State Regulations Update

When Off-Duty Conduct Becomes Off Limits: State Laws Expand to Protect Employees Outside the Workplace

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Traditionally, employment discrimination laws at both the federal and state levels have protected individuals from adverse employment actions based on some status or characteristic they possess both at work and while off duty. Typically, the protected status or characteristic is an intrinsic trait not subject to election or change, such as age, race, sex, national origin, or, many would argue, sexual orientation. Even when the protected status is one that an individual can change, it typically is a factor that is so intensely personal and fundamental to one's identity, such as religion or marital status, or so important to national security, such as military service, that legislatures have shown little hesitation in treating the status in the same way as an immutable characteristic.

Increasingly, however, many states are expanding their employment discrimination laws to protect certain forms of voluntary, off-duty behavior. Barring adverse employment actions based on off-duty activities is not an entirely new concept. Decades before the civil rights movement of the 1950s and 1960s spawned the adoption of broad antidiscrimination laws, many states adopted statutes designed to prevent employers from forcing their employees to vote for a company-backed candidate or to patronize a store or merchant favored by the employer. But, beginning in the 1980s, a movement to protect smokers from discrimination based on their off-duty tobacco use led to a spate of new laws expanding the traditional concept of employment discrimination, a trend that has continued unabated to the present day. In addressing the smoker-protection issue, some states concluded that employers generally had no business regulating certain other forms of off-duty conduct and adopted laws protecting

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a broad spectrum of off-duty behavior. Changing notions of employee privacy have also increasingly led courts to interpret state constitutional and statutory protections of individual privacy in ways that protect employees from adverse employment actions based on their conduct away from the workplace.

A familiarity with existing state laws protecting lawful, off-duty conduct will help employers avoid unexpected liability and anticipate areas into which state antidiscrimination laws may expand in the future. This article describes the major developments in state laws prohibiting private-sector employment discrimination based on lawful, off-duty conduct.

EMPLOYEE POLITICAL ACTIVITY

Long before most states enacted their traditional employment discrimination laws, many jurisdictions enacted statutes aimed at preventing employers from exerting undue influence over the political activities of their employees. Many of these laws, most of which were adopted in the 1920s or 1930s, prohibit employers from publishing threats of discharge, plant closure, or other adverse employment consequences if a particular candidate or political party is elected or defeated.[1] Some go further, however, and expressly prohibit employers from discriminating against employees because of their political activities away from the workplace.

Many of these laws deal with discrimination based on an employee's exercise of the right to vote. In nine states (Connecticut, Florida, Kentucky, Massachusetts, Michigan, Mississippi, New Mexico, South Carolina, and Tennessee), employers are expressly prohibited from terminating an employee because an employee has voted (or, in some states, failed to vote) for a particular candidate or party or to influence an employee's vote. California prohibits employers from discharging employees to induce them to follow or refrain from following any particular line of political activity. California courts have interpreted the concept of "political activity" quite broadly under this statute and have, for example, applied the statute to protect employees from discrimination based on their involvement with gay and lesbian rights organizations.[2] Louisiana and South Carolina go even further and prohibit employers from discharging employees because of their political opinions, which, in practice, creates a form of free-speech protection akin to the constitutional free-speech protection enjoyed by public employees. Pennsylvania, New Jersey, and Utah have statutes dealing with interference with voting rights that are not limited to actions by employers. These statutes prohibit any person or corporation from inflicting injury, damage, harm, or loss to induce someone to vote in a particular manner or to refrain from voting. A dismissal from employment or an adverse change

to an employee's terms and conditions of employment would appear to qualify as harm or a loss within the meaning of these statutes. Several states, including Delaware and Wisconsin, prohibit employers from threatening employees with discharge to influence their vote but do not expressly bar the discharge itself. The statutes in these states may nevertheless be sufficient to state a clear public policy against discharging employees to influence their votes and thereby render employers taking such actions vulnerable to common-law wrongful discharge claims alleging termination in violation of public policy.

