

Insights, News & Events

EMPLOYEE OFF-DUTY CONDUCT: CAN YOU ENFORCE WORKPLACE POLICIES OUTSIDE OF WORK?

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Tracy Moon and John Stapleton drafted “Employee off-duty conduct: Can you enforce workplace policies outside of work?” for Hr.Blr.com.

Employers often adopt and enforce written policies regulating conduct at the workplace. Many employers expect that employees will follow their employment policies at all times, regardless of whether the employee is working at home or at work.

Today, in the age of social media and smartphones, employers and employees have much greater visibility when they leave work – giving employers the ability (and desire) to monitor their workers after hours, and resulting in greater exposure and potential for harm to an employer’s reputation. But can employers monitor or discipline employees for policy violations that occur when an employee is off-duty and off-premises?

First, regarding *illegal* off-duty conduct, employers are generally entitled to take action after learning of an employee’s conviction, although they may have to demonstrate that the decision or policy is job related and consistent with business necessity. For instance, an employer would have a valid interest in an employee-driver’s recent conviction for drunk driving.

In fact, failing to take remedial action could lead to a claim for negligent hiring or retention against the employer down the road. (In the union context, generally an employer cannot discipline for off-duty conduct unless the activity

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threatens the safety and security of the workplace, the employee's performance or the employer's business interests.)

The answer is slightly more complicated when an employer attempts to regulate *lawful* off-duty conduct, such as social media postings or tobacco use. There are several competing interests at play. On one hand is the employee's right to be free from the employer's control while he or she is away from work and for conduct that may have no impact on the employee's performance. On the other hand is the employer's desire to enforce its policies to minimize liability, protect its reputation and maintain employee productivity.

In an at-will employment relationship, both the employer and the employee can end the employment relationship at any time without notice or reason. In other words, the employer has the right to terminate an employee at any time, for any reason, for no reason at all or for a bad reason, as long as it is not an unlawful reason. In order to determine what reasons are "unlawful," one must look to federal, state and local laws.

FEDERAL LAW

Federal law clearly outlines many factors that would be unlawful reasons for making employment decisions such as race, color, religion, genetic information, national origin, sex (including same sex), pregnancy, childbirth or related medical conditions, age, disability or handicap, citizenship status and service member status.

Likewise, federal law prohibits making employment decisions based on whether an employee has taken time off under the Family Medical Leave Act, made a safety complaint to OSHA, questioned the overtime practices of his or her employer or filed a charge of discrimination or harassment.

Off-duty social media use also may be protected under federal law. As many employers have learned the hard way, the National Labor Relations Act (NLRA) applies to the private sector and may restrict an employer's ability to terminate an employee for posting disparaging comments on social media. An employer also may violate the NLRA by maintaining an overbroad social media policy if it could be

construed by employees to prevent them from discussing their wages or other conditions of employment.

STATE AND LOCAL LAWS

Next, employers must consider state and local laws, as well. Most states have laws that are similar to or mimic federal law. Many states, however, have laws that are much more expansive and protective of employees' rights. Many states have laws protecting smoking, elections and voting, certain types of court-related leaves of absence, victims of crimes and/or abuse, medical marijuana or the possession of firearms, among others.

In addition to laws that protect specific types of off-duty conduct, some states have enacted laws that 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 non-working 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, below are additional instances of off-duty conduct that may or may not be grounds for discipline or termination, depending on the state and the circumstances.

- Twenty states have enacted medical marijuana laws, and 13 states have similar legislation pending. Arizona's and

Delaware's statutes restrict an employer's ability to terminate an employee in response to a failed drug test.

- While most employers may prefer that employees not bring firearms onto company property, some states have laws that protect an employee's right to do so, including Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Minnesota, Mississippi, North Dakota, Oklahoma, Utah, and Wisconsin.
- Twenty-nine states and the District of Columbia have statutes protecting the rights of employees who smoke.

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

Even with all of the possible restrictions in some states, employers may have more leeway than they think to consider off-duty conduct when making employment decisions. A wise employer seeks wise counsel to help the employer avoid possible legal pitfalls while exercising the full extent of the employer's rights.

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