

Discipline of Employees for Conduct Outside the Workplace: Best Practices to Avoid Claims

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Most human resources professionals are comfortable issuing discipline to employees who engage in workplace misconduct during the workday; simply consult the handbook and determine the appropriate course of action based upon the nature and level of the offense. The situation becomes considerably more fraught, however, when employees engage in inappropriate conduct outside of the workplace. Employers must balance the potential for bad publicity and negligent retention litigation for failing to address behavior with laws that protect aspects of an employee's personal life from discipline.

Further complicating the issue are the numerous exceptions to the Employment At-Will Doctrine, which theoretically allows an employer to terminate an employee for a good reason, bad reason or no reason at all. Termination for conduct outside the workplace may fit within the at-will doctrine, but in our increasingly regulated society, employers must be aware of the laws in their jurisdiction which limit the ability to take an adverse employment action based on conduct outside of work.

best practices to avoid claims

- To the extent you can discipline or terminate for a job-related reason, instead of personal behavior, do so. For example, if an employee is arrested and is missing work due to court appearances or incarceration, discipline for the absenteeism under established policy, rather than the arrest, if possible.
- Be careful *how* you obtain information regarding employees' outside-of-work misconduct. Do not force an employee to give you his/her Facebook password. Do not engage in monitoring or surveillance of an employee's personal behavior outside of work that could violate his or her right to privacy.
- Focus on legitimate, job-related impact of employee misconduct, rather than on mere assumption or bias.
- Make sure you can clearly articulate a sound business reason for the termination that is based on objective facts.
- Do not jump to conclusions and assume the worst about an employee. Consider the source of your information, and assess the reliability of the report. Investigate and make sure your information is correct.

Factors to Consider

- Is the off-duty conduct illegal?
- Is the off-duty conduct contrary to the company's articulated mission and values?
- How did you learn about the off-duty conduct?
- How reliable is the source of information?
- Is further investigation appropriate?
- Has the employee's off-duty conduct been publicized?



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- Will the employee's off-duty conduct jeopardize the company's reputation?
- Is there a law in your jurisdiction that regulates your industry and disallows employment for certain criminal convictions?
- Is there a law in your jurisdiction that prevents employers from disciplining or terminating employees for the off-duty conduct in question?
- Is the employee's conduct protected as a "concerted activity" under the NLRA?
- Is your business engaged in a safety sensitive activity that would be impacted by the employee's misconduct outside of work?

For more information or questions concerning discipline of employees for conduct outside the workplace, please contact Tanya Salgado (215.864.6368; salgadol@whiteandwilliams.com) or another member of our Labor and Employment Group.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.

