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Can You Terminate Someone for Off-Duty Misconduct?



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You try hard to keep your workplace free from behavior that tears apart teams, disrupts the flow of work or, worse, causes anyone harm. Updated policy manual? Check. Annual training on policies? Check. Things seem to be going well.

Then you're notified that an employee in a management position has been arrested for domestic assault. This may cause you to wonder if the employee could be a threat to others in the workplace, and how you can best address this situation. Can that person be terminated for off-duty misconduct? Most cases depend on applicable federal and state laws, as well as the facts of each situation.

Know the Law

Given the number of laws designed to protect employees, terminating someone can come with certain risks. While most states recognize "at-will" employment (save Moi SUBSCRIBE

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individual unfit for the position in question." This includes potential termination.

Employees may be protected from adverse employment action related to lawful conduct that takes place outside of work. Some states — including but not limited to California, Colorado, Illinois, Minnesota, Montana, Nevada and North Dakota — prohibit you from taking adverse action when employees engage in lawful off-duty activities or use lawful products while off-duty. For example, some states prohibit employers from taking action against employees for smoking cigarettes, drinking alcohol or participating in political activities during their free time.

Be sure not to base any employment decision on any factor that is protected under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, or any other federal, state or local employment law. Consider consulting an attorney when you anticipate terminating an employee.

Clarify Your Position

Before you do anything, define the behavior as misconduct. Ask yourself, was the off-duty misconduct:

- Directed at a coworker? In many circumstances, you can treat the conduct just as you would had it occurred on duty. That could encompass anything from harassment, stalking and threats to bullying, fighting and assault.
- Not involving a coworker, but serious enough that you aren't sure you want the employee back in the fold? Be mindful of the EEOC, federal, state and local laws that place limitations on employers attempting to take actions against employees based solely on an arrest. Remember, an arrest is not a conviction. You may review and further investigate the conduct underlying the arrest, such as allowing the person to explain the circumstances, and assess credibility. Be aware that relying on criminal history information, such as an arrest, can inadvertently screen out individuals of a protected class. This is why the EEOC emphasizes the importance of ensuring that any decision is job-related and consistent with business necessity.
- Has the employee been convicted? The EEOC reminds employers that, unlike with arrest or indictment, conviction is "sufficient evidence that a person engaged in particular conduct." You may be able to respond with termination, if you so choose. However, employers making an adverse employment decision based on a criminal conviction must show that it is job related and consistent with business necessity. This means the employer must show a link between the specific criminal conduct, and its dangers, and the risks inherent in the duties of a particular position.



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You walk a fine line when making adverse employment decisions. Your best strategy? Have clear off-duty misconduct policies and consistently follow established disciplinary procedures. Scrupulously document performance problems and violations that could lead to termination. And most important of all, have your employment law attorney review everything to make sure you don't make a decision you'll regret.

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