

Employers grapple with workers' off-duty behavior

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Coworkers adding each other on social media to keep in touch while they work from home. The politicization of COVID-19 safety measures, and the divisive conversations on race and social justice sparked by George Floyd's death this spring. In recent months, this cultural storm has reframed previously banal behavior as having high stakes in workplaces.

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"With Covid and the social justice issues that are out there, we're finding more and more employers are wanting to regulate off-duty conduct," said Ron Holland, who represents employers as a partner at McDermott Will & Emery LLP.

"If [an] employee has posted photos where they're violating ... a mask ordinance or social distancing rules, can you tell the employee not to come to work that day, for the safety of others? Do you have to pay them?" he asked. "We're starting to see these really significant questions, which will survive long after Covid."

"Companies realize their workers are part of their brand and their image," said Chris Foster, another partner at McDermott.

"Whenever people make outrageous comments on social media or happen to be caught engaging in conflict with police or neighbors, there are a lot of more flash points," he said. Media reports will often include "a mention of who they work for, and then there are follow-up efforts directed at their employers and maybe even their spouse's employers," Foster said.

The question employers are grappling with is not whether, but how much, they can regulate their employees' off-duty conduct.

While California is an at-will employment state, there are laws and regulations that protect certain types of employee conduct from employer discipline. Examples include Labor Code Sections 1101 and 1102, which ban employers from controlling the political activities or affiliations of their employees, and the National Labor Relations Act, which extends similar protections to facets of employees' social media usage, Holland and Foster said.

"There's not a clear demarcation in California about the exact limit where employers can or can't regulate off-duty conduct," Foster said. "It creates more exposure and uncertainty about how far is too far."

Discipline also can't be motivated by discrimination or an employer's desire to retaliate against an employee, said Beth W. Mora, who represents employees at Mora Employment Law. "The dance is difficult" for employers, Mora said. "If employees are 'friends' on social media and someone posts hate speech ... that indicates discrimination based on gender or race, or sexual harassment, and another employee complains ... that employer may have a duty to investigate that, especially if they feel it's affecting the terms and conditions of employment."

The challenge for employers is making sure policies for investigating and disciplining employees are applied fairly and neutrally to employees across the board. In cases concerning COVID-19 safety, Mora said, if an employer "only questions people of Asian descent, or someone who went to a dim sum restaurant, or someone who went to Chinatown ... you would have a complaint of race or national origin discrimination."

Such considerations put constraints on how and when employers can regulate their employees' conduct after hours, but employers have long turned to contracts or company-specific policies to run a tighter ship. In recent months, the types of clauses employers are putting into employment contracts may have begun to shift.

"I was looking at a chef's contract the other day, and the contract was drawn up in such a way to specifically require certain things like Covid testing and specific observation of local ordinances and CDC regulations, and all of that not just inside the workplace, but

outside the workplace," Holland said. The attorney also said he's seen employers put clauses about social media conduct into contracts.

Mora said she's also noticed this trend. "What I would caution an employer to do is if they try to take too much control of an employee's time outside of the workplace, they may be asked to compensate an employee," she said. "We don't know yet when that's going to cross the line. It's an entirely new field."