

OFF-DUTY CONDUCT: ENFORCING WORKPLACE POLICIES OUTSIDE THE WORKPLACE

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Nearly every employer has enforced written policies regulating conduct at 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 increased 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?

Regarding *illegal* off-duty conduct, employers are generally entitled to take action after learning of an employee's conviction, although depending on the state, 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 a housekeeper's recent conviction for theft or a shuttle driver's recent conviction for drunk driving. In fact, failing to take such 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? The answer becomes slightly more complicated. Employees have a right to be free from their employer's control when away from work and engaging in personal business. On the other hand, employers have a desire to minimize liability, uphold reputation and maintain employee productivity. In

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many ways, lawful off-duty conduct can be just as harmful to the employer's reputation as unlawful off-duty conduct.

In an at-will employment relationship, both the employer and the employee can end the employment relationship 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. Unfortunately, the practical application of this employment-at-will doctrine is not as straightforward as it may seem. To determine what reasons are "unlawful," one must look to federal, state and local laws. Although most employees believe they are completely free from the employer's control when they are away from work, that is not the case. Employers may have more leeway than they (or their employees) realize.

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. Similarly, 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. In addition, the Equal Employment Opportunity Commission has provided guidance related to making employment decisions based on arrests and convictions.

Off-duty social media use may also 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 interpreted by employees as preventing them from discussing their wages or other employment conditions.

State and Local Laws

Next, employers must consider state and local law. Most

states have laws that are similar to or mimic federal law. Many states, however, have laws that are 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.

For example in Colorado, 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.

Employer Policies

But, what about employer policies? Many employers can and do expect that employees follow their employment policies regardless of if they are at work or off-duty. This is because employers perceive the actions or inactions of an employee to reflect on the reputation of the business or company. Many employers have learned that it is wise to establish written policies that set forth the standards of conduct expected of their employees. Furthermore, wise employers know that these policies must be monitored and enforced in order to encourage or prohibit certain behavior. However, employers may not be able to rely on these written policies, especially if the conduct also occurred off-premises and did not negatively impact the employee's performance of his or her duties or the business. The key here is to check federal and state law.

As the above examples illustrate, employers must carefully analyze each situation before refusing to hire a candidate, 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 counsel to help the employer avoid possible legal pitfalls while exercising the full extent of his right as the employer.

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