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Labor: Lifestyle discrimination laws are becoming increasingly prevalent

In-house counsel must be aware of the risks in regulating off-duty employee conduct.

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By Christine Burke , Barbara Roth

Employers in the United States are by now quite familiar with Title VII and the other laws that prevent discrimination in the workplace on the basis of race, gender, religion, national origin, age, disability and other protected factors. But businesses may not know that many states also have statutes preventing employers from taking action against employees based on their off-duty conduct. These so-called “lifestyle discrimination” laws are becoming more prevalent, and employers should examine their policies and practices to ensure that they are in compliance with these often-overlooked statutes.

That employers would want to make employment decisions based on an employee’s off-duty conduct is understandable. The principal basis for such decisions is, unsurprisingly, economic. The vast majority of U.S. employers provide healthcare benefits to their employees. Employees who engage in certain risky activities off-the-job— such as smoking and drinking alcohol— are more likely to suffer illnesses as a result of these activities and, in turn, to require more medical treatment, which increases the employer’s health-care costs. Refusing to hire or terminating such employees helps curb the ever-rising expense borne by employers that provide health benefits. Furthermore, certain employers— particularly non-profit organizations and other organizations that focus on a particular mission— may be inclined to recruit and retain employees who “fit in” to the organization’s culture and behave in a manner that supports its goals. But these employer interests are at odds with an employee’s reasonable expectation that what he does on his own time is his own business, so long as the conduct is not unlawful.

Lifestyle discrimination laws take a variety of forms, with some laws addressing a specific activity and others encompassing a wide array of off-duty conduct. The most sweeping statutes, such as those enacted by California, Colorado, New York and North Dakota prohibit discrimination based on any lawful activity by an employee off the premises and during non-working hours. Only slightly less broad are laws prohibiting discrimination on the basis of an employee's use of "lawful products" or "lawful consumable products." Such statutes are on the books in Illinois, Minnesota, Montana, Nevada, North Carolina and Wisconsin. Despite their broad brush, however, such laws prohibiting discrimination on the basis of lawful off-duty activity or the use of lawful products often contain exceptions that allow employers to base decisions on such conduct if (i) doing so is related to a bona fide occupational requirement, (ii) doing so is necessary to avoid a conflict of interest with the employer, (iii) use of the product affects an employee's ability to perform his job duties and/or (iii) the primary purpose of the organization is to discourage the use of the product at issue.

Most states' lifestyle discrimination laws regulate a much narrower range of conduct. For example, some 30 states have enacted laws prohibiting discrimination based on off-duty tobacco use. Also prevalent are statutes that protect against employment actions based on an employee's marital status or sexual orientation, which exist in about half of all states; indeed, such provisions often make their way into the state's primary anti-discrimination law prohibiting adverse actions based on race, gender and the other standard protected characteristics. Some states prohibit employers from taking adverse action based on an employee's political activity or affiliation, while others prevent discrimination based on an employee's arrest record or certain minor criminal convictions.

Lifestyle discrimination laws also vary with respect to the kind of employer action that is forbidden. Most but not all laws cover both applicants for employment and employees. Additionally, the majority of states with such laws on the books prohibit discrimination with respect to all terms, conditions and privileges of employment. On the other hand, certain states only cover discharge, while others only apply to discipline, discharge and the refusal to hire.

To minimize their risk of exposure to claims of lifestyle discrimination, employers should first determine the scope of protections under the state laws in the states where their employees work. If lifestyle discrimination laws exist, employers should check to see if there is an applicable statutory exception that would allow decisions to be made on the basis of the protected conduct or status. Assuming no exception applies, employers should treat discrimination based on these "lifestyle" characteristics the same as discrimination based on other federal and state protected characteristics. They should

be mentioned in the company's standard equal employment opportunity policy, and complaints about lifestyle discrimination should be investigated just as any other discrimination complaint. Employers should ensure that supervisors and managers receive training on these issues, and employees who violate the policy should be disciplined. Taking these simple steps can help avoid disputes and potentially costly and unanticipated litigation.

About the Author

Christine Burke

Christine Burke's practice includes representing employers in litigation before federal and state courts, and counseling clients on a variety of employment and labor law issues. She has experience litigating discrimination and harassment claims, wage payment issues, non-competition and trade secret issues, claims relating to disability and leave, and pension and welfare benefit issues under the Employee Retirement Income Security Act.

About the Author

Barbara Roth

Barbara Roth is a partner at Hogan Lovells. She represents management exclusively in all types of employment litigation and advises clients on all aspects of the employment relationship, with emphasis on minimizing the likelihood of litigation.