



It's None of Your Business

Management of Employees' Off-Duty Conduct

April 5, 2019

"One time they brought me a lot of stuff about his personal life, and I told them I didn't give a damn about that. That wasn't my business. It was while he was at work that was my business."

(Pres. Harry S. Truman commenting on FBI Director J. Edgar Hoover)

Charlottesville, Virginia

@YesYoureRacist

"If you recognize any of the Nazis marching in #Charlottesville, send me their names / profiles and I'll make them famous #GoodNightAltRight

Dating / sex /
romance

Drug / alcohol
use

Smoking

Domestic
violence

Harassment /
stalking

Civil / political
activity

Arrests /
Convictions

Associations
with unsavory
characters

Moonlighting

Possible Limitations

- Employment agreement or CBA
- Off-duty conduct / lifestyle discrimination statutes
- National Labor Relations Act
- Anti-discrimination laws
- Employee privacy rights and other sources of tort liability
- Other specific statutes restricting ability to act upon information

Contractual Restrictions

- Is the employee “at will” or subject to discharge only for cause?
- If for cause, carefully review definition of “cause.”
- Is there a requirement of notice and opportunity to cure?
- Ideally agreement broadly defines cause to include conduct that could negatively impact the employer in any way.

First Amendment / “Free Speech” Rights

- U.S. Constitution does not provide rights to private sector employees.
- *But see* Connecticut statute, which prohibits discrimination based on the rights guaranteed by the 1st Amendment, even for private employers as long as the activity does not interfere with the employee’s job performance.
 - Must show speaking as private citizen
 - Speech must concern a matter of public concern
 - Must show speech did not substantially interfere with job performance or working relationship with employer.

Protection for Political Activity / Opinions

- Some states and jurisdictions prohibit retaliation based on “political activities” (see CA, CO, Guam, LA, MN, MO, NV, SC, UT, WV)
- New Mexico protects “political opinions”
- Several states prohibit discrimination based on party membership or for engaging in election-related speech and political activities.
- Most (but not all) contain exceptions for BFOQs, conflicts of interest, and speech that materially interferes with job performance.

“Lifestyle Discrimination” Statutes

- Also known as lawful off-duty conduct or activity statutes.
- Maine statute limited to smoking.
- Some very broad; *e.g.*, Colorado:
 - “It shall be a discriminatory practice for an employer to terminate the employment of any employee due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours. . . .”
 - But with generous defenses for restrictions that are rationally related to the employer’s employment activities, constitute a BFOQ, or are necessary to avoid conflict of interest.

New York Labor Law Section 201-d

- *State of NY v. Walmart* (N.Y. App. Div. 1995)
 - Discussing Walmart's policy, prohibiting "dating relationships" between a married employee and another employee, other than his/her spouse.
 - Over-ruling lower court, which held that extra-marital dating was a "lawful recreational activity."
- *McCavitt v. Swiss Reinsurance America* (2d Cir. 2001)
 - Dating is not a recreational activity.
 - Concurring opinion, stating "It is repugnant to our most basic ideals in a free society that an employer can destroy an individual's livelihood on the basis of whom he is courting, without first having to establish that the employee's relationship is adversely affecting the employer's business interests," and encouraging NY courts or legislature to rule otherwise or amend the law, respectively.

Dating / Affairs / Romance

- Between coworkers
- Between manager and subordinate
- Between employee and client
- Between individuals married to others

Dating / Affairs / Romance

- How does the relationship impact the workplace?
 - Exposure to sexual harassment claims
 - Concerns about favoritism / negative impacts on other employees
 - Concerns about confidentiality
- To what extent are the concerns hypothetical v. real and are there actions short of termination that can control them?
- Policies regarding disclosure

Crowley v. LL Bean (D. Me. 2001, 1st Cir. 2002)

- Stalking behavior for 1.5 years, including outside of work.
 - Grabbing foot and massaging it at pool party
 - Giving unwanted gifts (e.g. book on cancer therapy after victim's friend's mother died of cancer)
 - Home invasion, watching outside of work (peering in window of home)
- Terminated only after Crowley obtained a permanent protection from harassment order from court.

Protected Concerted Activity

- December 2017 GC Memorandum
 - Policies presumed lawful: civility rules; bans on insubordination / non-cooperation, actions that adversely affect operations; bans on disruptive behavior; protecting confidential / proprietary / customer information; bans on defamation / misrepresentation; authorization to speak for employer; bans on disloyalty / nepotism / self-enrichment.
 - Policies presumed unlawful:
 - Prohibiting disclosure / discussion of wages, benefits, conditions of employment.
 - Prohibiting employees from joining outside organizations or “voting on matters concerning” the employer.

