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When is Off-Duty Conduct Off Limits to the Employer?

WHEN IS OFF DUTY CONDUCT OFF LIMITS TO THE EMPLOYER?

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I. Introduction

Colleges and universities are often faced with having to make employment decisions based on the off-duty conduct of their applicants and employees, including faculty, administrators and staff. Off-duty conduct can include such activities as posting on social media, using marijuana for recreational or medicinal purposes where permitted by state law or engaging in other legally protected activities like political speech. Off-duty conduct may also include activities that are not legal, such as criminal conduct. This outline provides a summary of the types of off-duty conduct higher education employers most frequently encounter and whether, and under what circumstances, employers can consider such conduct in deciding whether to hire, terminate or otherwise discipline an employee.

II. Employee and Applicant Use of Social Media

In our modern world, it is safe to assume that most, if not all, employees and applicants use some form of social media. Social Media is broadly defined as "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system."[1] Facebook alone has 2.45 Billion active monthly users;[2] Instagram has 1 Billion,[3] Twitter has 126 Million,[4] and LinkedIn has 575 Million registered users.[5] This, of course, only touches the tip of the iceberg of current social media options. Quora, WhatsApp, TicToc, Tumblr, Snapchat, YouTube, Ravelry, Goodreads, Reddit, Nextdoor, and so many more, are places where your employees and applicants may be active. It

[1] Danah M. Boyd & Nicole B. Ellison, ***Social*** *Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2008), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1083-6101.2007.00393.x/full (follow "Get PDF (217K)" hyperlink).
[2] https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/
[3] https://www.statista.com/statistics/253577/number-of-monthly-active-instagram-users/
[4] https://www.theverge.com/2019/2/7/18213567/twitter-to-stop-sharing-mau-as-users-decline-q4-2018-earnings
[5] https://kinsta.com/blog/linkedin-statistics/

is virtually impossible to name them all, as new social media sites arrive regularly and old ones (remember MySpace and Google+?) disappear.

This leads to two threshold questions for college and university reporters. First, can we check the social media activity of prospective hires to see if they have done anything "controversial" that may bring controversy to the institution? Second, if they do something "controversial" on social media after they are employed, can we discipline them?

As an overview, be mindful that there is a major difference between checking up on people using publicly available information (e.g., a search for the publicly available Facebook profile of an applicant) and requiring the applicant to either provide you with their login credentials or to permit someone from your human resources department into their "friend" group. The first is generally legal, although should be tightly controlled, as it can lead to discrimination claims, as we will discuss further in Section A below. The second is illegal in many states already, and legislatures across the country are considering bills that would add to those prohibitions, as discussed in Section B below.

Once someone is hired, you can implement carefully crafted social media policies, but beware of: infringing on free speech if you are a public institution (discussed in Section C);[6] and infringing on employees' freedom to engage in National Labor Relations Act protected concerted activity (discussed in Section D).[7] Also, your social media policy or management training should address dealing with "friend requests" from coworkers, including superiors and subordinates as discussed in Section E.

Let's discuss these issues in more detail.

A. Searching for Publicly Available Information

Many hiring managers, and even Human Resources staff, consider it a normal part of hiring due diligence to search for publicly available information about an applicant, including any available information from an applicant's social media accounts. There are significant pitfalls to this practice, however, as information may be obtained which can lead to claims of discrimination against an applicant by the potential employer.

Title VII makes clear that it is unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

[6] *Connick v. Myers*, 431 U.S. 138 (1983), *and Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).
[7] *See, generally*, the May 30, 2012 Acting General Counsel of the NRLB report "OM 12-59" and the March 2015 General Counsel of the NLRB report "GC 15-04."

opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[8]

Social media makes it easy to learn things about an applicant that may not be otherwise obvious as part of a standard hiring procedure. Consider, for example, the notable case of *Gaskell v. University of Kentucky.*[9] In *Gaskell*, a candidate to be the head of the University of Kentucky's observatory, had personal web pages which made it apparent that he held religious beliefs which made him question the theory of evolution. Members of the search committee found this information and expressed concerns about Gaskell becoming a liability to the University if hired. Gaskell was not hired and brought suit against the University, claiming religious discrimination under Title VII. In addition to denying discrimination at all, the University of Kentucky alternatively argued that it should be entitled to invoke a "safe harbor" under Title VII because it could not reasonably accommodate his religious beliefs in a public facing position where, given his work and his title, he would be discussing the origins of the universe. The Eastern District of Kentucky denied summary judgment to both parties.[10] The University and Gaskell settled out of court and before trial for $125,000.[11]

Title VII is not the only implicated basis for a claim of discrimination by a candidate who is denied a job opportunity and can demonstrate that hiring individuals accessed information from social media. It is possible to learn from applicants' social media accounts information about potential disabilities that could be used to limit hiring of individuals contrary to the provisions of the Americans with Disabilities Act,[12] or information that could lead to a claim of age discrimination in violation of the Age Discrimination in Employment Act of 1967.[13] Using social media to screen potential applicants makes it more likely that hiring individuals will have access to protected information, like a candidate's religious beliefs, sexual orientation, or political views, that can be used to unlawfully discriminate against a candidate.

At the same time, there is an ever-growing pool of electronic information that may be vitally relevant to an employment search and it seems potentially risky to ignore this treasure trove of information because of potential discrimination claims. Best practices that minimize the risks and permit use of publicly available information include hiring a third-party agency to screen candidates' publicly available information -- this separates the individual gathering information from the decision maker. Third-party agencies are skilled in redacting protected information, while passing on potentially relevant information for review.[14]

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[8] 42 U.S.C. § 2000e-2(a)(1)-(2).
[9] *Gaskell v. Univ. of Ky., Civil Action No. 09-244-KSF (E.D.Ky. Nov. 23, 2010).*
[10] *Id.*
[11] https://ncse.ngo/settlement-gaskell-case.
[12] 42 U.S.C. § 12101 *et seq.*
[13] 29 U.S.C. § 629 - 34.
[14] Of note, while the Fair Credit Reporting Act ("FCRA") does not apply to information gathered independently by an employer through informal internet searches, it does apply to third party agencies.

A policy that requires consistent treatment of all job applicants can also help prevent disparate treatment of any member of a protected group. To the extent that employers conduct internet searches, those searches should be conducted for every applicant at the same point in the process, pursuant to a documented plan, and well-documented to ensure equal treatment.

B. Requiring Disclosure of Quasi-Public Information

Employers have tried various ways to ensure that they know what employees are doing on social media. This led to controversies regarding what access is permitted, and eventually to the Uniform Law Commission to adopt the Uniform Employee and Student Online Protection Act in 2016.[15] States began enacting their own social media privacy laws in 2012, and to date twenty-six states and Guam have passed some form of social media privacy law.[16] Legislatures in other states are also considering versions of the social media privacy laws. As such, employers are urged to contact their counsel for assistance with what may be permitted in their state.

The Uniform Employee and Student Online Protection Act, which serves as a general model for many of these laws, prohibits employers from requiring, coercing or requesting that an employee, including an applicant, disclose the login to her/his social media account(s), disclose the contents of such social media accounts, alter the privacy settings of such accounts, access the accounts in a way that the employer can observe, or alter the privacy settings on such accounts so that the employer may view the accounts.[17]

Some states' enacted laws do not protect some of the nuances contained in the Uniform Act. Some laws do not protect the practice known as "shoulder surfing," where a prospective employer or employer requires the applicant/employee to log in to her/his social media accounts and explore while the employer observes. Some do not prevent an employer from requiring that an employee "friend" a designated individual within the employer. These and other loopholes are being addressed legislatively, and each state's progress in this process will be different.

To reiterate, a policy that forbids anything other than gathering of public information is a good start. Hiring a third-party firm to do background checks will also eliminate some of the potential harms that can be done. If using a third-party firm for background checks, make sure to get consent for the background checks to be conducted from the candidate or employee.

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[15] https://www.uniformlaws.org/committees/community-home?CommunityKey=0e44f6fc-9e17-41e8-835d-0461e8ea548b

[16] https://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-usernames-and-passwords.aspx. These states include: Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maine, Maryland, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

[17] https://www.uniformlaws.org/committees/community-home?CommunityKey=0e44f6fc-9e17-41e8-835d-0461e8ea548b.

C. Free Speech and the Public Institution

As a general rule, governmental entities, including public universities, cannot restrict the speech of private citizens because those citizens are protected by the First Amendment.[18] These days, much of an employee's public-facing speech may take the form of Tweets and Instagram postings. The analysis is complicated, of course, when the government is also the employer of the citizen in question.

To determine whether an employee's speech is protected, the following factors for consideration have been provided by courts.

First, is the speech part of the employee's official job duties, or is the employee speaking as a private citizen? Governmental entities are free to discipline employees for speech in the employee's official capacity. As such, only speech that is conducted as a private citizen can be protected by the First Amendment.[19] The challenge for this first part of the analysis is determining when exactly speech is private versus in an official capacity. Clearly, speech conducted through the employer's official social media accounts is not private speech. And for most employees, speech on their personal social media account that is about family, friends, mundane household issues, etc., is private speech. Public employees can sometimes express private opinions on social media regarding issues of public concern, as long as those opinions are not expressed through the lens of their employment. Some employees are deemed to have public-facing positions and *all* speech by such employees will be deemed to be in that employee's official capacity (e.g., University Spokesperson).

