Can (or Should) Employers Regulate Employee Conduct Outside of Work?

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Employers routinely discipline and terminate employees for employee conduct which takes place *in* the workplace. Can (or should) an employer discipline or terminate an employee for employee conduct which takes place *outside* of the workplace?

Generally, if an employer hires an employee in Michigan for an indefinite period of time, the law presumes that the employer may terminate the employee for any reason, or no reason, so long as it is not an unlawful reason. This is known as "at will" employment. However, an employer cannot and should not always terminate an "at will" employee for unwanted employee conduct which takes place outside of the workplace. Under the National Labor Relations Act (NLRA), covered employees have the right to engage in "concerted activity" outside of the workplace for mutual aid and protection. For example, an employer should not terminate an employee for participating in a discussion with other employees outside of the workplace regarding their work conditions, wages or hours. Often these discussions take place on social media. Additionally, an employer should review any applicable employment agreement, collective bargaining agreement, employee handbook, as well as the past treatment of similarly situated employees, before terminating an employee for unwanted conduct outside of workplace.

Employers may lawfully terminate an employee based upon a criminal conviction for conduct outside of the workplace. Importantly, the Equal Employment Opportunity Commission warns employers that a blanket policy of terminating employees for any criminal conviction may be unlawful if the policy has a disparate impact on groups protected by Title VII. Accordingly, termination decisions should be made on a case-by-case basis. The employer should first consider whether the conduct at issue is job related and consistent with business necessity. Employers should analyze the nature and gravity of the offense or conduct, the time that has passed since the conviction, and the nature of the employee's job.

Sometimes employers should terminate an employee for misconduct outside of the workplace. For example, an employer may be held liable for sexual harassment of an employee by a supervisor, or a sexually hostile work environment created by co-workers, even if the misconduct takes place outside of the four walls of the workplace and regular work hours, such as company sponsored business trips and social events. If the sexual misconduct unquestionably takes place outside of the work environment, nevertheless in some cases an employer could be held liable based upon the consequences of that misconduct in the workplace.

Romantic relationships between co-workers outside of the workplace may start as consensual, but end in accusations of unwanted sexual harassment in the workplace. Consider adopting a written anti-fraternization policy, such as prohibiting all supervisor-subordinate romantic relationships, or requiring employees to notify the employer of the relationship so that the employer may place the employees in different departments.

As a general matter, employers may prohibit moonlighting or outside work which competes with the employer's business. An employer may prohibit an employee from outside work while taking leave pursuant to the Family Medical Leave Act as long as the policy is uniformly applied to all kinds of leave. Such prohibitions may hurt employee morale and recruitment, especially where the outside employment does not hurt the employer. A well drafted policy in the employee handbook can adequately and fairly address these issues.

Some worker activities outside of regular hours and locations benefit the employer. For example, an employee may routinely read and respond to work email and make work-related calls outside of the office and regular business hours. Under the Fair Labor Standards Act, if the worker is not exempt from federal minimum wage and overtime requirements, the employer must compensate the employee for such work time which benefits the employer, unless the work is "de minimis." In the appropriate circumstances, an employer should adopt and enforce a written policy requiring employees to keep records of such work time or limiting work performed outside of traditional work hours and locations.

Public employers must navigate additional laws which do not typically apply to private employers. The Michigan Public Employment Relations Act protects covered public employees from adverse employment actions for engaging in lawful "concerted activity" outside of the workplace much like the NLRA does for private employees. Public employers must also be careful not to terminate or discipline an employee for exercising his First Amendment right to speak as a private citizen on a matter of public concern outside of work, unless the employer's interest in workplace efficiency, discipline or harmony outweighs the employee's First Amendment right. If confronted with this issue, the employer should consult a public employment attorney before making a disciplinary decision.

There is no single law which sets out an employer's rights or liabilities in connection with employee conduct outside of the workplace. If you have any questions about which laws may apply in your particular situation, or you would like to discuss adopting written policies to address these issues, please contact Karl Butterer at 616.726.2212 or kbutterer@fosterswift.com.