A number of states prohibit discrimination based on an employee's running for or holding public office. In Connecticut and Oregon, employees who serve in the state legislature are protected against employment discrimination based on that service and are entitled to a leave of absence from work to perform that legislative service. Thus, not only must an employer allow an employee/legislator time off to serve in the state legislature, it may violate the antidiscrimination statute by retaliating against the employee for supporting or opposing particular legislation while serving as a legislator.

In addition to protecting active members of the state legislature, Connecticut prohibits discrimination against candidates for that body. New York and Wyoming provide greater protection than Connecticut by prohibiting the discharge of an employee because he or she is running for *any* public office. New York also prohibits discrimination based on off-duty campaigning or fund-raising on behalf of any candidate, provided these activities take place away from the employer's premises. Six states—California, Colorado, Louisiana, Missouri, Nevada, and Wyoming—prohibit employers from adopting any rule or policy prohibiting employees from engaging in political activities or running for public office. Because employees who are injured as a result of such unlawful rules or policies are entitled to sue the employer for damages, these laws effectively prohibit employment discrimination based on political activities or candidacy for public office.

Most of the state laws prohibiting discrimination based on political activities carry criminal penalties for violators. In a few states, including Tennessee, corporations that violate state laws protecting employee political rights can lose their corporate charter and be deprived of the right to do business in the state. In addition to imposing criminal sanctions, many states authorize employees who are discriminated against because of their political activities to bring a civil suit to recover damages and other relief. Furthermore, even in those states that do not expressly create a statutory right of action against the employer, if the state's judiciary has recognized a common-law claim for wrongful discharges that violate public policy, these political-rights statutes may very well provide the enunciated policy on which to ground such a claim.

EMPLOYEE PATRONAGE OF STORES AND MERCHANTS

Far less common than statutes prohibiting discrimination based on political activities, but of comparable vintage, are state laws prohibiting employers from discharging employees for failing to do business as a customer with a particular merchant, business, or person. Florida, Louisiana, and Texas have such laws, which appear to have been aimed at abuses associated with "company stores." Their application is by no means limited to that situation, however. Under these laws, an automobile dealer, for example, might commit unlawful discrimination by discharging an employee for buying a car from another dealer. An employer might also run afoul of these laws by requiring employees to patronize the businesses of the employer's clients and by discharging those employees who refuse to comply.

In addition to prohibiting discharge for failing to patronize a particular business, the Florida statute goes one step further and prohibits the discharge of an employee for patronizing a particular merchant or business. The Florida law might therefore prohibit an employer from discharging an employee for patronizing a business that the employer considers unsavory, such as a topless bar or a pornographic bookstore.

In all three states with laws prohibiting discrimination based on commercial patronage, violators are subject to criminal prosecution. None of these statutes creates a private cause of action on behalf of unlawfully discharged employees, but in Florida, which recognizes a common-law cause of action for wrongful discharge when a termination directly conflicts with a statutory prohibition, employees who are discharged because of their off-duty shopping activities may be able to sue their employers for wrongful discharge in violation of a public policy.

OFF-DUTY USE OF TOBACCO OR "CONSUMABLE PRODUCTS"

Changing attitudes toward smoking and the ever-increasing cost of health insurance, coupled with the adoption of state laws requiring or encouraging employers to implement policies regarding smoking in the workplace, have led many employers to restrict workplace tobacco use. Some employers, however, have attempted to eliminate the issue of smoking in the workplace altogether by employing a smoke-free workforce. These employers have discharged or refused to hire individuals simply because they were smokers, even though their tobacco use occurred away from the workplace on nonworking time.

Although discrimination based on off-duty tobacco use never became a widespread phenomenon, 26 states[3] and the District of Columbia enacted legislation in the 1980s and 1990s to prohibit such employment actions in

the private sector.[4] These laws vary widely in the scope of the off-duty conduct they protect, although at a minimum, all of them prohibit discrimination based on smoking away from the employer's premises during nonworking time. In 11 jurisdictions,[5] the smoker-protection laws provide only that minimum protection. They prohibit employment discrimination based on an individual's off-duty smoking or use of tobacco products away from the employer's property. Five states—Kentucky, New Jersey, New Mexico, Oklahoma, and Wyoming—provide protection to nonsmokers as well as smokers. In those states, an employer may not discriminate against an individual because of his or her status as either a smoker or a nonsmoker. One state, Missouri, prohibits discrimination based on off-duty alcohol use as well as discrimination based on off-duty tobacco use, but off-duty use of either substance is not protected if it interferes with the employee's job performance or the operation of the business.

