

Legal Connections



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GOING VIRAL: CAN EMPLOYEES BE DISCIPLINED FOR OFF-DUTY CONDUCT?

Technology, social media and ubiquitous camera phones have blurred the line between work life and private life. Increasingly, employers are faced with the need to consider employees' off-duty conduct, even when the conduct is not directly related to their role with the company. Take, for example:

■ An employee was fired from the marketing team at Akima, LLC after she was photographed making an obscene gesture at the presidential motorcade and the photo went viral;

■ A white woman dubbed #PermitPatty was fired after she was videotaped calling the police to complain about a young African American girl who was selling bottles of water on the sidewalk in front of the woman's apartment building; and



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■ A white man was fired from his sales position after he was caught on video that later went viral, challenging a black family's right to use a private, gated pool. The man was serving as the pool chairman, called the police, and refused to apologize even after the police confirmed the family's right to access the pool.

These scenarios, though extreme, illustrate that employers have the right to enforce their policies and protect their business interests even when an employee is not working at the time. If an employee would have been disciplined for engaging in the same or similar behavior while at work, then the employee likely can be disciplined for engaging in the behavior after hours. That is not to say that employers can act with impunity. Rather, employers must consider that the employee may have

legal protections from discipline under a written contract, a collective bargaining agreement, the law or constitution (for public employees).

Before taking disciplinary action for off-duty conduct, employers should evaluate:

■ The nature of the conduct: Does the conduct violate any company policies, e.g., against discrimination and harassment, the code of conduct, electronic communications or remote work? Does the conduct breach any contract with the company? If proven to be true, is it illegal?

■ The employee's role in the conduct: Was the employee acting as a private citizen or as a representative of the company?

■ Who knows about the conduct: Has it gone viral? What is its shelf-life?

■ How the employer learned of the conduct: Was it voluntarily disclosed? Was it coerced? Was it learned through lawful monitoring or public access?

■ The potential impact on the business: Could the publicity or knowledge of the conduct harm the company's reputation, employee morale, sales, client relations or result in legal claims?

■ Legal protections the employee may have: Does a contractual, legal or constitutional protection apply?

Just as an employer can discipline an hourly (non-exempt) employee for working off-the-clock in violation of policy and wage and hour laws, an employer can discipline an employee for off-duty conduct that violates other company policies or threatens business interests. Employers should consider all of the facts and legal consequences before disciplining an employee for their off-duty behavior. ■

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PROTECTING BUSINESS SECRETS IN A MOBILE WORKFORCE

Today, it is common for employees to transition through several employers during their careers. So how does a business protect its trade secrets and confidential information from going out the door with departing employees? In general, Ohio law protects trade secrets as long as they are protected by the employer. The essential questions then become "what is a trade secret," followed by, "what must an employer do to protect it?"

A trade secret derives independent economic value from not being generally known and is subject to a reasonable



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amount of secrecy. Obvious trade secrets include: customer lists, manufacturing processes, secret formulas and more.

One way to maintain sensitive information is to make employees aware of the confidential nature of the information they have access to. This can be accomplished through an employee handbook

or a contractual agreement. Contractual restrictions take many forms and are often incorporated in an Employment Agreement or a Non-Competition Agreement. A non-compete agreement should be carefully tailored to the specific situation and employee.

The most useful contractual means of protecting trade secrets may be to have all employees sign a Confidentiality/ Non-Disclosure Agreement when hired. If properly prepared, these Agreements should specify the confidential nature of the information employees are given access to and specify how that information is to be protected and returned in the event of termination.

Another means for protecting sensitive information is to keep it separate from non-sensitive information. Such steps may include: limiting computer access to sensitive information, enforcing a sign-out procedure documenting access to sensitive information, keeping adequate backup records, destroying

or otherwise removing sensitive information from the premises when not otherwise required to be maintained at the workplace.

One final way to attempt to protect sensitive information is to conduct an exit interview with all departing employees that emphasizes the employer's expectation that the employee will continue to respect the employer's proprietary business information. This is also a good time to remind the employee of any agreement that restricts the employee after leaving the company.

Read the full post at cpmlaw.com. ■

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