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EMPLOYEES' OFF-DUTY PANDEMIC CONDUCT CAN CREATE ON-DUTY HEADACHES FOR HEALTHCARE EMPLOYERS – HOW TO REDUCE DISRUPTIONS IN YOUR WORKPLACE

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As the COVID-19 pandemic rages on and continues to hammer businesses, workers, and lifestyles with record-high infection rates and hospitalizations, companies still face challenges in ensuring employees comply with critical safety and health policies. With most people following guidance from the Centers for Disease Control and Prevention (CDC), state and local guidance regarding the use of face coverings, social distancing, and curtailing travel during the holidays, even a few outliers can create considerable headaches. Despite your best efforts, this can thrust employers into an unwelcome spotlight. This is especially true when the offenders work in a sensitive industry like healthcare.

A nurse in Salem, Oregon went so far as to use social media to flaunt her contempt for employer and public health guidelines by bragging about her non-compliance and not wearing a mask, among other things. Another group of healthcare workers may have spread the virus to coworkers and patients after attending a so-called "super-spreader" event. While the nurse's viral video does not appear to have resulted in any official sanctions, it generated tons of unwanted publicity for her employer and may have cost the offender her job. What happened in each case, and what can employers do to prevent such disasters in their workplaces?

THE VIRAL VIDEO

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The Salem nurse became a viral spectacle and generated headlines after posting a scandalous video of herself on TikTok, a social media platform where users share short-form videos, where she is wearing a stethoscope and hospital scrubs and bragging about violating COVID-19 safety guidelines. In her post, she stated that she does not wear a mask in public, continues to travel, and allows her children to have playdates. The nurse also hints that she tells her co-workers about this conduct, alluding with a sound-overlay from the "How the Grinch Stole Christmas" film that she views her behavior as "Grinch"-like or socially deviant.

When the video drew overwhelming online attention, the hospital placed the nurse on leave, and media reports indicate she no longer works there. By then, however, the community was outraged, and people were expressing concerns about patient safety. In short, considerable damage had been done.

DEVASTATING NUPTIALS

Not long afterward, another disturbing story emerged in neighboring Washington state. This time, healthcare workers reportedly engaged in off-duty conduct contrary to statewide health guidelines, an action that may have contributed to the infection of numerous people at long-term care facilities where they worked. In Grant County, where coronavirus restrictions limited gatherings to 30 guests or fewer, a couple reportedly held a 300-guest wedding in early November. About two weeks later, multiple staff members at the workers' facilities tested positive for COVID-19. The wedding was subsequently deemed a "super-spreader" event, as multiple news outlets reported at least 40 guests from the wedding had tested positive.

After attending the wedding, but while still asymptomatic, facility staff-members went to work and came in contact with the facilities' high-risk residents. Unsurprisingly, there were reportedly COVID-19 outbreaks among residents. The County reported that at least seven residents died due to COVID-19 complications since then. That number does not even include four more deaths at care facilities for which death certificate reviews were still pending. The health department has not said whether the staff who attended the wedding had direct contact with the deceased because the facilities have not yet released that information. There have

been no announcements about whether any of these staff members will be disciplined for attending what turned out to be a super-spreader event.

HOW CAN HEALTHCARE EMPLOYERS PREVENT SIMILAR CATASTROPHES?

Although employers cannot completely prevent such outlandish conduct, they can implement safeguards to reduce their likelihood and the damage that can result. Following well-planned strategies and policies, you can lawfully discipline or terminate employees for certain off-duty misconduct related to COVID-19 health and safety, even including employee social media activity. Especially in healthcare, you can indeed address conduct that may tend to place patients, staff, and your reputation in peril, particularly conduct that defies your safety policies or public health guidelines.

Laws vary across state and local jurisdictions, but as a general proposition, an employee's off-duty conduct may be a reasonable basis for corrective action when it affects the workplace. The first thing employers should therefore determine is how the disturbing conduct relates to an employee's job. Specifically, is there a legitimate business reason for disciplining the employee? If the conduct may threaten the safety and health of others in the workplace, you have rights to investigate and take action. You must proceed thoughtfully, however.

About 30 states provide some level of protection for employees' lawful off-duty activities, including protections for tobacco use, use of all lawful products, political activities outside of work, and generally protecting all lawful off-duty activities. Some federal laws provide more protections to employees and their social media conduct. The National Labor Relations Act (NLRA), for example, protects employees who engage in "Protected Concerted Activities" (PCA). Nevertheless, the law generally does not permit off-duty conduct that interferes with an employee's performance of their job or interferes with other employees' job performance. Employers have the right to enforce these principles.

ADOPT OR UPDATE RELEVANT OFF-DUTY CONDUCT POLICIES

Healthcare employers regularly update their policies regarding infection control and safety. The same should be

true of policies regarding conduct (both on- and off-duty), and social media activity, so that you identify the type of conduct that may jeopardize workplace safety, which naturally encompasses patient safety. This is especially important under the current pandemic emergency circumstances, where unprecedented symptom screening and other practices are already in place. These policies provide employers a critical tool, effectively a roadmap to help ensure reasonable and consistent navigation through these uncertain times.