Employment discrimination laws in ten states—California, Colorado, Illinois, Minnesota, Montana, Nevada, New York, North Carolina, North Dakota, and Wisconsin—prohibit discrimination based on off-duty smoking, but do so without expressly referring to either smoking or tobacco products. Instead, they protect a range of off-duty conduct that includes, but is not limited to, tobacco use. For example, in Minnesota and New York, employers are prohibited from discriminating on the basis of an individual's use of lawful, consumable products off the employer's premises during nonworking hours. Because tobacco is a lawful product and is consumed in the process of smoking, discrimination based on an individual's use of tobacco products would be covered under these statutes. Of course, alcohol is also a lawful, consumable product, and discrimination based on off-duty alcohol use would generally be prohibited by the Minnesota and New York statutes, although adverse employment actions for violent or unprofessional behavior resulting from too much alcohol consumption presumably would not be. Likewise, employers in those states would be free to enforce workplace substance-abuse policies that prohibit working under the influence of alcohol, as it is the employee's on-duty conduct that is punished in that situation.

Illinois, Montana, Nevada, North Carolina, and Wisconsin prohibit employment discrimination based on the use of any lawful products away from the employer's premises during nonworking hours. Like the statutes covering the use of lawful, consumable products, these laws would protect smokers and drinkers from discrimination based on their off-duty use of tobacco or alcohol, but they protect a far broader range of off-duty activities. For example, these laws would arguably prohibit adverse employment actions based on the off-duty use of products that the employer considers dangerous or inappropriate. Discriminating against employees because they

ride motorcycles, play slot machines in lawful casinos, or wear revealing outfits during their off-duty hours might be unlawful under these statutes.

Three states—California, Colorado, and North Dakota—provide extremely broad protections to employees. These states generally prohibit discrimination based on any lawful, off-duty activity or conduct that occurs away from the employer's premises. Although these statutes protect off-duty smoking, that activity is only a small part of the conduct potentially protected, as is discussed in more detail in the following section.

Although the various state smoker-protection laws differ in significant respects, they all have one thing in common: they do not prohibit employers from regulating smoking in the workplace or while employees are on working time. Thus, an employer with a policy prohibiting all smoking on company property may lawfully discipline or discharge a smoker for violating that policy.

Employers who discriminate in violation of these smoker-protection statutes face a wide range of consequences, including, in some states, criminal sanctions and civil penalties, and, in almost all of the states, civil actions for damages and attorney's fees.

LAWFUL OFF-DUTY ACTIVITIES

As mentioned above, California, Colorado, and North Dakota prohibit employers from discriminating against applicants and employees because of any lawful activity in which they engage off the employer's premises and during nonworking time. These statutes are potentially broad enough to cover all of the off-duty conduct previously described in this article, as well as a broad array of other activities. For example, these laws can protect lawful personal relationships such as dating among coworkers and homosexual relationships.[6] They can protect off-duty participation in controversial protest demonstrations, such as lawful demonstrations relating to abortion, gay marriage, or U.S. involvement in Iraq. They may prohibit discrimination based on an employee's working a second job for another employer.

Obviously, some lawful, off-duty conduct by employees may have a direct impact on the employer. For example, romantic or sexual relationships between employees create a heightened risk of sexual harassment claims for employers, and some employers have attempted to reduce that risk by prohibiting off-duty romantic relationships between supervisors and their subordinates or by requiring employees who become romantically involved with coworkers to disclose those relationships to the employer. When an employee with confidential employer information becomes romantically involved with the employee of a competitor, the employer may legiti-

mately fear that its confidential information is at risk of being disclosed to a competitor. Similar fears of unauthorized disclosure of confidential information may arise when an employee moonlights with a competitor. Acting on these concerns by discharging or transferring an employee in California, Colorado, or North Dakota, however, would appear at first glance to run afoul of the statutes in those states prohibiting discrimination based on lawful, off-duty activities.

