

## Employment Policies

# Proceed With Caution in Discipline for Off-Duty Conduct

### BNA Snapshot

- Occasionally, employees' off-duty conduct may negatively affect the employer
- But in imposing discipline, employers must take care not to violate discrimination and labor laws



By Martin Berman-Gorvine

In the rare cases where employers find it necessary to discipline workers for off-duty behavior, they must be aware that federal and state laws can protect employees even after the working day is done, attorneys say.

"It's the unusual case where discipline would be imposed based on off-duty conduct, at least where the conduct has no logical connection to the workplace," Lawrence Peikes, a partner at Wiggin and Dana LLP in Stamford, Conn., told Bloomberg BNA in a July 26 email.

But sometimes employers are impelled to act. "For instance, if a female employee complains that a male coworker is stalking her by following her home after work, employer action is warranted, indeed necessary, as the off-duty conduct is negatively affecting the workplace," San Francisco-based management-side employment attorney Allen Kato told Bloomberg BNA in a July 26 email. "Even though off work," the stalking would violate the employer's sexual harassment policy, he said.

Other examples include off-duty racist comments by employees, domestic violence, and some types of sexual misconduct, which "can lead to a significant blemish on your corporation," Susan Fahey Desmond, a management attorney and a principal in Jackson Lewis P.C.'s New Orleans office, said July 27.

### Sources of Liability

Employer liability for employers regarding discipline for off-duty conduct may arise from two sources: the National Labor Relations Act, which protects workers' right to organize to improve their terms and conditions of employment, and anti-discrimination laws that cover "protected characteristics" such as religion, race, national origin, and disabled status, including Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act.

"In general, an employer may discipline (up to terminating) an employee for misconduct outside of work that negatively impacts the workplace or the employer," Kato said.

But employers should avoid disciplining employees for "lawful, protected political activity," such as an employee who speaks in public about the Affordable Care Act and Republican attempts to repeal it, and in the process calls his or her employer's health coverage "stingy," he said.

A similar point was made by Peikes. "Some states, most notably New York, have enacted legislation prohibiting employers from imposing discipline based on an employee's lawful off-duty activities," he said.

Desmond listed 30 states, including New York and California, that limit employer regulation of employees' off-duty conduct, many protecting employee "lifestyle choices," such as smoking or bungee jumping.

Some state laws also protect employees who have been arrested but not convicted of a crime, Daniel J. Green, an associate in the employment, labor, and workforce management practice in the New York office of management-side law firm Epstein

Becker Green, told Bloomberg BNA in a July 27 email.

"This area of the law involves a great deal of nuance," he said. For example, "some state laws prohibit employers from disciplining employees because the employee was arrested, but permit the imposition of discipline to punish the underlying conduct that led to the arrest."

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NLRA protections for employees apply "regardless of whether the employee is on-duty, off-duty, on-site, or off-site," Peikes said. "We've seen this time and again with Facebook posts about workplace matters that employers find disconcerting." If an employee publicly posts a "rant" about the company's pay structure or policies and other employees chime in, the employer may be breaking the law if it imposes discipline, he said.

He also cautioned employers to beware of violating anti-discrimination statutes. "Although difficult to envision a real-life scenario, to the extent off-duty activities are in furtherance of religious practices or might relate to treatment for a disabling condition, discipline, or critical comment, may lay the foundation for a discrimination claim," he said.

Desmond was speaking in a webinar sponsored by Aurora Training Advantage.

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