Anti-Discrimination Laws

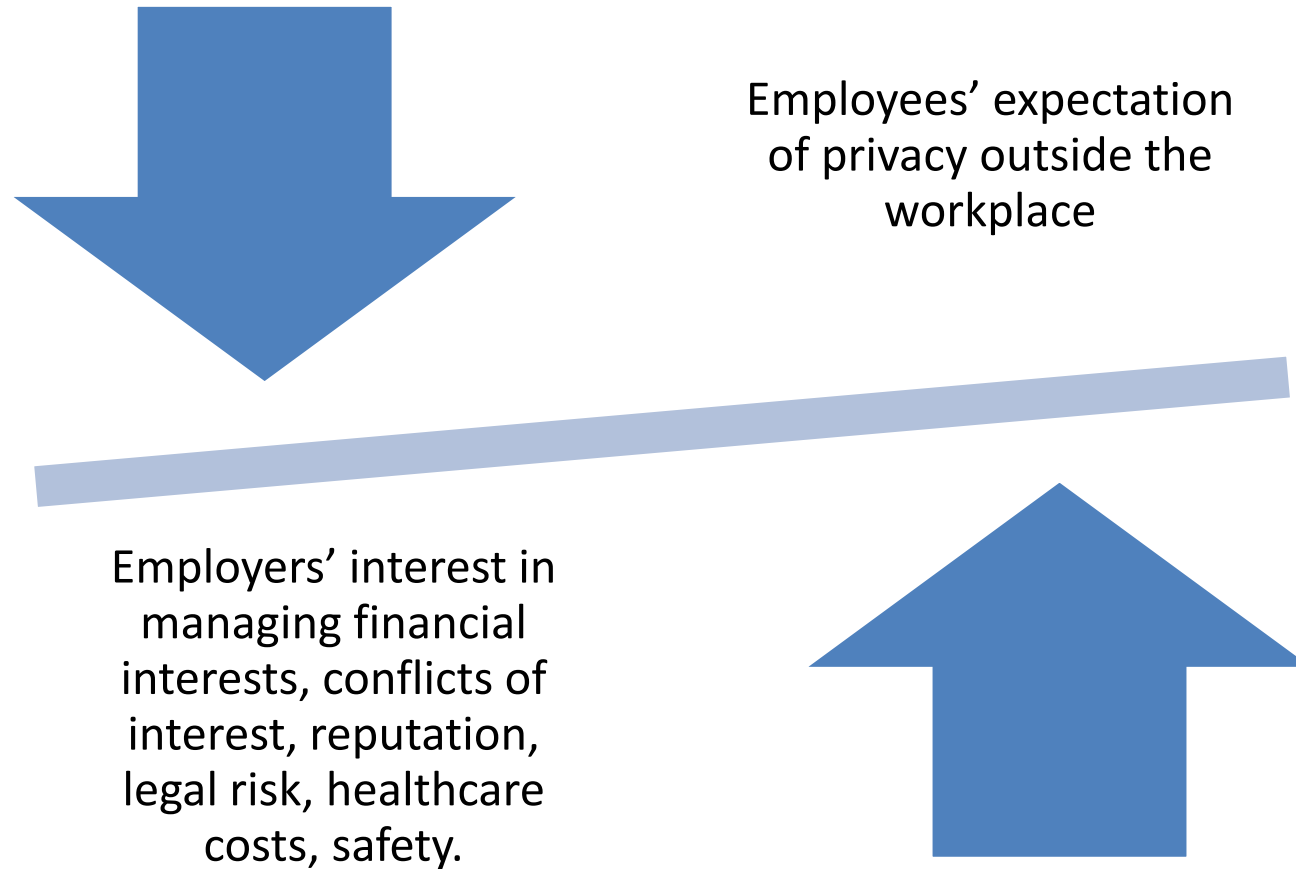
Reported \$225K settlement between GA Dept. Public Health and Dr. Eric Walsh, a Seventh-day Adventist who alleged he wasn't hired after videos surfaced showing him giving sermons against homosexuality and evolution.

Arrests / Convictions

- Some states prohibit employers from taking adverse action because of arrests.
- EEOC maintains adverse action because of arrests may violate non-discrimination laws (but disparate impact required).
- Some states prevent employers from considering criminal convictions that do not relate to employee's job duties.

“Wrongful Discharge”

- Common law exception to doctrine of employment-at-will
- Tort of wrongful discharge in violation of public policy recognized in many jurisdictions.
- Maine has not yet recognized, but said “we do not rule out the possible recognition of such a cause of action when the discharge of an employee contravenes some strong public policy.”



Lawful?

- National grocery chain fires truck driver after finding out his spouse was convicted of a hit and run.
- Beer distributor fires worker for drinking competitor's beer at private bar, off hours.
- Woman terminated for refusing to remove a bumper sticker endorsing a presidential candidate from her car.
- Worker fired after her partner posted topless pictures of her on a photo-sharing website.

Presenters

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