Fortunately for employers facing genuine, business-related concerns over off-duty conduct, the protections afforded by the off-duty-activity laws in California, Colorado, and North Dakota are not limitless. Each of these states imposes some statutory restrictions on the application of these laws. In North Dakota, for example, off-duty activities are not protected if they are in direct conflict with the employer's essential business-related interests. Thus, an employee who is discharged for starting a business in direct competition with his employer would ordinarily have no claim for relief under the North Dakota statute.[7] The California statute contains a similar exception but requires that it be set forth in a written contract and that the conduct that conflicts with the employer's business interests constitutes a material and substantial disruption of the employer's operations. Colorado more reasonably allows an employer to discharge an employee because of lawful, off-duty conduct when the restriction on such conduct is rationally related to the employment responsibilities and duties of the employee or is necessary to avoid the appearance of a conflict of interest with the employee's responsibilities to the employer.

New York, in addition to prohibiting discrimination based on off-duty political activities and use of lawful consumable products, bars employers from basing adverse employment actions on an individual's lawful, off-duty recreational activities away from the employer's premises. The New York statute defines "recreational activities" as any lawful, leisure-time activity that is engaged in for recreational purposes and for which the individual receives no compensation. The statute lists sports, games, hobbies, exercise, reading, and the viewing of television or movies as examples of recreational activities. The question of whether the term "recreational activities" encompasses off-duty dating, romantic, or sexual relationships has been litigated in several lawsuits. Although there was initially some disagreement among the courts over the issue,[8] current case law indicates that such relationships are not protected.[9]

The New York statute certainly appears to prohibit employers from denying employment opportunities to individuals because they engage in such high-risk recreational activities as skydiving or mountain climbing. The statute does, however, exempt employees who have professional service contracts with the employer that limit the off-duty activities of the

employee because of the unique nature of the services provided. The New York statute also allows employers to offer employee health, disability, or life insurance policies that make distinctions in coverage or price based on employees' recreational activities.

Employers in California, Colorado, North Dakota, and, to a lesser extent, New York should tread carefully before basing an adverse employment action on an employee's lawful, off-duty conduct. Consideration should be given to the conduct's demonstrable effects on the employee's ability to perform his or her job and to the existence of any conflict of interest between the employee and the employer's business. Employers in these states would be wise to consult legal counsel before discharging or disciplining employees because of lawful, off-duty conduct.

MISCELLANEOUS OFF-DUTY CONDUCT

Several states have enacted legislation that protects, in unique ways, certain lawful, off-duty conduct by employees. Connecticut, for example, prohibits employers from discharging or disciplining employees because of their exercise of certain rights guaranteed by the U.S. Constitution and the Connecticut Constitution. The protected rights include the right to free speech and the freedom of association. Although these rights, in their constitutional setting, are protected only from infringement by the federal or state government, the Connecticut statute effectively protects them from infringement by private-sector employers. The Supreme Court of Connecticut, however, has limited employee speech protected by this statute to that involving matters of public concern. Speech concerned solely with an employee's personal matters is not protected.[10]

A Massachusetts statute prohibits any person from using intimidation or force to prevent a person from entering into or continuing in the employment of any person. Arguably, this statute might be invoked against an employer that discriminates against an employee for moonlighting.

A Minnesota statute prohibits employers from taking reprisals against employees for declining to contribute to charities or community organizations. Although this statute is most likely to come into play in connection with an employer-sponsored charity drive such as a United Way campaign, it may also be invoked when an employee fails to contribute to a charity that is totally unrelated to the workplace.

Another Minnesota statute prohibits employment discrimination based on an individual's status with respect to public assistance. Under this law, an employer may not base an adverse employment action on an individual's receipt of federal, state, or local assistance, including Medicare, housing subsidies, and rent supplements.