Second, is the employee speaking on a matter of public concern? If so, the speech *may* be protected.[20] If not, it *is not* protected by the First Amendment. The definition of public concern varies widely within the federal circuits, so check with your counsel if you need to pin down an issue in your jurisdiction. Speech related to discrimination or corruption in the workplace is generally considered to be of public concern.[21]

Third, if the employee is speaking on a matter of public concern, do the employee's free speech interests outweigh the efficiency interests of the employer. The factors that a court will use to determine this are: 1) whether the speech would interfere with the employee's responsibilities, 2) the nature of the working relationship between the speaker and those at whom the criticism was directed, 3) whether the relationship between the speaker and the person criticized was sufficiently close that the speech would create disharmonious relations in the workplace, 4) the speech would undermine an immediate superior's discipline over the employee, or 5) would compromise the loyalty and confidence required of close working employees. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference is given to the

[18] *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).
[19] *Garcetti v. Cabelos,* 547 U.S. 410 (2006).
[20] *Connick v. Myers,* 431 U.S. 138 (1983), *relying on Pickering v. Bd. of Educ.,* 391 U.S. 563 (1968).
[21] *Id.*

government employer's judgment. After the courts consider each factor, the courts weigh these factors against the employee's interest in speaking out.[22]

The District Court for the Eastern District of Michigan addressed these issues in a 2019 case involving faculty member Mark Higbee's claim that he was improperly disciplined for a Facebook post on a public Facebook group criticizing Eastern Michigan University's response to racially charged graffiti and related protests.[23] Higbee alleged that the EMU violated his First Amendment Rights when it suspended him without pay for a semester for the Facebook post. "To establish a prima facie case of First Amendment retaliation under § 1983, Higbee must demonstrate that '(1) he was engaged in a constitutionally protected activity; (2) he was subjected to adverse action or deprived of some benefit; and (3) the protected speech was a `substantial' or `motivating factor' in the adverse action.'"[24] The parties did not dispute that Higbee was subjected to adverse action or that the speech was a substantial factor in that action. The dispute centered on whether Higbee, in complaining about racial issues on campus, was "engaged in a constitutionally protected activity."

The court noted that Higbee must satisfy three requirements: (1) he was speaking on a matter of public concern;[25] (2) he spoke not pursuant to his official duties, but as a private citizen;[26] and (3) that the employee's speech interests outweighed EMU's interest in "promoting the efficiency of the public services it performs through its employees."[27] Courts have determined that this analysis is a question of law for the courts to decide.

Speech may be of public concern if "it is of general interest and value to the public."[28] "The Supreme Court has described the 'right to protest racial discrimination' as 'a matter inherently of public concern.'"[29] The University countered that the use of a purported racial slur made Higbee's speech unprotected. The court determined that Higbee's Facebook post on the whole was making a broad point about the University's handling of a newsworthy issue. The University also asserted that Higbee's claims were based on a "run-of-the-mill employment dispute," because his Facebook post merely

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[22] *Id.*

[23] *Higbee v. Eastern Michigan University*, 399 F.Supp.3d 694 (E.D. Mich. 2019). The Facebook Post, in its entirety, said: EMU administrators, a small group of well paid white guys in suits (plus one woman and a few lower level "HN in C" functionaries), lacked the insight to imagine that they could ever, possibly, be remotely seen as responsible for institutional racist practices. And so they continued to act as the aggrieved party, needlessly alienating students who objected to racism. Why EMU officials, earning six figures or more, took this stance can only be explained by a combination of 1. ignorance about what racism is, 2. overconfidence that they are the good guys, 3. a lack of knowledge of EMU specifically and of higher education generally.
Id. at 698. According to the University, "HN in C" is commonly interpreted as a racial slur, "Head N***er in Charge." According to Higbee, "HN in C" is used in his academic world to mean "Head Negro in Charge." *Id.*

[24] *Id. quoting Farhat v. Jopke*, 370 F.3d 580, 588 (6th Cir. 2004).

[25] *Mahew v. Town of Smyrna Tenn.*, 856 F.3d 456, 462 (6th Cir. 2017) *citing Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 337 (6th Cir. 2010) and *Connick v. Myers*, 461 U.S. 138 (1983).

[26] *Mahew*, 856 F.3d at 462, *citing Garcetti* at 421.

[27] *Mahew*, 856 F.3d at 462, *citing Pickering*, 391 U.S. at 568.

[28] *Connick*, 431 U.S. at 148.

[29] *Connick*, 461 U.S. at 148 n.8, 103 S.Ct. 1684; see also *Hardy v. Jefferson Community College*, 260 F.3d 671, 689 (6th Cir. 2001) (noting that "race, gender, and power conflicts in our society" are "matters of overwhelmingly public concern.").

claimed his employer's general incompetence. The court countered that at least a portion of Higbee's Facebook post was a matter of public concern, and that speech about racial discrimination was not a run-of-the-mill employment dispute. The court noted that for summary judgment purposes, Higbee had demonstrated that he engaged in protected speech. Because the factual record had not yet been developed, the court declined to rule that the University's efficiency interests outweighed Higbee's free speech interests.

D. Freedom to Engage in Concerted Activity

Section 7 of the National Labor Relations Act ("NLRA") guarantees that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organization . . . and to engage in other concerted activities for the purpose of . . . mutual aid or protection . . . ."[30] Section 8(a)(1) of the Act protects employees' Section 7 rights by prohibiting an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in [Section 7] . . . ."[31] These rights are not unlimited, however. "An employee's Section 7 rights must be balanced against an employer's interest in preventing disparagement of his or her products or services and protecting the reputation of his or her business."[32] Criticisms disconnected from any ongoing labor dispute may be sufficiently disloyal or defamatory to lose the protection of the NLRA.[33] An employee statement made "with knowledge of its falsity, or with reckless disregard of whether it was true or false" is considered to be defamatory.[34] "The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue. Where an employee relays in good faith what he or she has been told by another EMPLOYEE, reasonably believing the report to be true, the fact that the report may have been inaccurate does not remove the relayed remark from the protection of the Act."[35]

In *Three D, LLC v. N.L.R.B.*, an employee posted on Facebook, "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money . . . Wtf!!!!"[36] A second employee "liked" the Facebook status above. A third employee wrote, "I owe too. Such an asshole."[37] The employee who posted the original post was not at issue in this instance. The NLRB concluded, and the Second Circuit agreed, that both the second and third employees could not be responsible for participating in an otherwise protected discussion in which the initial posting party made unprotected statements.[38] This conclusion was based in part on the fact that discussion had begun in the workplace and continued on Facebook. The Second Circuit then found that even though the Third Employee's Facebook activity contained obscenities that were Triple Play could demonstrate were viewed by customers, it was still

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[30] 29 U.S.C. § 157.
[31] 29 U.S.C. 158(a)(1).
[32] *Three D. LLC v. N.L.R.B.*, 629 Fed.Appx. 33 (2015), *citing Valley Hosp. Med. Ctr., Inc.* 351 NLRB 1250, 1252-53 (2007).
[33] *NLRB v. Elec. Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 476-477 (1953).
[34] *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966).
[35] *Valley Hosp., supra,* note 12, 351 NLRB at 1252-53.
[36] 629 Fed.Appx. 33, 35-36.
[37] *Id.*
[38] *Id. at* 36.

protected under the NLRA.[39] To do otherwise, the court concluded, "could lead to the undesirable result of chilling virtually all employee speech online," as almost all social media posts could potentially be viewed by customers.[40] It was central to the Second Circuit's Decision in *Three D, LLC*, that the discussion was not directed at customers and that it did not reflect on the employer's brand, products, or services.[41]

Social media use is nearly universal in modern society. Given that, the NLRB and courts have recognized that employers must accept that some discussion of workplace activities may take place on social media. Employers can try to protect themselves with a well-crafted Social Media Policy, but extreme care must be taken to ensure that such a policy does not "chill employees in the exercise of their Section 7 rights."[42] If a policy "does not explicitly restrict activity protected by Section 7, the violation [if any] is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[43]

E. Friending (or accepting friend requests from) Employees

Certain networking platforms, most famously LinkedIn, are designed for connecting professionals together. Other platforms, like Twitter, are fairly public in nature. Others, most notably Facebook, are generally more private in nature. Regardless of platform, however, what are the best practices around friending, or accepting friend request from, other employees, supervisors, and/or subordinates?

Traditional wisdom indicates that there are more hazards than benefits from friending co-workers, particularly between supervisors and subordinates. The hazards include: (1) giving a supervisor access to information that could potentially give rise to discrimination claims, including Americans with Disabilities Act (ADA)[44] claims and Genetic Information Nondiscrimination Act[45] claims; (2) claims of favoritism by employees not in your social media friend circle; and (3) claims of discrimination based on membership in a protected class that the supervisor was only aware of through social media; (4) eroding employee privacy and unequal treatment based upon awareness of situations through social media; and (5) supervisor awareness of employee use of social media during the work day. As social media becomes more of a normal location for human interactions, the lines blur around what are best practices. Nonetheless, there are clearly some rules.

1. **The Supervisor should not send friend requests to subordinates**. A supervisor should never send the friend request to direct reports. This is true even if the

[39] *Id. at* 36-37.
[40] *Id.*at 37.
[41] *Id.*
[42] *Id.* at 38 *citing Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999).
[43] *NLRB v. Martin Luther Mem'l Home, Inc. d/b/a Lutheran Heritage Village—Livonia*, 343 NLRB 646, 647 (2004).
[44] 42 U.S.C. § 12101.
[45] 42 U.S.C. § 2000ff.

supervisor is genuinely a friend of the direct report. A direct report may feel pressure to accept the friend request from a supervisor. Even if that pressure was not actually mentioned or discussed at the time, claims of feeling required to accept such a friend request could lead to a finding that the employer violated the law in those jurisdictions that have adopted laws like the Uniform Employee and Student Online Privacy Protection Act.[46]

2. **What is the Standard?** Consider your industry, company, and position when determining whether to accept a friend request from a subordinate. Human Resources professionals and lawyers tend to avoid friending colleagues for many of the reasons highlighted above. But many social media professionals have an unwritten rule that everyone connects on all the platforms used by the company. So learn the informal rules of your industry, company, and position, and follow them.

3. **Suggest a different Forum**. Most people consider Twitter to be a public forum. As such, following a subordinate's public twitter account is not normally considered to be invasive. Facebook and Instagram, however, are much more private in nature. These social media fora should be approached with great care. LinkedIn is the clear winner for a platform where you can connect with a subordinate employee in a friendly, professional fashion.

One HR professional indicated that she sends colleagues who request to be let into her friend circle the following message before accepting such requests:

> *While I'm grateful you'd reach out and that you'd like to include me amongst your Facebook friends, I typically reserve this channel for friends/family and business associates I've known for years. . . . I'm OK with being connected via Facebook, with the caveat that this is strictly a personal space for me and not always "work appropriate" with the content or language and not where I do any of my professional networking/introductions or lead (job or business) hand-offs. Let me know how you'd like to proceed. Again, okay with connecting anywhere-just want to give fair warning there is a fair amount of profanity and other NSFW [not suitable for work] content I post here in my "closed" network. As long as you're cool with this, I'll approve the request.*[47]

This is not the only solution, or even a desirable solution for everyone. But it is interesting to note that people find various paths that work for them. Care should be taken to ensure that supervisors are aware of the pitfalls involved in friending their subordinates.[48] And it's always wise to

[46] Uniform Law Commission, 2016. Twenty-six states and Guam have passed Employee Privacy Acts that prohibit most employers from requiring an employee to either give their employer the password to their social media account(s) or accept friend requests from employers.

