

OFF-DUTY CONDUCT: ENFORCING WORKPLACE POLICIES OUTSIDE THE WORKPLACE

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Nearly every employer has adopted and enforced written policies regulating conduct in the workplace. However, few have taken the time to think about effective and lawful policies that regulate employee behavior after hours and outside the workplace. Today, in the age of social media and smartphones, employees have much greater visibility when they leave work, resulting in greater exposure and potential for harm to an employer's reputation. So, 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.

But what about an employee's *lawful* off-duty conduct such as political activism, social media postings, or tobacco use? In many ways, lawful off-duty conduct can be just as harmful to the employer's reputation as unlawful off-duty conduct. However, most employees believe they are

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completely free from the employer's control when they are away from work. Of course, that is not the case. Employers may have more leeway than they (or their employees) realize.

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 applies to the private sector and may restrict an employer's ability to terminate an employee for posting disparaging comments on Facebook or Twitter. An employer also may violate the NLRA by maintaining an over-broad social media policy if it could be construed by employees to prevent them from discussing their wages or other conditions of employment online.

State and Local Laws

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 such as 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 policies. 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.