EMPLOYEE PRIVACY LAWS

Several states have constitutional provisions or statutes that bestow a general right of privacy on individuals within the state.[11] These laws, to the extent they apply to actions taken by private-sector employers, may provide a means for challenging adverse employment actions based on off-duty conduct of a private nature, such as a personal or sexual relationship. As yet, however, only a handful of courts have addressed the application of constitutional or statutory rights of privacy to lawful, off-duty conduct by private-sector employees. In California, where the constitutional right of privacy applies to both private- and public-sector employees, a court held that an employee who was responsible for processing insurance benefits for police officers had a constitutionally protected privacy interest in her romantic involvement with and impending marriage to an incarcerated felon. However, the court, balancing the employee's privacy interests against her employer's legitimate interest in protecting its confidential information about police officers from unauthorized disclosure, held that the employer's discharge of the employee due to her relationship with an inmate did not unlawfully infringe on the employee's privacy interests, because the employer's confidentiality concerns justified the action.[12]

CONCLUSION

Whereas federal antidiscrimination laws have tended to focus on immutable characteristics, state antidiscrimination laws have shown a much broader reach and protect a wide variety of lawful, off-duty activities engaged in by employees and applicants. In many states today, antidiscrimination laws protect not only who you are, but what you say and do. Therefore, when addressing off-duty conduct in personnel policies and employment decisions, employers should consult applicable state laws to ensure that their actions will not create a risk of liability.

NOTES

1. Arizona, California, Mississippi, New Jersey, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin prohibit such threats. Most of these laws state that an employer may not print such threats on pay envelopes or on posters, placards, or handbills displayed or distributed in the workplace.
2. See Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592 (Cal. 1979). See also Smedley v. Capps, Staples, Ward, Hastings and Dodson, 820 F. Supp. 1227 (N.D. Cal. 1993) (applying California law).
3. California, Colorado, Connecticut, Illinois, Indiana, Kentucky, Maine, Minnesota, Mississippi, Mis-

souri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, West Virginia, Wisconsin, and Wyoming.

4. In addition, two states—Arizona and Virginia—prohibit discrimination in state employment based on off-duty tobacco use.
5. Connecticut, District of Columbia, Indiana, Maine, Mississippi, New Hampshire, Oregon, Rhode Island, South Carolina, South Dakota, and West Virginia.
6. In Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371, 376 (Colo. 1997), the Supreme Court of Colorado, addressing the appeal of a jury verdict in favor of a gay man who had sued his employer for discrimination based on his off-duty homosexual relationship, commented that the evidence may have supported a finding that the plaintiff had been discriminatorily discharged for engaging in a lawful activity away from the workplace during nonworking hours, but the court overturned the jury verdict on the ground that the discrimination claim had not properly been submitted to the jury.
7. See Fatland v. Quaker State Corp., 62 F.3d 1070 (8th Cir. 1995) (applying North Dakota law) (employer lawfully discharged sales employee with access to confidential business information for starting a business in direct competition with the employer).
8. Compare State v. Wal-Mart Stores, Inc., 621 N.Y.S.2d 158 (N.Y. App. Div. 1995) (the term "recreational activities" does not encompass a dating relationship) with Aquilone v. Republic Nat'l Bank of New York, No. 98 Civ. 5451, 1998 WL 872425 (S.D.N.Y. Dec. 15, 1998) (applying New York law) (holding that off-duty, off-premises social relationship was a protected recreational activity), and Pasch v. Katz Media Corp., 10 I.E.R. Cas. (BNA) 1574 (S.D.N.Y. 1995) (applying New York law) (holding that employee's cohabitation with a former employee was a protected recreational activity).
9. See McCavitt v. Swiss Reinsurance Am. Corp., 237 F.3d 166 (2d Cir. 2001) (applying New York law) (a romantic, dating relationship does not constitute a recreational activity); State v. Wal-Mart Stores, Inc., 621 N.Y.S.2d 158 (N.Y. App. Div. 1995) (dating relationships do not constitute recreational activities).
10. Daley v. Aetna Life and Cas. Co., 734 A.2d 112 (Conn. 1999).
11. California, Illinois, Louisiana, and Washington have constitutional rights of privacy that either do or may protect against nongovernmental infringements. Massachusetts grants a general right of privacy by statute.
12. Ortiz v. Los Angeles Police Relief Ass'n, Inc., 120 Cal. Rptr. 2d 670 (Cal. Ct. App. 2002).

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