[47] Wright, Aliah D. "To 'Friend' or Not to 'Friend'? Should HR professional connect with employees on Facebook?", May 10, 2016, Society for Human Resource Management, available at: https://shrm.org/ResourcesAndTools/hr-topics/technology/Pages/To-Friend-or-Not-to-Friend.aspx

[48] Note: often, supervisors are promoted from the ranks of the subordinates. This can lead to circumstances where a current supervisor has a wide variety of social media "friends" who are now subordinates.

remember that you should use great care in posting to social media. Even if you believe that your post is private, it should be written as if your mother, your boss, and your children are all reading it. Because they likely are or will be.

F. Conclusion

Social media is here to stay, and in many ways is overtaking other means of communication. Your employees are making public statements on social media every day, all day, somewhere on your campus. How you handle employee social media use is an issue that it would be wise to address sooner rather than later. Responsible social media policies or social media guidelines should be drafted or reviewed to ensure compliance with the ever changing legal and technical landscape.

III. Legal Activities Laws

Legal activities laws refer to a broad subset of legislation aimed at protecting employees' legal, off-duty conduct. With no federal law on point, state and local governments have stepped in to fill some of the space and restrict employment actions based on certain types of conduct outside of the workplace. Recent trends have sparked renewed interest in this area, with off-duty political activities and lawful marijuana use and possession taking center stage.

Legal activities laws have special resonance in the higher education environment. First, colleges and universities must regularly confront the challenge of encouraging free speech and academic exchanges while minimizing disruptive and potentially harmful conduct. Permitting disagreement while minimizing confrontation is therefore an acutely important task for college and university employers. Colleges and universities may also be uniquely susceptible to criticism regarding suppression of employees' political viewpoints based on the perception that particular institutions have their own political ideologies. As highly visible and public-facing institutions, colleges and universities also have an interest in managing how their employee representatives communicate on and off campus, including on social media and with the press. In addition, the increase of medicinal and recreational marijuana laws will continue to pose challenges for institutions as they attempt to maintain and enforce drug-free policies.

The below discussion is an overview of the types of legal activities laws and issues that have potential significance for college and university employers.

A. State Legal Activities Laws

The tension between an employee's right to engage in legal, off-duty activities and the competing interest of an employer to prohibit certain conduct that it deems harmful to the employment relationship or the reputation of the employer has gained increasing attention from state legislatures. These concerns have gained even greater prominence in light of technology advances, such as social media, that grant employers greater and more immediate insight into employees' off-duty activities. A number of states have consequently enacted legal activities laws which, depending on their scope, protect a range of legal activities by applicants and employees and prohibit employers from taking such activities into account in making employment decisions. These statutes vary as well in terms of penalties and enforcement.

Some states offer broad protection for individuals to engage in legal activities. For example, the New York Legal Activities Law prohibits discrimination against any individual for engaging in certain activities during non-working hours, including: political activities; legal use of consumable products; legal recreational activities; and union membership.[49] However, there is an important exception: if an employee's activity "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest," the activity is not protected.[50] In other words, although an "employer ordinarily may not discharge [or refuse to hire] an employee for lawful off-hour recreational activities, an employer may discharge [or refuse to hire] an employee for conduct that is detrimental to the company or that impacts an employee's job performance."[51] In *Pasch v. Katz Media Corp.*, the plaintiff alleged that she was constructively discharged due to her co-habitation with a former employee of the same company.[52] The court held that the co-habitation, occurring off the employer's premises, and without using any of the employer's resources, should be an activity protected from discrimination, unless the co-habitation somehow conflicted with the employer's business interest.[53]

Similarly, in California, an employee cannot be discriminated against for lawful conduct that occurred during non-working hours off the employer's premises.[54] In Colorado, an employer may not terminate an employee for engaging in a lawful activity off the employer's premises during non-work hours unless the restriction reasonably relates to the employment activities or responsibilities, or is necessary to prevent a conflict of interest.[55]

Although the legal activities law was not expressly at issue, there is at least one example of a California court upholding an employer's decision to terminate an employee based on his off-duty conduct. In *San Diego Unified Sch. Dist. v. Comm'n on Prof'l Competence*,[56] a school district suspended and served a notice to terminate a dean of students for soliciting sex on Craigslist via a posting that included explicit and pornographic pictures of himself. The dean removed the ad upon notification and argued that he did not intend students to see it and that parents should be monitoring their children's Internet activities. Both the Commission on Professional Competence and the trial court (who reviewed the commission's decision) found no cause for dismissal existed because, although "this sexually explicit ad was vulgar and inappropriate and demonstrated a serious lapse in good judgment," the school district failed to prove any nexus between the ad and the employee's employment. However, the California Court of Appeal reversed. Although the court found that the employee did not use school time, resources, or

[49] N.Y. LAB. LAW § 201-d.
[50] *Id.* § 201-d (3)
[51] *Pasch v. Katz Media Corp.*, 1995 WL 469710, at *5 (S.D.N.Y. Aug. 8, 1995)
[52] *Id.*
[53] *Id.* at *9; *but cf.*, *McCavitt v. Swiss Reinsurance America Corp.*, 237 F.3d 166 (2d Cir. 2001) (holding that a dating relationship between two employees in violation of a company fraternization policy does not fall within "recreational activities" protected under section 201-d).
[54] CAL. LAB. CODE § 98.6.
[55] CAL. LAB. CODE § 1450 *et seq.*
[56] 124 Cal. Rptr. 3d 320 (Cal. Ct. App. 2011).

equipment to post the ad and that the employee did not intend any student to view it, the court determined that the employee's actions demonstrated "evident unfitness to teach" and that he had engaged in immoral conduct under California Education Code section 44932, either of which was enough to warrant termination by itself.

Other states offer more limited protections for the off-duty conduct of applicants and/or employees. For example, the Illinois Right to Privacy in the Workplace Act (RTPWA) protects employees who use lawful products away from the employer's premises during non-working hours.[57] In Washington, the Fair Campaign Practices Act prohibits employment discrimination on the basis of an employee's political activity.[58]

The District of Columbia Human Rights Act (DCHRA) prohibits discrimination in employment based on religion and political affiliations.[59] This statute was invoked, without success, in *McCaskill v. Gallaudet University*.[60] Angela McCaskill, the Chief Diversity Officer at Gallaudet University, alleged that her employer subjected her to adverse employment actions (including being placed on administrative leave, demoted and subjected to harassment) because she signed a petition to place a state constitutional amendment that would have banned same-sex marriage on the ballot. McCaskill sued, alleging religious and political affiliation discrimination based on her lawful activity of signing the petition. The court dismissed the claim because she only alleged that the university discriminated against her based on her action of signing a petition, and not because she was a member of any particular group or political party.[61] The court also noted that it appeared that McCaskill was disguising a First Amendment argument as an employment discrimination claim, and that her First Amendment claim did not apply to Gallaudet, a private party.[62]

Some states have statutes that specifically address the use of tobacco products. A majority of the states and the District of Columbia make it illegal for employers to impose smoking bans on their employees when they are off duty. Some states also extend this protection to any legal substance.[63] The New Jersey Smoking Law (NJSL) prohibits an employer from discriminating against an employee because he does or does not smoke or use tobacco products.[64] The law, however, does not affect any laws, rules or policies relating to the smoking or the use of tobacco products during the course of employment.[65] Similarly, the District of Columbia prohibits discrimination on the basis of an applicant's

[57] 820 ILL. COMP. STAT. 55/5(a).
[58] WASH REV. CODE § 42.17A.495(2).
[59] D.C. CODE § 2-1402.11(a).
[60] 36 F. Supp. 3d 145 (D.D.C. 2014).
[61] *Id.* at 154.
[62] *Id.* at 155.
[63] *Compare* CONN. GEN. STAT. ANN. § 31-40s (prohibiting employers from discriminating against anyone who uses cigarettes or other tobacco products outside the workplace) *with* WIS. STAT. ANN. § 111.31, *et seq.* (prohibiting employers from discriminating against employees who use any legal substance away from work).
[64] N.J. STAT. ANN. § 34:6B-1.
[65] *Id.* § 34:6B-2.

off-duty tobacco use.[66] Oregon law prohibits discrimination against persons using tobacco during non-working hours.[67]

B. Medicinal and Recreational Marijuana

One unique subset within the maze of legal activities laws relates to state and local legislation around medicinal and recreational marijuana use. Concerns regarding marijuana legalization are especially acute in higher education given confusion regarding drug free workplace policy enforcement and safety obligations on university and college campuses. The trend in marijuana legalization nationwide has created something of a legal vacuum, with marijuana classified as a Schedule I drug and its use and possession still outlawed at the federal level. In 2005, the Supreme Court held that the intrastate enforcement of the federal Controlled Substances Act (CSA) did not violate the Commerce Clause.[68] As a result, state marijuana legalization efforts pose no bar to enforcement of the CSA within a state, including with respect to individual use and possession of marijuana.

On August 29, 2013, the Obama-era Department of Justice issued guidance, the "Cole Memorandum," placing a moratorium on the enforcement of federal marijuana laws with respect to most personal marijuana use and possession in states that have decriminalized the same.[69] Then, on January 4, 2018, the Department of Justice under the new administration rescinded the "Cole Memorandum," reinstating potential conflicts between state and federal positions on the consumption and possession of marijuana.[70]

Despite these complications, thirty-three states and the District of Columbia have now enacted laws legalizing or decriminalizing marijuana use and/or possession in some contexts. Among those jurisdictions, eleven states and the District of Columbia have legalized recreational marijuana use. The remaining twenty-two states have decriminalized or legalized marijuana in more limited ways, including by limiting lawful marijuana use and possession to medicinal applications. Along with ongoing legalization efforts in other states, New York Governor Cuomo has prioritized marijuana legalization in the state for the 2020 legislative session.[71]

The dissonance between the status of marijuana use at the federal and state levels is increasingly troublesome for employers. As an initial matter, although no law protects employee marijuana use on the job, several jurisdictions have yet to clarify what actions an employer may take against employees who use marijuana outside of the workplace, as discussed below.

