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## **Dealing with Off-Duty Conduct? Are You Sure You Want to?**

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## **DEALING WITH OFF-DUTY CONDUCT? ARE YOU SURE YOU WANT TO?**

### **I. INTRODUCTION:**

**“I got a lot of off days, but it ain't often that I'm off the clock.” – Chance the Rapper**

Employers are rightly focused on the conduct of their employees while they are on-duty, on-site, and on the clock. But in an age with less and less privacy and more and more access to employees' attitudes and behaviors away from work, employment law practitioners are increasingly likely to deal with a situation where an employer wants to (or has to) address employees' off-duty conduct.

Can an employer discipline or fire an employee for off-duty conduct? Sure.

As we can no doubt recite in our sleep, Texas is an at-will employment state and under the at-will employment doctrine employers can make employment decisions for just about any reason aside from a discriminatory/retaliatory/otherwise unlawful reason. It is often repeated (for some reason) that an employer can fire an employee because they do not like their shoes. Has anyone ever heard about that happening? That would be wild. How would that even come about? A sneaker-head supervisor flips out when they see an employee wearing vintage Jordan's on a rainy day? A boss who abhors the sound of Velcro?

The question of whether an employer *can* make decisions based on off-duty conduct is less interesting than whether an employer *should* make decisions based on off-duty conduct. That will be the focus of this paper. I will use examples from case law and the news to explore instances in which firing someone for off-duty conduct is a good idea, or at least legally defensible, and instances in which it is not such a good idea and could get the employer into more trouble than it is worth.

If an employer wants to start policing off-the-clock behavior that is a good way to open itself up to a disparate discipline / unequal treatment claim. Plaintiff employment lawyers will analyze an employment decision based on off-duty conduct like any other employment decision. Is the reason given for the reason true? Is it credible? Consistent? Is it a pretext for discrimination? Is the employer looking at every employee's off-duty-conduct, or just some groups?

The paper will focus on Texas and 5<sup>th</sup> Circuit cases because, really, do any other states or circuits matter?

## **II. THERE OUTTA BE A LAW AND IN SOME PLACES, THERE IS**

Several states have laws that prohibit employers from taking action against employees for off-duty conduct. If you are wondering whether Texas has a law that similarly protects employees, ask that question out loud and see if you can stop from laughing.

States including New York, California, Colorado, and North Dakota have laws that prohibit discrimination against an employee for participation in legal activities outside work hours. NY Labor Law §201-D; California Labor Code section 96(k); Colo. Rev. Stat. Ann. § 24-34-402.5; N.D.C.C. § 14-02.4-03. As long as the conduct does not present a conflict with the employer's business or put the company in a negative light, the activity should be allowed.

The Colorado law, for example, prohibits the termination of an employee for “engaging in any lawful activity off the premises of the employer during nonworking hours,” with exceptions for restrictions that relate “to a bona fide occupational requirement or [are] reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees ... or [are] necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.” Colo. Rev. Stat. Ann. § 24-34-402.5.

Such laws could protect an employee who drinks alcohol, smokes cigarettes, or smokes weed (where that is legal) after clocking out.

## **III. WHAT HILL ARE YOU WILLING TO DIE ON?**

Employers have to decide what is important to them. Like with any employment decision, the employer gets to decide what is worth getting upset about, or what is worth firing someone about. Then the question becomes, how comfortable are you defending that justification.

Here are some factors that weigh into that analysis.

### **a. Is there a Connection with the Job or the Company's “Mission”?**

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