

# PUBLICATION

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## Ah, Social Media: Blurring the Lines Between Work Life and Personal Life

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Andy Warhol is quoted as saying, "In the future, everyone will be world-famous for 15 minutes." How prophetic you were Andy. These days a single post on social media can travel around the world faster than you can say Snap Chat. Social media is a circus where anything goes and the lines between persons/personas, private/professional lives and what is "acceptable" public content is often blurred. John Doe can become a "cyber celebrity" gaining notoriety and attention from posting funny or controversial photos, videos or opinions. Employers now have to live in and address this new cyber world; especially when actions by their employees are recorded and blasted to the world.

On the positive side, social media can act as pseudo-managers, providing omnipresent eyes and ears on employee behavior. When a bystander posted a [video on YouTube](#) showing a FedEx driver hurling packages into the back of her truck, FedEx immediately posted a response video and terminated the employee. In Atlanta, a Petco employee was fired after a customer posted a [video of the groomer](#) "roughing up" one of the dogs on his grooming table. And just when you thought you had seen it all, a photo of a [Taco Bell employee licking a stack of taco shells](#) made went viral. (Taco Bell issued a statement that the photo was part of an internal contest and the shells were not served to customers but the posting of the photo on social media was a violation of the franchisee's policies). Although these cases can be public relations nightmares for the company, they are straightforward in terms of employment laws. The posts are *prima facie* evidence of employees violating company policy. As long as the employer is consistent in its treatment of employees, firing employees for those posts pose little risk to the company. What is less clear, however, is what an employer can do when employees are "caught on tape" behaving badly *outside* the workplace.

Before a few weeks ago, you may not of ever heard of Britt McHenry. The 28-year-old ESPN reporter had only been working for the network a little over a year when a [surveillance video](#) of her ranting and insulting a clerk at a towing company went viral. Some of the gems McHenry is recorded saying include:

"I'm in the news sweetheart. I will \*\*\*\*\* sue this place."

"That's why I have a degree and you don't."

"I wouldn't work at a scumbag place like this. Makes my skin crawl even being here."

"Do you feel good about your job? So, I could be a college dropout and do the same thing?"

"Maybe if I was missing some teeth they would hire me, huh?"

"I'm on television and you're in a \*\*\*\*\* trailer, honey. Lose some weight, baby girl."

ESPN immediately suspended McHenry for a week but many critics posted that they didn't think ESPN's discipline went far enough. Just this week, Ontario's largest electric company, Hydro One, terminated a six-figure employee when he was filmed at a soccer match [heckling a female reporter](#) and defending vulgar comments made by another fan. Hydro One cited a zero tolerance for discrimination and harassment of any

type. Although these actions were not during the employees' work time, the publicity of their poor behavior motivated their employers to take swift action. But most posts don't go viral. Employers often learn of incriminating employee posts/activities from either monitoring employees' social media activity, happenstance or reports from a co-worker.

So can an employer terminate an employee for off duty conduct? As is the customary (and admittedly frustrating) answer in employment law: *maybe*.

The cornerstone of employment law is the at-will doctrine. This doctrine provides that, absent an employment contract, employers or employees may end the employment relationship "at will," meaning for any reason – good or bad – as long as it is not an unlawful reason. Taken to the logical conclusion, it would seem the at-will doctrine would allow an employer to discipline or terminate an employee for offensive or illegal off duty conduct. Unfortunately, the law is not always logical. In some cases, one of the myriad of federal, state or local employment laws will prohibit an employer from taking action for off-duty conduct. And then there is always the EEOC to consider . . .

When an employee's off-duty conduct is illegal (e.g. when Baltimore Raven running back Ray Rice was caught [on surveillance tape](#) knocking his then-fiancée unconscious) it seems clear that employers (even you, NFL) should have the right to terminate the employee. But not so fast . . . the [EEOC has taken the position](#) that racial minorities are disproportionately more likely to get arrested and convicted of criminal offenses and have harshly criticized blanket policies that allow employers to discipline employees for any criminal records/activity.

But what about an Instagram post of the vice president dancing provocatively on the bar at a local watering hole? What about legal conduct that an employer finds offensive, repugnant or just downright distasteful? Or off-duty conduct that has an effect on the employer's health care costs – such as smoking or obesity? Again, employers must look to state or local law to see if the off duty conduct is protected. California, Colorado, New York and North Dakota have enacted very broad "lifestyle discrimination" statutes that protect employees' right to engage in *any* lawful activity outside the workplace during non-working hours. Some states – Illinois, Minnesota, Montana, Nevada, North Carolina and Wisconsin – have taken a slightly less expansive approach and provided protection for employees use of "lawful products" or "law consumable products." Thirty states have laws that protect an employee's right to off-duty tobacco use.

But don't despair. The bottom line is that employers have the right to terminate for any *legal* reason. Here are some simple questions to consider before taking action based upon social media posts (or any information regarding off-duty conduct):

1. **Does your Code of Conduct or Social Media Policy address this behavior?** The first place to look is your own policies. Does your policy address the questionable behavior? Have you been consistent in implementation of that policy? With the National Labor Relations Board's recent crackdown on social media policies, you should be careful that your social media policy is narrowly drafted, provides concrete examples and does not interfere with an employee's rights to "protected concerted activity" under the National Labor Relations Act (which includes the right of the employee to discuss – and criticize – the terms and conditions of employment).
2. **Does the off-duty conduct negatively affected the employee's job or the business of the employer (such as employee morale, reputation, relationship with clients)?** There is less risk for termination when you can tie the off-duty conduct with job performance or negative impact on the company.
3. **Is there an applicable federal, state or local law that protects the employees' off-duty conduct?** This is when you need to seek counsel. An attorney can help you analyze the behavior in terms of applicable employment laws.

4. **What are the ramifications of applying this policy consistently?** Sometimes in the heat of the moment or analyzing the facts of a particular situation, you may be ready to take immediate action. It is always a good idea to stop a moment and think about what would happen if you uncovered the same behavior with your most productive, key employee. Would you take the same action? You want to be consistent in your treatment of similar off-duty behavior.