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[66] D.C. CODE § 7-1703.03.
[67] OR. REV. STAT. § 659A.315.
[68] *Gonzales v. Raich*, 545 U.S. 1, 33 (2005).
[69] James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.
[70] Jefferson B. Sessions, III, Att'y Gen., Memorandum for All United States Attorneys: Marijuana Enforcement (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download.
[71] Luis Ferré-Sadurníand Jesse McKinley, THE NEW YORK TIMES, "Marijuana Will Be Legalized In New York In 2020, Cuomo Vows," (Jan. 08, 2020), *available at* https://www.nytimes.com/2020/01/08/nyregion/state-of-the-state-cuomo-ny.html (last accessed Jan. 26, 2020).

Further complicating an employer's actions in this regard is the relative difficulty of accurately assessing employee marijuana intoxication. Unlike other drugs, including alcohol, THC, the active ingredient in marijuana, may remain detectable in an individual's blood, hair, and/or urine for months after consumption. Granting summary judgment to a plaintiff under the Arizona Medical Marijuana Act, an Arizona federal district court held in the 2019 *Whitmire v. Wal-Mart Stores, Inc.* decision that the presence of cannabis metabolites in an employee's drug test alone, without further evidence, is insufficient to establish an employee's marijuana-related impairment in the workplace.[72] Accordingly, an adverse action taken with respect to an employee's drug test alone, without corroborating evidence or expert testimony interpreting the results of such a test, may constitute discrimination in relation to lawful medical marijuana cardholders in Arizona.[73]

Following *Whitmire*, and given the trajectory of legalization bills nationally, an adverse action taken on the basis of a positive drug test alone may increasingly prove problematic. That is, while marijuana legalization bills to date have tended to protect an employer's ability to discipline an employee for a positive drug test, it may not be clear what a positive drug test for THC indicates. As state laws governing marijuana use and possession continue to refine and develop, the risk of litigation regarding false or meaningless positive drug test results may increase. An employer's ability to require employees to submit to a drug test may be further limited under other state and local laws, including state and local nondiscrimination laws.

For example, New York City became, in May of 2019, the first jurisdiction in the United States to enact legislation precluding most pre-employment marijuana drug screening.[74] This prohibition does not, however, interfere with an employer's ability to require that current employees submit to marijuana-related drug testing to screen for impairment at work. The ordinance also creates exceptions for pre-employment marijuana drug testing with respect to certain professions, including law enforcement personnel, individuals in professions "requiring compliance with section 3321 of the New York city building code or section 220-h of the labor law," commercial drivers, medical professionals, and individuals in positions "with the potential to significantly impact the health or safety of employees or members of the public."[75]

Nevada, passed a comparable law in 2019, subject to similar exceptions for employees in safety-sensitive occupations.[76] On January 1, 2020, Nevada became the first

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[72] *Whitmire v. Wal-Mart Stores Inc.*, 359 F. Supp. 3d 761, 792 (D. Ariz. 2019).
[73] *Id*.
[74] NEW YORK CITY ORDINANCE FILE NO. INT. NO. 1445-A, "A Local Law To Amend The Administrative Code Of The City Of New York, In Relation To Prohibition Of Drug Testing For Pre-Employment Hiring Procedures" (Feb. 13, 2019), *available at* https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3860393&GUID=7040463F-8170-471C-97EC-A61AE7B1AA2F&Options=ID%7cText%7c&Search=1445-A.
[75] *Id*.
[76] NEVADA ASSEMBLY BILL NO. 132, "An Act Relating To Employment; Prohibiing The Denial Of Employment Because Of The Presence Of Marijuana In A Screening Test Taken By A Prospective Employee With Certain Exceptions; Authorizing An Employee To Rebut The Results Of A Screening Test Under Certain Circumstances; And Providing Other Matters Properly Relating Thereto," (Feb. 13, 2019), *available at* https://leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6191/Text.

state to make it unlawful for an employer to deny a prospective employee employment on the basis of a positive marijuana drug test result.[77]

Legal, off-duty marijuana use is emerging as a seminal conflict in marijuana-related employment litigation. In addition to actions brought under purpose-built state legislation specifically governing marijuana use and possession, the use of legalized marijuana is likely to be the subject of increasing litigation under existing state and local disabilities laws, as well as general state legal activities laws. A primary issue in the area of off-duty employee marijuana use and possession is the lack of explicit guidance from legislatures. State laws regarding medical marijuana use tend to be somewhat clearer than statutes addressing recreational marijuana use and possession, although this is not uniformly so.

Several states have passed or are likely to pass bills protecting workers who use medical marijuana under a valid prescription outside of the workplace. Massachusetts has considered legislation that would protect medical marijuana license-holders from workplace discrimination, as well as discrimination in education, housing and elsewhere.[78] The measure came on the heels of a 2017 Supreme Judicial Court of Massachusetts decision in *Barbuto v. Advantage Sales and Mktg., LLC* holding that a medicinal marijuana user can assert a claim of disability discrimination under state law.[79] Twelve other state laws—in Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Oklahoma,[80] Pennsylvania, Rhode Island, and West Virginia— now expressly protect authorized medicinal marijuana users, though others may do so under general disability-related statutes.[81]

Although medical marijuana laws have existed in the United States for decades, courts are still grappling with how to reconcile medical marijuana laws with other state and federal statutes. A recent trend in state court decisions has rejected defendants' arguments that federal laws such as the CSA and the Drug-Free Workplace Act of 1988 preempt contrary state laws. These decisions may hold, for example, that laws like the Drug-Free Workplace Act do not mandate drug testing and do not speak to employees' lawful, off-duty activities.[82] In the Colorado case of *Coats v. Dish Network*,[83] the plaintiff—a quadriplegic who is licensed by Colorado to use medical marijuana—was fired after he tested positive for marijuana in violation of his employer's drug policy. The employee subsequently filed an action alleging his termination violated Colorado's Lawful Activities

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[77] *Id*.
[78] MASSACHUSETTS HOUSE BILL NO. 2385, "An Act to Protect Patients Approved by Physicians and Certified by the Department of Public Health to Access Medical Marijuana," (Jan. 23, 2017), *available at* https://malegislature.gov/Bills/190/H2385.
[79] *Barbuto v. Advantage Sales and Mktg., LLC*, 78 N.E.3d 37 (Mass. 2017).
[80] OKLAHOMA HOUSE BILL 2612, "Medical Marijuana; Creating The Oklahoma Medical Marijuana And Patient Protection Act," (Feb 4, 2019), *available at* http://webserver1.lsb.state.ok.us/cf_pdf/2019-20%20ENR/hB/HB2612%20ENR.PDF.
[81] *See*, *e.g.*, ME. REV. STAT. § 2423-E(2).
[82] *See*, *e.g.*, *Carlson v. Charter Commun., LLC*, 742 Fed. Appx. 344, 345 (9th Cir. 2018)(unpublished); *Noffsinger v. SSC Niantic Operating Co., LLC*, 338 F. Supp. 3d 78, 88 (D. Conn. 2018); *Chance v. Kraft Heinz Foods Co.*, CV K18C-01-056 NEP, 2018 WL 6655670, at *15 (Del. Super. Dec. 17, 2018); *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 WL 2321181, at *10 (R.I. Super. May 23, 2017).
[83] 303 P.3d 147 (Colo. Ct. App. 2013).

Statute. The Colorado Court of Appeals held that because plaintiff's state-licensed medicinal marijuana use was still illegal under federal law, it did not qualify as a "lawful activity" under the Colorado law.[84] The Colorado Supreme Court affirmed the court of appeals' decision, holding that the state's lawful activities statute does not protect workers who engage in an activity that is legal under state law, but illegal under federal law.[85] On similar grounds, and observing the illegal status of marijuana under federal law, the California Supreme Court held in *Ross v. RagingWire Telecommunications, Inc.* that the California Compassionate Use Act does not require employers to provide a reasonable accommodation for employees' use of medical marijuana.[86]

There are, by comparison, more recent indications that the national climate concerning medical marijuana protections is shifting. As a barometer of how challenges to employment discrimination against medical marijuana users are likely to fare, several decisions since 2017 make a case for protecting medicinal marijuana use on anti-discrimination grounds. A 2017 Rhode Island Superior Court held in *Callaghan v. Darlington Fabrics Corp.* that, under the Rhode Island Hawkins-Slater Act, which governs medical marijuana use in the state, an employer could not deny a medical marijuana cardholder employment solely on the basis of her or his inability to pass a pre-employment drug screening.[87] The court further held that an employee could bring an action under the Rhode Island Civil Rights Act (RICRA) on the basis that, in connection with the Hawkins-Slater Act, a qualifying medical marijuana cardholder in Rhode Island must have a "debilitating medical condition."[88] Such conditions, the court held, necessarily must "substantially limit[] one or more … major life activities," as required under RICRA's definition of disability.[89] Rejecting an employer's contention that it did not hire a prospective employee based on the employee's marijuana use rather than her underlying disability, the court held that it is "sufficient [for purposes of a RICRA claim] to show that Defendants discriminated against a class of disabled people—namely, those people with disabilities best treated by medical marijuana."[90] The court also rejected defendants' federal preemption argument under the CSA, holding that "Congress seems to want, as Justice Brandeis said, the States to be the laboratories of democracy with respect to medical marijuana."[91] A Pennsylvania trial court continued the trend in 2019, holding that the Pennsylvania Medical Marijuana Act creates a private right of action for discrimination claims for medical marijuana cardholders.[92]

In contrast with the *Callaghan* and *Palmiter* decisions, a 2019 Hawaii district court in *Kamakeeaina v. Armstrong Produce, Ltd.* granted a motion to dismiss in an action involving an ADA employment screening claim under the Americans with Disabilities Act

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[84] *Id.* at 152.
[85] *Coats v. Dish Network, LLC*, 2015 CO 44 (Colo. 2015).
[86] *Ross v. RagingWire Telecommunications, Inc.*, 70 Cal.Rptr.3d 382, 393 (Cal. 2008).
[87] *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680, 2017 WL 2321181, at *10 (R.I. Super. May 23, 2017).
[88] *Id*. at *11.
[89] *Id*.
[90] *Id*. at *12.
[91] *Id*. at *15.
[92] *Palmiter v. Commonwealth Health Systems, Inc.*, Case No. 19 CV 1315 (Pa. Ct. C.P. Lackawanna County, Nov. 22, 2019).

predicated on the plaintiff's possession of a medical marijuana card.[93] In so holding, the court noted that an employee's possession of such a card does not, in itself, constitute a disability.[94] As a result, an employee, under certain statutory regimes, may be required to allege more at the pleading stage than her or his status as a medical marijuana card holder. Such pleadings may require, for example, additional material allegations linking an employee's status as a medical marijuana card holder to an underlying disability and/or an employer's awareness thereof.

