

Discipline of Employees for Conduct Outside the Workplace: Criminal Activity

By: Tanya Salgado
Labor and Employment Alert
11.11.15

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.

Drug Use, Smoking, Firearms

Concerns about employee health and safety have caused some employers to take steps to limit employee smoking, considering it a bad habit that will only drive up health insurance premiums. Many employers have established drug-free workplace policies and engage in drug testing. Other employers, concerned about workplace violence, have banned guns in the workplace or on company property. Many human resources professionals would assert that such policies are positive steps to encourage good employee behavior that will ultimately help the bottom line. After all, smoking, drug use and guns on company property could increase health insurance premiums and sick leave usage and potentially result in a disastrous accident in the workplace.

However, some privacy advocates have taken the position that corporate America has gone too far and are taking a stand to protect workers' freedom to live their personal lives without punishment by a corporate "big brother." Many state legislatures have pushed back against overly intrusive employer policies in an effort to protect employees from adverse employment actions based on certain specified lawful behavior, such as smoking while off duty or carrying a firearm in one's personal vehicle. Other states have enacted medical marijuana laws that would impact the ability of an employer to discipline an employee who tests positive for the substance in a drug screening. Some states, including Colorado and North Dakota, have gone so far as to enact legislation that prohibit an employer from terminating employees who engage in lawful activities off the employer's premises while off-duty.

Legislation

Medical Marijuana. The New Jersey Compassionate Use Medical Marijuana Act protects "patients who use marijuana to alleviate suffering from debilitating medical conditions, as well as their physicians, primary caregivers and those who are authorized to produce marijuana for medical purposes" from criminal prosecution. Only certain conditions are included on the approved list, including multiple sclerosis, terminal cancer, muscular dystrophy, inflammatory bowel disease and terminal illness.

Many employers have instituted drug-free workplace policies, which, when properly drafted, are a very positive addition to any workplace. However, the passage of medical marijuana laws in certain jurisdictions has led to a conundrum for human resources

professionals: if you are aware that an employee is using medical marijuana for a disability, how do you apply your drug-free workplace policy? Does the duty to accommodate a known disability under the Americans with Disabilities Act (ADA) require an exception to the drug policy in the case of medical marijuana? As the law currently stands, employee claims brought under the ADA asserting a right to use medical marijuana as a reasonable accommodation have failed; because marijuana is an illegal drug under federal law, its use is not recognized as an accommodation under the ADA.

Another issue that arises in jurisdictions with medical marijuana laws is the question of safety in the workplace. When an employee is using medical marijuana on non-work time due to a disability, does the employer retain the right to insist that employees report to work free from the influence of an intoxicant, including medical marijuana? As the law currently stands, under the ADA, there is no requirement to accommodate a disability by allowing medical marijuana. This is of particular importance in the case of safety sensitive positions, such as operating heavy machinery.

Smoker Protection. The New Jersey Smoking Law provides that employers may not refuse to hire or otherwise discriminate against employees or job applicants because they do or do not smoke. If an employer has a rational basis for opposing tobacco use that is reasonably related to the employment, this is a valid exception. Pennsylvania and Delaware do not have smoker protection laws.

Guns In the Workplace. Approximately 22 states have enacted legislation permitting employees to keep firearms in their vehicles in their employer's parking lot. Employers with employees located throughout the country that have policies prohibiting guns on company property need to stay up to date on laws across their jurisdictions. States with such laws include Arkansas, Alaska, Arizona, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Oklahoma, Tennessee, Texas, Utah and Washington.

Arrests

Employers may find themselves facing a situation where one of their employees has been arrested and charged with a criminal offense. Questions may arise about the propriety of continuing to employ this individual after the arrest. Will the employer face a negligence lawsuit by someone who is later harmed by the employee? Some employers are engaged in regulated industries such as childcare and healthcare, where certain criminal convictions will disqualify the employee from continued employment. On the other hand, many jurisdictions have enacted ban-the-box laws that limit an employer's use of criminal history record information. A responsible employer will need to be aware of the laws that apply in its jurisdiction, and balance all of these considerations.

For further information, or questions regarding policies or legislation in your jurisdiction, please contact Tanya Salgado (215.864.6368; salgadot@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.

