

What happens in Vegas might not stay there

Employers should keep federal and state laws in mind when regulating employees' off-duty misconduct

Employers are rightfully concerned with their employees' off-duty and after-hours activities. Off-duty conduct can have an adverse impact on productivity within the workplace, employee relations and morale. Employers must be thoughtful, however, about when and how they choose to regulate off-duty conduct because a myriad of laws reinforce employee privacy outside the workplace.

These laws range from privacy and Title VII protections, to credit check restrictions and prohibitions on regulating off-duty tobacco use. Public-sector employee constitutional rights as well as protected union activities provide additional protections to some employees engaging in certain off-duty activity.

Generally, an employer is prohibited from regulating off-duty conduct or using that conduct as a basis for discipline. For the most part, what an employee does on his or her own time is his or her own business. The exception to this rule is when there is a connection (or nexus) between the off-duty conduct and the workplace.

There are three primary forms that this connection can take. First is where the off-duty conduct harms the employer's reputation or business. This is discussed in connection with breaches of confidentiality below. Second is where the employee is unable to perform his or her duties at work because of the off-duty conduct.

Drug and alcohol abuse, discussed below, as well as moonlighting that leads to fatigue on the job, are examples of off-duty conduct that may inhibit the employee's job performance. Third is when the off-duty conduct has an impact on other employees. In this instance, other employees may refuse to work with that employee given his or her off-duty conduct. Then off-duty instances of discrimination or harassment may create liability for an employer that does nothing in response to reliable reports.

In our digital age, intellectual property represents a large percentage of the average company's value, such that breaches of confidentiality or violations of non-disclosure agreements can have serious repercussions. In addition to establishing confidentiality protocols and having employees sign nondisclosure agreements at the outset of employment, employers should remind their employees periodically of these obligations and that they extend outside the workplace (whether the employee is talking with family, friends or a competitor). A minor slipup can cost a company years of investment in research and client development.

In the event a breach does occur, a prompt investigation – including appropriate disciplinary action – should be undertaken. Also, a temporary restraining order should be secured from the court, and the recipient of the information should be notified that it was disclosed in violation of a nondisclosure agreement. Time is of the essence, so be prepared to act fast with the internal investigation and be consistent with the discipline that is handed down to employees that violate those agreements.

Off-duty drug and alcohol use may also be disciplined if it is in violation of the



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employer's drug and alcohol policy or if such use impacts the employee's ability to perform his or her duties. Employers are free to have a zero tolerance drug and alcohol policy, though many employers choose to permit their employees to consume alcohol off-duty, so long as they are not under the influence while at work.

However, an off-duty DUII that causes a driver to lose his or her license may lead to on-the-job discipline if the employee is no longer able to perform necessary driving duties required of the position. Additionally, off-duty drug or alcohol abuse that leads to decreased productivity or more mistakes on the job can lead to discipline based on job performance.

Furthermore, given the recent vote to decriminalize marijuana use and possession in Oregon, employers should remind their employees of the details of their drug and alcohol policy, including whether there is a prohibition on marijuana use. Despite the decriminalization vote, employers are still free to prohibit the off-duty use of marijuana by employees, and to discipline employees for violations of the drug and alcohol policy. Educating the employees on this rule will help avoid uncertainty when the new law takes effect this July.

Last, but certainly not least, is off-duty discrimination and sexual harassment. Such behavior clearly has a nexus to the employer's business, as it will undoubtedly permeate the workplace and impact employee relations. In fact, when an employer receives reliable information regarding off-duty discrimination or harassment, it has an affirmative duty to investigate and remedy the situation in accordance with its anti-discrimination and anti-harassment policies just like it would if the conduct had occurred in the workplace.

Ignoring the problem simply because it occurred outside of the workplace or after hours can expose the business to serious liability. Again, prompt investigation and consistent application of discipline are keys to limiting liability.

Not all employee off-duty misconduct may be subject to discipline.

The best approach is to: 1, consistently regulate off-duty conduct when there is a legitimate operational or business need; 2, analyze the connection between the conduct and the employee's job duties; and 3, use balanced judgment on a case-by-case basis. Educating the workforce about when off-duty conduct may result in discipline and being consistent with the disciplinary process will help drive home the importance of maintaining a professional demeanor inside and outside the workplace.

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