The *Kamakeeaina* court also, however, denied defendant's motion to dismiss with respect to a separate failure hire claim arising under the Americans with Disabilities Act.[95] With respect to the failure to hire claim, the court held that the employee's possession of a medical marijuana card did not establish conclusively that the employee was using marijuana.[96] In particular, and citing to the factual record, the court noted that the employee nowhere conceded to using marijuana, and that the defendant's purported "reasonable inference" in this regard was not the only plausible inference that could be drawn.[97] Together, the court's holdings suggest first that medical marijuana-related disability discrimination claims may involve heavily fact-intensive inquiries, and second that an employee's status as a medical marijuana card holder rather than a medical marijuana user may impact the viability of particular marijuana-related disability discrimination claims.

A New Jersey Superior Court has held that the New Jersey Compassionate Use Act presents no conflict with the New Jersey Law Against Discrimination (LAD).[98] In *Wild v. Carriage Funeral Holdings, Inc.*, the court held that, while expressly not requiring an employer to accommodate workplace medical marijuana use, the New Jersey Compassionate Use Act "negates no rights or claims available to plaintiff that emanate from the LAD."[99] Accordingly, reversing a lower court's order dismissing a plaintiff's claims under the LAD, the court held that a plaintiff could make out a prima facie discrimination case under the New Jersey LAD based on allegations related to a plaintiff's medical marijuana use in connection with a plaintiff's given disability.[100]

Other states continue to buck the trend favoring non-discrimination against medical marijuana users. A Michigan appellate court decision held in April of 2019 that the Michigan Medical Marihuana [*sic*] Act (MMMA) establishes no "affirmative" rights in medical marijuana users, but immunities from prosecution and/or penalties.[101] The court further held that the MMMA does not create a protected class of medical marijuana users.[102] It is therefore imperative that employers operating in multiple states become

[93] *Kamakeeaina v. Armstrong Produce, Ltd.*, No. 18-CV-00480-DKW-RT, 2019 WL 1320032, at *8–9 (D. Haw. Mar. 22, 2019).
[94] *Id*.
[95] *Id* at *4-5.
[96] *Id*.
[97] *Id*.
[98] *Wild v. Carriage Funeral Holdings, Inc.*, 205 A.3d 1144, 1150-1151 (N.J. Super. App. Div. 2019).
[99] *Id*. at 1151.
[100] *Id*. at 1154.
[101] *Eplee v. City of Lansing*, No. 342404, 2019 WL 691699, at *5–6 (Mich. App. Apr. 23, 2019).
[102] *Id*. at *9–10.

familiar with what different medical marijuana laws require, as well as the potential liability associated with non-compliance under a multitude of non-discrimination and other laws.

In comparison with medical marijuana legalization, recreational marijuana laws are, in general, newer and more limited in scope. Few of the recreational marijuana laws passed to date, for example, expressly protect employees' off-duty marijuana use and possession. Most such laws explicitly permit employers to maintain policies prohibiting the use of marijuana in the workplace, and to take appropriate measures in view of employees' impairment while on duty. The Illinois Cannabis Regulation and Tax Act, which became effective on January 01, 2020, amends the Illinois Right to Privacy in the Workplace Act to make marijuana a "lawful product" within the meaning of the latter statute, thereby protecting employees' legal, off-duty recreational marijuana use.[103] Further amendments to the Cannabis Regulation and Tax Act in November of 2019, however, make clear that there is no employee cause of action under the statute in connection with employment actions that are consistent an employer's "reasonable workplace drug policy,"[104] and that employers may enforce non-discriminatory drug testing and other drug-related workplace policies.[105] The resulting tension between employees' and employers' rights and duties outside and inside the workplace exemplifies an ongoing effort to temper personal marijuana use and possession against workplace safety and management prerogatives.[106]

A provision in Maine's Marijuana Legalization Act would have made the state the first to explicitly prohibit discrimination in employment against recreational marijuana users.[107] As amended, however, the Marijuana Legalization Act is silent regarding employees' off-duty recreational marijuana use.[108] Oregon failed to pass similar legislation during the 2017[109] and 2019[110] state legislative sessions.

Other marijuana-related issues in the workplace concern workers' compensation and unemployment benefits. Given the continuing prohibition as to on-duty marijuana use, an employee's marijuana impairment at the time she or he sustains a workplace injury ordinarily will impact her or his recovery of workers' compensation benefits. States such as New Mexico and Wisconsin have enacted laws providing for reductions, if not the elimination, of workers' compensation benefits for employees impaired by marijuana at

[103] 820IL. COMPILED STAT. 5 § 5.
[104] 410IL. COMPILED STAT. 705 § 10-50(a), (c).
[105] 410IL. COMPILED STAT. 705 § 10-50(e)(1-4).
[106] *Id*.
[107] 7 ME. REV. STAT. ANN. § 2454.
[108] 28-B ME. REV. STAT. ANN. § 112.
[109] OREGON SENATE BILL NO. 301, "Provides that Conditioning Employment on Refraining from Using Any Substance that is Lawful to Use in this State is Unlawful Employment Practice," (Jan. 9, 2017), *available at* http://gov.oregonlive.com/bill/2017/SB301/.
[110] OREGON LEGISLATIVE CONCEPT NO. 2152, "A Bill for an Act relating to unlawful employment practices; amending ORS 659A.315; and declaring an emergency," (Nov. 07, 2018), *available at* https://olis.leg.state.or.us/liz/2017I1/Downloads/CommitteeMeetingDocument/153528.

the time of an operative workplace incidents.[111] In other states, courts have likewise upheld denials of workers' compensation benefits based on employees' alleged marijuana intoxication.[112]

The unique difficulty of ascertaining employee marijuana impairment, as described above, also implicates employees' recovery of workers' compensation benefits. Specifically, even under state laws disapproving workers' compensation benefits in connection with a positive marijuana drug screen, employees may be able to recover workers' compensation benefits in the absence of evidence demonstrating impairment at the time an injury at issue occurred. Various state court decisions highlight the evidentiary questions in this area.[113]

States have come to different conclusions regarding reimbursement of injured employee's medicinal marijuana expenses. Under Michigan law, an employer need not reimburse an employee for medicinal marijuana-related treatment associated with an employee's injury.[114] A recent New Hampshire Supreme Court decision, however, held that New Hampshire's workers' compensation laws do not preclude the reimbursement of employees' medicinal marijuana expenses.[115] The New Hampshire decision follows a similar New Mexico appellate court holding under the New Mexico Workers' Compensation Act[116] and a similar Connecticut Workers' Compensation Commission Review Board decision under the Connecticut Workers' Compensation Act.[117] Likewise, a New Jersey appellate court in 2020 held that the CSA does not preempt the New Jersey Compassionate Use Media Marijuana Act, and that reimbursing employees for medical marijuana expenses does not constitute aiding and abetting a crime under federal law.[118] For these reasons, the court upheld an order requiring an employer to reimburse an employee for the employee's medical marijuana costs.[119]

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[111] Louise Esola, "States Stepping Up Efforts To Cut Benefits For Workers Hurt While Impaired," BUSINESS INSURANCE (May 08, 2016), https://www.businessinsurance.com/article/00010101/NEWS08/305089993/States-stepping-up-efforts-to-cut-benefits-for-workers-hurt-while-impaired.

[112] *Jamy L. Blair v. American Stitcho, Inc. et al.*, Case No. CV-19-408, 2020 Ark. App. 38 (Ark. App. January 22, 2020).

[113] *Trent v. Stark Metal Sales, Inc.*, No. 2014CA00141, 2015 WL 1331917, *1-3 (Ohio App. March 23, 2015) (upholding a lower court decision granting Plaintiff workers' compensation benefits where proffered evidence did not establish that Plaintiff's alleged marijuana impairment was the proximate cause of the incident in question or that Plaintiff was impaired at the time of the incident in question); *Joseph v. Georgia P., LLC*, 182 So. 3d 163, 166-69 (La. App. 1st Cir. 2015) (denying summary judgment to defendant and holding that behavioral testimony could suffice to meet a Plaintiff's burden of establishing that a Plaintiff was not intoxicated and/or that the Plaintiff's intoxication was not causally related to the incident at issue following a defendant's production of a positive marijuana drug test which creates a presumption of impairment under Louisiana law); *Unique Staff Leasing, Ltd. v. Cates*, 500 S.W.3d 587, 597–98 (Tex. App. July 29, 2016) (upholding a jury verdict for Plaintiff in a death benefits workers' compensation case despite the presence of marijuana metabolites in the Plaintiff's blood test and urinalysis given countervailing evidence suggesting that the Plaintiff was not impaired by marijuana at the time the Plaintiff sustained the injury in question).

[114] MICH. COMP. LAWS § 418.315(a).

[115] *App. of Panaggio*, 205 A.3d 1099, 1100-1105 (N.H. 2019).

[116] *Vialpando v. Ben's Automotive Services*, 331 P.3d 975, 976-980 (N.M. App. 2014).

[117] *Petrini v. Marcus Dairy Inc.*, Case No. 6021-CRB-7-15-7, Workers' Compensation Review Board (May 12, 2016).

[118] *Hager v. M & K Constr.*, Case No. A-0102-18T3, 2020 WL 218390, at *11 (N.J. Super. App. Div. Jan. 13, 2020).

[119] *Id* at *11.

States are similarly split in terms of the provision of unemployment benefits to individuals separated for reasons relating to positive marijuana drug tests, and under what circumstances.[120] Maine in 2019 passed legislation[121] omitting off-duty medicinal marijuana use from the types of misconduct[122] that may disqualify employees from receiving unemployment insurance benefits under Maine law.

The groundswell in state legalization initiatives elevates policy regarding employees' off-duty marijuana use and possession as a top priority for employers in the coming years, as well as a likely battleground for future employment litigation.