When considering policies regarding employees' off-duty conduct, you should focus on two things: (1) conduct that could impact employees' ability to perform their job duties; and (2) conduct that could impact your business itself. For example, knowingly disregarding either your safety policies or public health requirements, thus exposing oneself to the highly-contagious and potentially deadly COVID-19 virus, could obviously impact the employee's ability to safely perform patient care duties, or even to be in the workplace around co-workers. This represents a legitimate concern even if employees use Personal Protective Equipment (PPE) while on the job.

Likewise, public defiance of safety policies or COVID-19 health guidelines could very possibly undermine public confidence in the organization as a reliable healthcare provider, as seen in the situation involving the social media post by the nurse in Oregon. A family member of someone who had been a patient in the offending nurse's unit publicly expressed concerns about her loved one's potential exposure to COVID-19. The potential consequences for that healthcare provider were tremendous.

Besides identifying conduct that could compromise patient care, off-duty conduct policies should also cover conduct that create risks for fellow employees. The policy should also prohibit conduct that threatens the workplace with dangerous, harmful, or illegal activity.

There is no ideal one-size-fits-all policy. Instead, it should be tailored to your services, operations, and role in its community. As referenced above, policies should take into account employees' rights under the NLRA, as employees cannot be retaliated against for engaging in PCA regarding terms and conditions of employment. Further, where the employees are represented by a union and/or there is a collective bargaining agreement in effect, you should

appropriately communicate with the union representing your employees about proposed new or changed policies.

SOCIAL MEDIA POLICIES

The NLRA protects employees' rights to discuss terms and conditions of employment, including on social media platforms. Social media policies should therefore only prohibit conduct that would adversely impact the employees' ability to perform their job duties and your compelling business interests, while being careful to not restrict or prohibit conduct or statements that may be PCA. The policy should even include a statement that does limit employees' rights to discuss terms or conditions of their employment, the policy was not promulgated in response to PCA, and it is not enforced in a manner to restrict PCA.

You may also want to limit employee use of your logo or uniform on social media because such use could distort the employee's level of authority to speak on behalf of the company. However, employees' non-commercial use of their employer's logos, uniforms, images, and name may be considered PCA, depending on the context. Such concern was significant in the Salem nurse situation, as she wore her hospital scrubs in her TikTok video. This presented important questions regarding whether she appeared to be representing the hospital or was instead engaging in PCA.

When drafting policies addressing the use of social media, your logo, or your uniform, you should establish the business justification for its policy. These same considerations are important when enforcing the policy. As opposed to a blanket-prohibition on the use of the company logo or uniform in social media posts, you may expressly prohibit social media posts that purport to speak on behalf of your organization or that may tend to pose a risk to – or threaten to pose a risk to – patient care, health, and safety while using the company logo or wearing your uniform. The policy should also encourage employees to include a disclaimer on posts mentioning the company, making clear that the statements and opinions expressed are not those of the organization, but are personal opinions.

INVESTIGATING OFF-DUTY CONDUCT OR SOCIAL MEDIA ACTIVITY

If an employee's off-duty or on-line activity violates a company policy, may adversely impact job performance or

co-workers, or detrimentally affects business operations, you have a right – and perhaps even a duty – to investigate. Investigations must always be neutral, objective, and well-documented.

Moreover, in view of the increasing level of COVID-related communication activity among healthcare employees, you should always consider whether the conduct *could* be considered PCA under the NLRA. For example, employees are currently likely to discuss questions and concerns regarding COVID-19 vaccines and their employer's policies. When such conduct involves or mentions the workplace, co-workers, job duties, terms and conditions of employment, or purports to represent the interests of more than one employee, it could be PCA – meaning that legal counsel should be consulted regarding your follow-up investigation.

DISCIPLINING OFF-DUTY CONDUCT OR SOCIAL MEDIA ACTIVITY

Disciplining off-duty conduct requires careful attention to the details underlying the conduct, as well as your policies, and, if applicable, the terms of the collective bargaining agreement. Disciplinary notices should specifically identify the unacceptable conduct and identify specific policies that were violated.

For example, stating only that the disciplinary action is issued for “acting in a way that reflects poorly on the organization,” without citing any related policies, is probably too broad. It does not even establish that the employee violated a policy. On the other hand, stating that the disciplinary action is for “engaging in conduct in violation of the employer's infection control and safety policies in a manner that poses a risk to staff and patient care,” while describing the specific conduct and citing the applicable policies, is much more likely to withstand a challenge, particularly if the underlying policy is sound and lawful.

Very specific documentation, clearly describing the unacceptable conduct, the policy or policies violated, the detrimental impact on the company, and expectations going forward, will serve you best in these situations. Again, if the offensive conduct could be considered PCA, you should seek legal counsel before proceeding.

CONCLUSION

As explained, during this challenging time it is especially critical to understand both the employer's rights and the employee's rights to maintain safety and keep the reputation of your system intact. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney or any attorney in our [Healthcare Industry Practice Group](#).

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