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Law Letter

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PERSONNEL POLICIES

Monitoring and controlling off-duty behavior

by Michael G. Petrie

Most employers today implement and enforce reasonable workplace rules to govern and control employee conduct during working hours. But many employers also wonder whether they can, or even should, monitor and control employees' off-duty behavior. Some would surely protest that placing restrictions on off-duty conduct goes too far while others would argue that model employee behavior is critical to the success of their business. For example, some employers prohibit their employees from moonlighting if that would interfere with their performance or create a conflict of interest.

Given that most employment relationships are at will, it's natural to assume that you're free to make whatever rules you want regarding employees' off-duty conduct. Not so fast. There are a variety of restrictions that you should be wary of. If you take those factors into consideration, the legal and other ramifications of tracking and restricting employee behavior outside the workplace may outweigh any benefits you could gain.

Employee privacy rights

Even though you may be free to implement rules restricting employees' out-of-work behavior, there are serious challenges and drawbacks to enforcing such rules. To ensure compliance, you're faced with the task of monitoring your employees. Aside from the likelihood that such an endeavor would be expensive and incredibly unpopular with employees, there are many legal pitfalls as well.

The U.S. Constitution and some state constitutions recognize a person's right to privacy. For government and public employers, that means that intruding or even inquiring into an employee's private affairs could give rise to a lawsuit for violating the employee's constitutional right

to privacy. In addition, many states have laws that prohibit or restrict the circumstances in which electronic surveillance can be done.

Even when no express statutory or constitutional prohibition exists, many states also recognize a common-law right to be free from unreasonable intrusion into one's private affairs. Generally speaking, people have a reasonable expectation of privacy in their homes and their personal activities. Employers that unreasonably intrude into that area in the course of monitoring their employees run the risk of being sued for invasion of privacy. Because there's no clear-cut line between reasonable and unreasonable intrusion, employers that consider that approach would be advised to err well on the side of caution.

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Controlling legal off-duty behavior

Assuming that you're able to reasonably monitor or otherwise learn about employee conduct without running afoul of privacy concerns, there are still a number of hurdles to clear before you can impose any discipline. Because of antidiscrimination laws and public policy, some types of conduct are simply off-limits to employer restrictions. In addition, some states restrict the types of conduct that you can control.

More than half of the states have enacted laws that specifically forbid you from imposing an adverse employment action against employees who engage in lawful off-duty conduct. Some, including California and New York, have laws that prohibit you from imposing adverse personnel actions or discharging individuals from employment because of lawful conduct that occurs during nonworking hours and away from your premises. Thus, in those states, even if an employee's off-duty conduct is distasteful, embarrassing, or even harmful to your business, you're essentially powerless to discipline or fire him for those actions.

Many other states have narrower restrictions on legal off-duty conduct. For example, Connecticut and many other states prohibit you from requiring employees to refrain from smoking while off duty. Other states prohibit you from restricting an employee from exercising political rights or seeking office. Even if statutes don't set forth a specific prohibition, many states also recognize as public policy that an employee shouldn't be fired for engaging in lawful conduct outside the workplace.

When it comes to lawful off-duty conduct, the only recognized justification for you to take adverse personnel action against an employee is when the conduct is directly harmful to your business. Moonlighting for a competitor and engaging in conflict-of-interest situations are prime examples. If such conduct is occurring in a state where you're prohibited from imposing discipline for legal off-duty conduct, you should seek legal advice before proceeding.

Protected activity

In addition to statutory restrictions on employer discipline for legal off-duty conduct, there are other laws that generally prohibit retaliation for certain protected activities. Under the National Labor Relations Act, you're prohibited from monitoring union-related activities. Many states, including Connecticut, have laws prohibiting discrimination based on religion, marital status, and the exercise of free speech.

Illegal conduct

Generally speaking, you're permitted to discipline or fire an employee for engaging in illegal conduct that occurs off duty. You should be careful, though, to distinguish between adverse action taken based on the illegal conduct and action based on the fact that an employee simply was arrested. The fact that the employee was arrested doesn't prove that she engaged in the alleged conduct. Still, you needn't prove guilt beyond a reasonable doubt. If you have a reasonable belief that an employee actually engaged in the illegal conduct, there's no law in Connecticut that prohibits the employee's discipline and/or dismissal.

The most common examples involve incidents of theft and driving under the influence. In one case, a court of appeals upheld a university's decision to fire an assistant football coach after he was arrested and charged with driving under the influence. Dismissing the assistant coach's claim that he was fired because of a disability, alcoholism, the court concluded that the university was free to fire him based on conduct that was not only illegal but also highly embarrassing to the university. *Maddox v. University of Tennessee*.

Bottom line

Although some employers may desire to assert some degree of influence over their employees' conduct away from the job, doing so requires a high degree of risk with minimal benefit to be gained in all but a few circumstances. Unless the conduct at issue is directly harmful to your business, creates a public relations problem, or is illegal, imposing adverse action on employees for it is likely to draw a response in the form of a lawsuit. In the end, the cost of curbing most types of off-duty conduct is prohibitively high.

Find out more about employee privacy issues in the subscribers' area of www.HRhero.com, the website for Connecticut

Web Alert

Surprise! You're on surveillance camera!

Our website, HRhero.com, gives you the latest national news in employment law. To read the following articles, go to www.HRhero.com/news.

- "Private investigator foils bogus FMLA claim" — An employee loses his FMLA claim because he got busted buying beer, going to the gym, and running other errands while out on leave.
- "Increased commute time may be tangible employment action" — A sexually harassed employee prevails at trial after suddenly being transferred to a facility 120 miles from his home.
- "Lack of adverse action dooms combo age/ADA claim" — Despite being called a "slow old man," a convenience store employee loses his age and disability claims because the employer didn't take an adverse action against him. ❖