C. Political Speech in the Workplace

Related to but distinct from the issue of lawful off-duty activities is the area of employee political speech. Whereas approximately nine states and several jurisdictions prohibit employer regulation of off-duty political activities, a still smaller subset address political speech and conduct in the workplace.[123] Political activities and employee speech laws have ascended to new prominence recently following a 2019 Executive Order on campus free speech[124] and a series of high-profile incidents involving tech giant Google,[125] the National Football League (NFL)[126] and several nationally-organized white supremacist rallies.[127] These incidents underscore the many ambiguities surrounding regulation of employee discourse.

On March 21, 2019, the Trump Administrative issued Executive Order 13864 relating to free speech in higher education.[128] Executive Order 13864 purports to guarantee

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[120] *Braska v. Challenge Mfg. Co.*, 861 N.W.2d 289, 303 (Mich. App. 2014) (benefits available given individuals' lawful medicinal marijuana use under the MMMA); *compare Beinor v. Indus. Claim Appeals Off.*, 262 P.3d 970, 978 (Colo. App. 2011) (benefits unavailable).

[121] MAINE SENATE BILL NO. 1013, "An Act To Clarify The Disqualification From Unemployment Benefits Of A Person Who Is Terminated From Employment For Being Under The Influence Of Marijuana," (Feb. 26, 2019), available at https://legiscan.com/ME/text/LD1013/id/2021596/Maine-2019-LD1013-Chaptered.pdf.

[122] ME. STAT. TIT. 26 § 1043.

[123] Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 Texas Rev. L. & Pol. 295, 313 (2012) (describing general off-duty political activities protections in California, Colorado, Guam, Louisiana, Minnesota, Missouri, Nebraska, Nevada, South Carolina, West Virginia, Seattle (Washington), and Madison (Wisconsin), as well as related protections such as for partisan electoral activities in New York).

[124] EXECUTIVE ORDER NO. 13864, "Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities," (March 21, 2019), https://www.whitehouse.gov/presidential-actions/executive-order-improving-free-inquiry-transparency-accountability-colleges-universities/.

[125] Kate Conger, "Exclusive: Here's The Full 10-Page Anti-Diversity Screed Circulating Internally at Google [Updated],"GIZMODO (Aug. 5, 2017), https://gizmodo.com/exclusive-heres-the-full-10-page-anti-diversity-screed-1797564320.

[126] Ken Belson, "Fueled by Trump's Tweets, Anthem Protests Grow to a Nationwide Rebuke," THE NEW YORK TIMES (Sept. 24, 2017), https://www.nytimes.com/2017/09/24/sports/trump-national-anthem-nfl.html.

[127] Rebecca Greenfield, "Can You Fire Someone for Being a White Supremacist? Not necessarily," BLOOMBERG (Aug. 21, 2017), https://www.bloomberg.com/news/articles/2017-08-21/can-you-fire-someone-for-being-a-white-supremacist.

[128] EXECUTIVE ORDER NO. 13864, "Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities," (March 21, 2019), https://www.whitehouse.gov/presidential-actions/executive-order-improving-free-inquiry-transparency-accountability-colleges-universities/..

free expression on university and college campuses, although it does not provide mechanisms for addressing free speech impairments or redress.[129] The Executive Order followed complaints from individual students and groups that have accused colleges of suppressing conservative viewpoints, including by, for example, limiting "chalking" practices on the Iowa State University campus.[130] While Executive Order 13864 does not directly impact higher education employees' speech activities, it highlights the balance that universities and colleges must strike in encouraging expression while limiting threats and disruptions to campus life.

Additional media coverage over the last several years has shone a light on similar issues in the workplace, with implications for university and campus employees. In late July 2017, Google engineer James Damore circulated a memorandum through internal employee channels describing what Damore dubbed an "ideological echo chamber" in Silicon Valley.[131] Damore criticized the purported suppression of conservative viewpoints in the technology industry and the neglect of biological "differences" in designing and implementing diversity plans.[132] Damore's "manifesto," as it came to be known, specifically highlighted alleged sex-based differences in explaining the diminished presence of women in engineering roles.[133] When the "manifesto" leaked to the media, it was widely criticized as trading in gender stereotypes, including heightened female "neuroticism," disinterest among women in engineering generally, differences between men and women in negotiating prowess, men's "higher drive for status," and other alleged personality differences such as the tendency for women, on average, to be more interested in "people rather than things."[134] The document concluded that Google should deemphasize aspects of its diversity programming. In the ensuing media firestorm, Google terminated Damore's employment. Conservative outlets sharply criticized Google's decision as vindicating Damore's allegations of anti-conservative bias.[135] Damore then filed a complaint with the NLRB,[136] and subsequently initiated a class action lawsuit in January 2018.[137] Although Damore withdrew the NLRB complaint before the Board had occasion to decide the matter, the agency in February 2018 published an advisory memo rejecting Damore's claims.[138] Along with a second claimant, David Gudeman, Damore

[129] *Id*.
[130] Anemona Hartocollis, THE NEW YORK TIMES, "Why This Iowa Campus Is Erasing Political Chalk Talk," (Jan. 30, 2020) https://www.nytimes.com/2020/01/30/us/iowa-caucus-chalking.html.
[131] *See supra* at n. 227.
[132] *Id*.
[133] *Id*.
[134] *Id*.
[135] Jon Swartz & Elizabeth Weise, "Alt-Right Finds a New Hero: Ex-Googler James Damore," USA TODAY (Aug. 12, 2017 [updates Aug. 13, 2017]), https://www.usatoday.com/story/tech/columnist/2017/08/12/alt-right-finds-new-hero-ex-googler-james-damore/556570001/.
[136] National Labor Relations Board, No. 32-CA-205351 (Aug. 30, 2017), https://www.nlrb.gov/case/32-CA-205351.
[137] Complaint, *Damore v. Google*, LLC, Case No. 18CV321529, 2018 WL 317984 (Cal. Super., Jan. 8, 2018).
[138] *Advice Memos – Google, Inc., Case No. 32-CA-205351*, National Labor Relations Board (Jan. 18, 2018), https://www.nlrb.gov/cases-decisions/advice-memos.

later moved his claims into an arbitral proceeding, while the class action will proceed with other plaintiffs.[139]

On June 7, 2019, a court overruled, in relevant part, Google's demurrer and denied Google's alternative motion to strike and motion in the class action as to plaintiffs' political discrimination claims under California Labor Code Section 1101 and Section 1102.[140] The demurrer, which alleged failure to state a claim and uncertainty, argued that the class in question was not ascertainable.[141] In overruling the demurrer, the court held that Google had failed to establish that there exists "'no reasonable possibility' that a political group along the same lines could be identified," and that "the issue is best decided following the 'preferred course' of an evidentiary hearing on class certification."[142] On similar grounds, the further rejected Google's argument alleging a lack of commonality among the putative class, holding that holding that the "Court is not prepared to find that there is 'no reasonable possibility' plaintiffs will be able to establish commonality'" with respect to plaintiffs' political discrimination claims."[143] In a footnote, the court noted the novelty of the political discrimination claims at issue, and offered no opinion as to their viability.[144] Google in 2019 settled with the NLRB with respect to a separate, related political activities complaint, although the settlement itself does not specifically refer to Google's obligations with respect to employees' political speech.[145]

Employee political speech also captured national headlines after several NFL players knelt in protest during the national anthem.[146] Participating players explained the gesture as a way to protest racial injustice and the lack of accountability following numerous police shootings of unarmed African American individuals.[147] Media coverage became increasingly polarized after President Donald Trump criticized the protest as anti-American and anti-military, a sentiment that gained traction as protest participation mounted. President Trump went on to encourage team owners to fire protesting players, and blamed declining ticket sales and television ratings on the protests.[148] Supporters objected to the President's characterization, suggesting that the President and other critics had artificially grafted onto the gesture an unrelated political message which had the effect of stoking racial tensions. The issue was a virtual inversion of one that surfaced just weeks prior, in August 2017, after at least four employees were fired for participating in a

[139] Adi Robertson, "James Damore Is Moving His Lawsuit Against Google Out Of Court," The Verge (Oct. 17, 2018), https://www.theverge.com/2018/10/17/17989804/james-damore-google-conservative-white-male-discrimination-lawsuit-arbitration.
[140] *Damore v. Google, LLC*, No. 18CV321529, 1-16 (Cal. Super. Cnty. of Santa Clara June 7, 2019).
[141] *Id*. at 1-10.
[142] *Id*. at 9-10.
[143] *Id*. at 10-11.
[144] *Id*. at 8-9 n. 2.
[145] David McCabe, THE NEW YORK TIMES, "Google Settles with U.S. Over Workers' Complaints It Stifled Dissent," (September 12, 2019), *available at* https://www.nytimes.com/2019/09/12/technology/google-settlement-nlrb.html.
[146] Ken Belson, "Fueled by Trump's Tweets, Anthem Protests Grow to a Nationwide Rebuke," THE NEW YORK TIMES (Sept. 24, 2017), https://www.nytimes.com/2017/09/24/sports/trump-national-anthem-nfl.html.
[147] *Id*.
[148] *Id*.

highly-publicized white nationalist rally in Virginia.[149] Related political speech questions reemerged in April 2018 when a former employee of a federal contractor brought suit alleging violations of her off-duty speech rights after allegedly losing her position over a viral photograph that depicted her extending a middle finger toward the President's motorcade.[150] The county court later dismissed Briskman's lawsuit.[151]

The Damore, NFL, and other incidents raise a variety of questions about the extent of employee political speech rights in the workplace. Lawful activities laws, as described in detail in the section above, primarily concern employee conduct outside of the workplace. Even so, employers have largely maintained the right to discipline employees for conduct outside of working hours that disrupts workplace dynamics. And while a number of states have enacted lawful activities laws protecting employees' political activities, those laws commonly do not protect political speech at work, much less speech that is divisive or discriminatory in nature. That distinction drives much of the difference in result when determining whether an employer may lawfully fire an employee for protesting on the field or during an off-duty white supremacist march.

Moreover, private employees' speech is not protected federally from employer action by the First Amendment. Under Supreme Court precedent, even public employees do not enjoy unqualified free speech rights in the workplace.[152] These limitations emphasize the importance of state lawmaking in setting workplace speech standards. Yet despite the ample space for state action on point, relatively few states have cultivated well-defined rules for regulating speech at work. Given the lack of explicit political speech protections, the question of whether and to what extent an employer can moderate employee political speech is largely unresolved.

