particularly if the employee is traveling out of state for religious purposes.

As an alternative to a blanket prohibition on travel, you may be better served to require employees to disclose any travel plans or recent travel so that you can take mitigating measures. You can also remind employees of the CDC’s travel guidelines and [Gov. Andy Beshear’s advisory](#) regarding travel to states with high rates of COVID-19 cases.

## **Can We Prevent Our Employees From Attending Certain Events?**

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Likely not. Some employers are venturing into a legally gray area by prohibiting employees from engaging in certain activities, such as going to night clubs, concerts, and attending group social justice events. If you're an employer in the public sector and contemplating similar restrictions, you should exercise caution. Doing so may violate an employee's federal and state constitutional rights, such as freedom of speech and association.

For those in the private sector, while the constitutional issues may not be of concern, efforts to restrict an employee's religious observances could run afoul of Title VII of the Civil Rights Act and/or the Kentucky Civil Rights Act, both of which prohibit religious and racial discrimination, and may require a reasonable accommodation for certain protected practices. You must also consider protections afforded to employees under the National Labor Relations Act (NLRA), which applies to non-supervisory employees, whether unionized or not. For example, if employees attend a social gathering to discuss an employer's COVID-19 workplace safety protocols, such conduct would likely be considered concerted activity and protected under the NLRA.

## **Can We Prohibit Employees From Voting In Person In the 2020 General Election?**

No. As my colleague discussed in a [recent article](#) for the Kentucky Association of Manufacturers, employees in Kentucky are entitled to at least four unpaid hours off to vote. Kentucky law does not allow employers to mandate that their employees vote by mail or vote early in-person, and Kentucky employers cannot deny leave for in-person voting if an employee chooses not to vote by mail.

## **Conclusion**

There is much work to do in curbing the spread of COVID-19 and restoring the economy. While employers across the state play an important role in this recovery, you should scrutinize your workplace policies to ensure they don't infringe on an employee's lawful off-duty conduct. As they say, no good deed goes unpunished.

We will continue to monitor the rapidly developing COVID-19 situation in Kentucky and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in any of our [Louisville](#) office, or any member of [our Post-Pandemic Strategy Group Roster](#).

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*This Legal Alert provides an overview of a developing situation. It is not intended to be, and should not be construed as, legal advice for any particular situation.*

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