

14.7: Employee Behavior Outside of Work

Learning Objectives

- Discuss laws related to employee behavior outside of the workplace
- Discuss laws related to employee social media use

Federal laws related to employee behavior include the National Labor Relations Act (discussed below) and the Occupational Safety and Health (OSH) Act (discussed in Module 14: Safety, Health, and Risk Management), as well as the laws that apply to human conduct in general. However, an employer's ability to control or discipline an employee's behavior outside the workplace is typically regulated by state law. Thus, it is essential to know the laws of your state.

In general, state laws variously protect employee's right to participate in political activities, to volunteer for civic organizations and to smoke or drink outside working hours. The laws also detail the circumstances under which an employer can restrict or modify policies based on lawful off-duty behavior.

California State Law

For example, California law, which applies to all employers, protects an employee's right to engage in political activity and specifies that employers are prohibited from controlling or influencing political activities or affiliations or restricting employees participation in political activities. Illinois protects an employee's right to off-duty use of lawful products but also allows employers to "offer, impose or implement a health, disability or life insurance policy that makes distinctions between employees for the type of coverage or price of coverage based on the employee's use of lawful products, under certain circumstances."

Practice Question

<https://assessments.lumenlearning.co...essments/18206>

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Consider developing and working through relevant scenarios using SimplicityHR's "[Can you fire an employee for their off-duty behavior?](#)" article as a prompt.

Employee Social Media Use

Employee use of social media may or may not be protected as "concerted activity" by the National Labor Relations Act. The National Labor Relations Board (NLRB) notes that an employee has "the right to act with co-workers to address work-related issues. Examples include: talking with one or more co-workers about your wages and benefits or other working conditions, circulating a petition asking for better hours, participating in a concerted refusal to work in unsafe conditions, openly talking about your pay and benefits, and joining with co-workers to talk directly to your employer, to a government agency, or to the media about problems in your workplace."^[1]

An employer "cannot discharge, discipline, or threaten [an employee] for, or coercively question you about," this type of activity. However, making statements that are "egregiously offensive or knowingly and maliciously false," or "publicly disparaging your employer's products or services without relating your complaints to any labor controversy" is not protected concerted activity.

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For perspective on what is protected and not protected activity, refer to the NLRB's interactive map and summaries of recent cases: Protected Concerted Activity.

SimplicityHR reports that claims of wrongful termination (retaliation) due to online remarks is "the leading type of claim filed with the Equal Employment Opportunity Commission."^[2]

? Legislation to watch

House Rule 537—[Social Networking Online Protection Act](#) (SNOA), introduced in the House on 02/06/2013 but parked at the Subcommittee on Workforce Protections since 4/23/2013.

The California Peculiarities Employment Law Blog notes that using social media in hiring decisions can expose an employer to liability.^[3] California's AB 1844 prohibits employers from requesting an applicant's log-in information, asking applicants to "friend" other employees, or asking an applicant's "friends" to disclose what the applicant has posted on social media. Although employers are not specifically prohibited from accessing publicly available information, the author's advise against it, noting it could be a "discrimination trap," since social media reveals personal information that would be illegal to ask during the hiring process.

? Practice Question

<https://assessments.lumenlearning.co...essments/18207>

1. "[Concerted Activity](#)." National Labor Relations Board. Accessed September 12, 2019. ↵
2. "[Can You Fire and Employee for Their Off-Duty Behavior?](#)" Simplicity HR. Accessed September 12, 2019. ↵
3. Lubeley, Aaron R. and Candace Bertoldi "[She Posted What? Employers Face Increased Legal Scrutiny for Using Social Media in Hiring Decisions](#)." Seyfarth Shaw. April 17, 2013. Accessed September 12, 2019. ↵

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