State law standards for employee speech rights are an unusually intricate and diverse assortment. Such laws vary, for instance, in the means by which they protect political speech as well as the intensity of such protections. A small number of states include political affiliation within broader antidiscrimination statutes. Of those states, an even smaller minority omit political affiliation or ideology from the list of statuses for which the employer may assert a "bona fide occupational qualification defense."[153] In these states, an employer therefore may not justify an adverse employment action on the basis that an employee's political viewpoints were at odds with an organization's values.[154]

Other states variably protect different aspects of an employee's politically-motivated conduct. California Labor Code section 1101 forbids employers from controlling or directing employees' political affiliations.[155] Section 1102 likewise

[149] Rebecca Greenfield, "Can You Fire Someone for Being a White Supremacist? Not necessarily," BLOOMBERG (Aug. 21, 2017), https://www.bloomberg.com/news/articles/2017-08-21/can-you-fire-someone-for-being-a-white-supremacist.
[150] *Briskman v. Akima, LLC*, Case No. 2018-5335, 2018 WL 1896070 (Va. Fairfax County Ct., April 4, 2018).
[151] *Briskman v. Akima, LLC*, Case No. 2018-5335 (Va. Fairfax County Ct., June 29, 2018).
[152] *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006).
[153] Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 Texas Rev. L. & Pol. 295, 305 (2012).
[154] *Id*.
[155] CAL. LAB. CODE § 1101.

states that "[n]o employer shall coerce or influence … his employees through or by means of threat of discharge or loss of employment to adopt or follow … any particular course or line of political action or political activity."[156] "Political activity" under California law encompasses more than partisan engagements, such as participation in a social movement.[157] Although the statute is ambiguous on the extent of employee speech protected, the California law therefore minimally prohibits employers from compelling an employee to adopt or express particular political values, including at work. And while the statute can be read as adopting a generally accommodating approach to on-the-job political speech relative to other jurisdictions, the statute has never been interpreted so broadly. Workplace political activities and speech protections are even scanter in states like Colorado[158] and New York.[159] Statutes in those states are either expressly or implicitly limited to protections for off-duty activities.

Further, state laws are often unclear about whether employers can take action when an employee's political speech affects or dampens customer demand, or otherwise imperils workplace dynamics. To the extent lawful intervention turns on disruption to the employer's business, many laws are silent regarding the amount of disruption that will justify employee discipline, or how to define and measure such disruptions. In Connecticut, by comparison, employee speech rights are subject to the explicit qualification that an employee may be disciplined for speech that materially interferes with the employee's performance or his or her working relationship with the employer.[160] Both public and private Connecticut employees are nevertheless generally protected when speaking on matters of public concern.[161]

The friction between employee liberties and employer interests is particularly acute in the context of diversity and inclusion issues. Another critical consideration for employers in regulating employee political speech or activities therefore concerns the interaction with other state and federal laws. Employers face potential liability for failure to discipline employees for offensive or degrading remarks that relate to a protected class, status or characteristic. Google, for example, might have faced sexual harassment or sex discrimination lawsuits from female employees had the company declined to intervene after Damore's memo was released. Employers must therefore be conscious not only of what political activities or speech laws require, but how such activities impact other employees' rights to a secure and nondiscriminatory workplace. Conn. Gen. Stat. § 31-51q and statutes like it may partly resolve that question by permitting employers to regulate disruptive conduct.

State laws that permit significant restriction of employee political speech may also conflict with federal statutes. The National Labor Relations Act (NLRA), for one, protects employee speech directed at concerted action.[162] Because the NLRA protects employee

[156] CAL. LAB. CODE § 1102.
[157] *Gay Law Students Ass'n. v. Pac. Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).
[158] COLO. REV. STAT. § 8-2-108.
[159] N.Y. LAB. LAW § 201-d(1)(a).
[160] CONN. GEN. STAT. § 31-51q.
[161] *Trusz v. UBS Realty Inv'rs, LLC*, 123 A.3d 1212 (Conn. 2015).
[162] 29 U.S. CODE § 158.

speech concerning labor and management practices, most broadly discriminatory or offensive remarks are not protected. In the Google example, by contrast, Damore might argue that his memo sought to prompt a collective employee response by challenging, in Damore's view, harmful aspects of Google's working culture.

Employees face additional complications in establishing what speech is political in nature, and therefore potentially protected under state law. Neither Damore's memo nor the NFL protest explicitly call for political action, though both involve matters of public interest. Unlike off-duty political activities laws that clearly list covered conduct (e.g. voting or running for office), whether speech is "political" is necessarily evaluated on a case-by-case basis. Likewise, whether employee speech is protected on other grounds—e.g., as speech designed to effect concerted action—can alter an employer's calculus when evaluating a workplace incident. That subjectivity, along with balancing employers' competing anti-discrimination obligations, can make regulating employee speech especially difficult.

Although about half of employees are covered by political activities and employee speech laws nationwide, legislation and litigation in this area has been fairly sluggish in recent years.[163] With the surge of renewed interest in on-the-job speech protections, however, caution is urged in responding to sensitive workplace controversies involving political speech and conduct. As the Damore case study above demonstrates, employers may face different kinds of legal exposure for alternately disciplining or failing to adequately discipline an employee for offensive speech. The NFL example similarly illustrates the related issue of regulating expressive conduct, such as kneeling, that drives or influences customer preferences. These and other ongoing matters are likely to produce new cases that will continue to define the scope of employee political speech laws.

IV. Off-Duty Criminal Misconduct

Colleges and universities are often faced with decisions about how to respond to off-duty misconduct by administrators, faculty or staff. Off-duty misconduct, especially if it becomes public, can have significant negative impacts on the reputation of the institution. The nature of the misconduct, particularly criminal conduct, may also indicate that the employee is not fit to perform their job responsibilities. Co-workers may also be uncomfortable, or even fearful, of working with someone who has engaged in certain types of off-duty misconduct. It is generally recognized that employees' time away from work is private, and even proof of off-duty criminal misconduct may not be sufficient to take action against an employee. Courts and arbitrators uniformly require that a relationship between the off-duty conduct and the workplace be established before disciplinary action may be taken. In addition, guidance from the EEOC and laws in several states limit the use of arrests and convictions against employees. This section provides a summary of the factors to be considered in analyzing criminal off-duty conduct, and the circumstances under which discipline may be appropriate. This section will also address issues pertaining to outside employment, or "moonlighting."

[163] Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 Texas Rev. L. & Pol. 295, 305 (2012).

A. Nexus Between Off-Duty Criminal Conduct and the Workplace

The options available to employers seeking to discipline employees for criminal off-duty conduct depend first on the nature of the employment. At-will employees may generally be dismissed for any reason or no reason at all, with some exceptions.[164] This outline will focus on employees with protections against discipline except for just cause, through express or implied contracts, including collective bargaining agreements, civil service systems, employee handbooks and employment contracts.[165]

Courts and arbitrators are reluctant to impose discipline for off-duty conduct, unless there is a nexus between the off-duty conduct and the workplace.[166] There is a balance recognized between an employee's right to privacy, and the employer's need to efficiently operate its business. Arbitrator Clair Duff said that arbitrators should be reluctant to sustain discharges for off-duty conduct, "lest Employers become censors of community morals," but he agreed that "where socially reprehensible conduct and employment duties and risks are closely related, conviction for certain types of crimes may justify discharge."[167] As stated by an another arbitrator, "The right of management to discharge or suspend an employee for conduct away from his or her place of employment depends entirely upon the impact of that conduct upon the employer's operations."[168]

In determining whether a sufficient nexus exists between the conduct and employment, the following elements are often considered: (1) adverse impact upon the employer's reputation or business; (2) effect on the employee's ability to perform the job; (3) likely adverse impact of reinstatement on other employees.[169]

The impact of the off-duty conduct on the reputation of the institution is often the issue of greatest concern. When off-duty conduct may bring "considerable discredit to the employer," serious discipline, including discharge, may be sustained.[170] In *Bishop State Community Coll. v. Thomas*, a community college administrator pleaded guilty to a felony of leaving the scene of an accident, and in a separate incident, pleaded guilty to using his position as a school board member for personal gain, a misdemeanor.[171] The administrator

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[164] Exceptions to the employment-at-will doctrine include terminations that violate public policy, implied contracts for employment, and an implied covenant of good faith and fair dealing in the employment relationship. *See* Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, Monthly Labor Review (January 2001); Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, Nebraska Law Review, Vo. 87 (2008).

[165] *See* Michael B. Fabiano, *The Meaning of Just Cause for Termination When an Employer Alleges Misconduct and the Employee Denies It*, Hastings Law Journal, Vol. 44, Issue 2 (1993).

[166] Marvin F. Hill, Jr & Mark L. Kahn, *Discipline and Discharge for Off-Duty Misconduct: What are the Arbitral Standards?*, in Arbitration 1986: Current and Expanding Roles 121, 124, Proceedings of the Thirty-Ninth Annual Meeting, National Academy of Arbitrators (1986) (hereinafter "Hill & Kahn"); Frank Elkouri & Edna A. Elkouri, How Arbitration Works, 6th Ed. (2003) (hereinafter "Elkouri & Elkouri").

[167] *Chicago Pneumatic Tool Co*., 38 LA 891, 893 (Duff, 1961).

[168] *City of New Hope v. International Operating Eng'rs Local 49*, 89 Lab. Arb. Rep. (BNA) 427, 430 (Bard, 1987) (citing Elkouri).

[169] *See* Robert A. Kearney, *Arbitral Practice in Employee Off-Duty Misconduct Cases*, 69 Notre Dame L. Rev. 135, 137-41 (1993) (hereinafter "Kearney"); *W.E. Caldwell Co*., 28 LA 434 (Kesselman, 1957).

[170] *New York State Dep't of Corrections*, 86 LA 793 (LaManna, 1985).

