

What Your Employees Do While Not At Work

Handling employees' unacceptable behavior during work time and on-site is hard enough. But sometimes we have employees whose behavior and actions after hours or off-site impact the company or other employees. What can you do then?

It is a myth that you cannot take action based on an employee's off-hours behavior. While nearly 30 states have some level of protection restricting actions you can take against employees for legal off-duty behavior, if it impacts your business, clients, and/or other employees, you may have the ability, and sometimes the obligation, to discipline accordingly.

While most of your employment policies only cover working time, there are several critical policies that also cover off-hours behavior, most importantly:

- Non-Harassment/Non-Sexual Harassment/Non-Discrimination/Non-Retaliation
- Substance Use and Abuse
- Confidentiality/Non-Disclosure
- Workplace Violence

While circumstances are always different, some situations we have seen are:

- **An employee makes unacceptable advances and/or comments to another employee during an after-hours gathering for "happy hour."** Even though this is a voluntary event not sponsored or organized by the company, the victim has protections under the sexual harassment policy. If the harassed party makes a complaint or if a third party mentions the unacceptable behavior, management must investigate and take action so the harassed person feels safe. The discipline may not be as harsh as if it happened on-site but a warning at least may be warranted. *If the accused is a manager*, investigating and taking action is even more necessary as that liability will fall on the company regardless of if it is work time or not.
- **An employee uses marijuana legally over the weekend but then fails a random drug test on Monday.** The legalization of marijuana has created issues when it comes to drafting and implementing employment policies. Since marijuana shows up as a positive result for much longer than the employee is under the influence, it is hard to know when and how to discipline. In some situations, you may need to witness several side effects of the employee being under the influence regardless of the drug test result. In others, any positive result is ground for termination, such as in states where the substance is illegal or you are controlled by a zero-tolerance policy based on a federal contract.
- **An employee acts inappropriately during a conference in front of co-workers, vendors, clients, and prospects, becoming loud and "un-PC."** The employee is representing the company so this unacceptable behavior could cost the company money, reputation, and clients. More serious actions such as revealing classified information, harassing/sexually harassing an employee, client, or vendor, telling inappropriate jokes, or using unacceptable language should result in serious discipline. Note: The employee cannot use "being drunk" as an acceptable defense. They are still responsible for their actions and possibly restricting alcohol in future events may be appropriate.

- **An employee complains about their low wages (posting how much they make) and how awful their supervisor is.** Some speech like this is protected under the National Labor Relations Act (NLRA). Under the NLRA, all employees have the right to exercise “protected concerted activity” which is speech or actions with the purpose of improving working conditions for themselves and others. Employees talking about their own work conditions is protected; talking about others without permission is not. It is also not protected to violate confidentiality such as the company’s pricing structure or client information.
- **An employee is arrested for their part in a barroom brawl involving their friends and some strangers.** In most situations, you cannot take action on an arrest alone. However, if the charge is serious enough that the employee will be missing significant time (i.e., they cannot report to work because they are in jail) then you may have the option to terminate for unexcused absences. If the charge involves violence, you may have options for discipline if there is legitimate concern it could migrate into the workplace. If other employees were involved, you may need to evaluate the workplace situation since there may be harassment or workplace violence implications evolving from an unaddressed situation.
- **An employee uses their personal social media accounts to post derogatory messages which customers have complained about.** Somehow people have connected this employee and their opinions to your company so you may be “guilty by association.” Even though the employee is using their personal accounts, presumably on their own time, their actions are now impacting your business. This behavior could impact your company’s reputation, make customers take their business elsewhere, and make your other employees feel uncomfortable. You cannot make a knee-jerk decision but should evaluate all the factors, including the employee’s work performance, tenure, etc., and determine the best course of action including perhaps disciplinary action or even termination.
- **An employee who works in purchasing comes to the office Monday talking about the great time they had with a potential vendor at a sporting event including luxury box seats, a full bar, and a meet-and-greet with the team.** While on the surface there seems to be nothing wrong here, you need to consider all the potential outcomes arising from this situation. An employee accepting such a valuable gift could create a spoken or unspoken expectation to steer your company’s business to their company. If they have any power over the decision, the impartiality of their decision-making could come into question, possibly committing your company to a costly relationship that does not work for you. Having a Conflicts of Interest policy outlining what is and is not acceptable can help you ensure that employees are making decisions for the right reasons.

Please note that all situations differ based on factors such as the employee’s circumstances, the company’s past precedent, state and local laws, employment-at-will status, and/or collective bargaining agreements. Therefore, before you discipline or fire an employee for off-duty conduct, you want to assess:

- Is the employee an at-will employee?
- Did the employee engage in protected activity, such as that protected by the NLRA?
- Are there any federal, state, or local laws that may apply?

And before you take action, it is best to do a full investigation, listen to all sides involved and, when in doubt, check with your legal counsel or call us at Affinity HR Group to help walk you through it.

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