[171] 13 So.3d 978 (Ala. Civ. App. 2008).

was terminated by the community college because of the off-duty criminal conduct, but his termination was overturned by a hearing officer who found that his off-duty conduct did not adversely affect his work performance.[172] However, the hearing officer's decision was reversed in state court. The court found that, because of his criminal convictions, the administrator's retention of his job had damaged the reputation of the college, noting evidence of negative opinions from the community and a decline in student enrollment that the college attributed to the publicity about the criminal conduct.[173]

The effects of publicity may now be magnified where information about an employee's off-duty misconduct may be easily discovered and disseminated via the internet and social media. What once may have been a private matter now has a greater potential to be public.[174]

For serious crimes, a nexus to the workplace may be found even without evidence of impact on the workplace.[175] The potential for adverse public opinion upon such an employee's reinstatement may establish a sufficient nexus on its own. An employee who was charged with beating and holding a woman captive in his house was suspended pending outcome of the criminal proceedings. The employee was subsequently convicted and sentenced to 28 years in prison. An arbitrator found that the conduct was of such an egregious nature that the employer had just cause to suspend him pending the resolution of the criminal case, because of widespread publicity and the potential impacts on the reputation of the business and the effect it could have on co-workers and customers.[176]

Similarly, Arbitrator Donald Crane, in an unpublished 1985 decision, upheld the termination of an employee who was charged with murder and pleaded guilty to a lesser charge of manslaughter. Basing his decision on the impact on the employer's reputation, he found no need for independent evidence of damage. He said "[i]t is intuitively obvious that the Company's image would be tarnished by [grievant's] reinstatement. C___ is a small town and [grievant's] crime was headlined in the local press. Literally every citizen was aware of the incident and it would be naïve to assume that the public would fail to associate her with the Company should she return to the job."[177]

In addition, if the employee's position is one of higher authority or public visibility, establishing the requisite nexus will be more likely.[178] This is especially true for public employees, who are held to a higher standard in the public trust.[179] A recent example that

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[172] Id. at 984-85.
[173] Id. at 987-88.
[174] See Daniel V. Johns, *Toward a More Modern Application of the "Nexus to the Workplace" Test: Arbitral Considerations in Off-Duty Employee Misconduct Cases*, Harvard Negotiation L. Rev. Vol. 23, p. 1-27 (2017) ("[a]rrests that at one point would have only been covered in a paragraph blurb in the back of a printed newspaper can be uncovered easily now in court documents at the click of a button").
[175] Some off-duty conduct is considered so egregious that the nexus between the conduct and employment "speaks for itself." *Graham v. U.S. Postal Service*, 49 MSPR 364, 367 (postal employee convicted of first degree sexual abuse of 14-year-old girl).
[176] *Westvaco Corp*., 94 LA 169 (Abrams, 1990).
[177] Hill & Kahn, at 128-29.
[178] Memorandum for All Department Employees: Off-Duty Conduct, U.S. Dep't of Justice (January 29, 2016), p. 2.
[179] Id.

bears watching involves Charles Lieber, a professor and chair in Chemistry and Chemical Biology at Harvard University, who was charged in January 2020 with lying to Pentagon investigators and the National Institutes of Health about allegedly entering into secret agreements with a Chinese university and a Chinese government program. He has been arrested, and placed on administrative leave by the university. There is a clear nexus between the work of a prominent faculty member and the misconduct in which he allegedly engaged, and the negative impacts on the reputation of the university seem obvious.

By contrast, in *Goddard Space Flight Ctr*., an electrician who repaired and maintained electrical systems at a NASA space flight center was arrested for attempting to buy cocaine from an undercover police officer. He ultimately pleaded guilty to felony possession of cocaine with intent to distribute. The employer conducted an investigation, and then terminated the employee, citing the seriousness of the crime and loss of trust in his ability to perform the duties of his position. However, an arbitrator overturned the dismissal, based in large part on the employee's role as an electrician. He found that the employee was not in a "unique position of trust or responsibility." In addition, while recognizing the seriousness of a felony drug conviction, the arbitrator did not find a relationship between the conduct and the employee's job duties.

Nexus may also be based on the relationship between the off-duty conduct and the employee's job duties. A nexus exists where the nature of the misconduct is closely related to the employee's job responsibilities.[180] In *Cisco v. United Parcel Serv., Inc.*, a UPS driver was arrested for theft and trespass that occurred while he was making deliveries. The court found that the off-duty criminal conduct arose from the performance of his regular duties, and his termination was justified as his conduct was directly related to his job.[181]

The effects on other employees (or in the case of a college or university, certainly students) may be considered in assessing whether sufficient nexus exists. In *Archer Daniels Midland Co*.,[182] an employee was terminated after a road rage incident, in which he stopped his car and fought with another driver, stabbing him in the leg. The incident received extensive media coverage. The employer did an investigation, and then discharged the employee.[183] In arbitration, the union argued that the employee was off-duty and the employer was not identified in the media coverage. However, the arbitrator sustained the termination, despite not finding a direct impact on the employer's reputation.[184] He determined that information on the employee's arrest was well known within the company because of the media coverage. This established a nexus through the effect of the coverage on the employee's ability to work with co-workers, as other employees became aware of the employee's "anger and inclination to violence."[185]

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[180] Kearney at 139.
[181] 328 Pa. Super. 300, 307-08 (1984) (the court also found that the conduct also created the inference that the reputation and business activity of UPS were jeopardized).
[182] 135 LA 1392 (Fitzsimmons, 2015).
[183] Id. at 1396.
[184] Id. at 1398.
[185] Id. at 1397. *See also Doe v. Dep't of Justice*, 113 M.S.P.R. 128, 138 (2010) (information about FBI employee videotaped sexual encounters with two female employees upsetting to employees and interfered with their work).

If an employee is charged with a crime, but the charges are ultimately dismissed or the employee is otherwise not found guilty, the employer may still impose discipline where its own investigation substantiates misconduct that has a sufficient nexus to the workplace. In *Bailey v. Dep't of Public Safety and Corrections*,[186] a sergeant with the Louisiana State Police was arrested for driving while intoxicated and careless operation of a vehicle.[187] He was acquitted after a trial, but was still terminated after an administrative hearing.[188] The court noted that "acquittal on a criminal charge does not preclude a civil service disciplinary action based on the same set of facts."[189] The court found that the investigation by the State Police independently provided sufficient evidence that the sergeant had been driving while intoxicated, and had violated other State Police rules.[190] It is always important to do a thorough investigation independent of any criminal proceedings, especially in cases that do not result in conviction.

An employee's inability to report for work because of incarceration may also provide sufficient nexus for discipline. Arbitrators will often uphold discharge when an employee is unavailable for work based on a situation they have created themselves through criminal conduct.[191] Factors such as the length of confinement, the cause for the confinement (resulting from arrest, or because of a sentence), the seriousness of the conduct, and the extent to which the absence negatively affected the employer, may be taken into account.[192]

EEOC guidance and laws in several states prohibit discrimination based on criminal history, and require a direct relationship between the conviction and the job duties in making employment decisions.[193] The EEOC has determined that employers' use of criminal history records in employment decisions, including hiring, retention and promotion, may result in discriminatory disparate treatment or disparate impact. In order to defend the use of criminal records in a disparate impact case, the employer must demonstrate that its actions are job related for the position and consistent with business necessity. The Guidance also discusses differences between arrest and conviction records. EEOC stresses that the fact of an arrest does not establish that criminal conduct has occurred. The employer may inquire, however, about the circumstances surrounding an arrest, and may be justified in taking action based on the underlying facts. A conviction record will generally provide sufficient evidence that a person engaged in particular conduct. Under the EEOC guidance and state laws where they apply, an employee may be disciplined based on a conviction, or the circumstances surrounding an arrest, only where

[186] 951 So.2d 234 (La.App. 1 Cir. 2006)
[187] *Id*. at 238.
[188] *Id*. at 239.
[189] Id. at 240.
[190] *Id*. at 240-242.
[191] Hill & Kahn at 131-33.
[192] *Sperry Rand Corp*., 60 LA 220, 222 (Murphy, 1973).
[193] *EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, as amended, 42 U.S.C. § 2000e et seq.; Ariz. Rev. Stat. § 13-904(E); Colo. Rev. Stat. Ann. § 24-5-101; Conn. Gen. Stat. § 46a-80; Fla. Stat. § 112.011; Ky. Rev. Stat. § 335B.020; La. Rev. Stat. § 37:2950; Minn. Stat. § 364.03; N.M. Stat. §§ 28-2-3, 28-2-4, 28-2-5 and 28-2-6; Wash. Rev. Code §§ 9.96A.020, 9.96A.060 and 9.96A.030; Haw. Rev. Stat. § 378-2.5(a); Kan. Stat. Ann. § 22-4710(f); N.Y. Exec. Law § 296(15); N.Y. Correct. Law §§ 750-753; 18 Pa. Cons. Stat. § 9125; Wis. Stat. § 111.335.

there is a relationship between the conduct and the job duties. This is also true of off-duty misconduct that occurred prior to employment.

B. Outside Employment

Employers sometimes desire to regulate outside employment, often out of concern that it will interfere with their ability to perform their primary job, or that a conflict of interest exists.

One approach is to implement a "moonlighting" policy restricting outside employment. There are a number of limitations on an employers' ability to restrict outside employment, however. Some states, including California, have laws preventing employers from taking adverse action for employees' lawful off-duty activities, including outside employment.[194] In addition, the National Labor Relations Board recently ruled that a moonlighting policy preventing employees from having another job that was inconsistent with the company's interests or could have a detrimental impact on the company's image violated Section 7 of the National Labor Relations Act.[195] The NLRB administrative law judge stated that the rules could interfere with organizing efforts, including "salting," or taking a job at another workplace with the intent of assisting with organizing efforts. Some states have also enacted noncompetition laws, which prohibit employers from entering into noncompetition agreements with lower-wage workers.[196]

Instead of a moonlighting policy per se, it may be more effective to develop and implement policies on conflicts of interest and protection of confidential and proprietary information, and to enforce conduct rules pertaining to job performance or misconduct.

[194] CA Labor Code § 96(k); § 98.6; Colo. Rev. Stat. § 24-34-402.5; N.D. Cent. Code § 14-02/4-03.
[195] *Nicholson Terminal & Dock Co*., Case 07-CA-187907 (NLRB May 16, 2018).
[196] New Hampshire S.B. 197; Maine H.B. 733; Maryland S.B 0328; Oregon H.B. 2992 (eff. January 1, 2020); Rhode Island S.B 0698 (eff. January 15, 2020); Washington H.B. 1450 (May 8, 2019).