



Off-Duty Employee Conduct: Where HR Can (and Can't) Legally Intervene

September 24, 2026

Today's agenda

1Federal
Protections**2**

State Rules

3Drug &
Alcohol Use**4**

Harassment

Today's session is being recorded! The recording will be sent to your email within 24 hours of the conclusion of the webinar.

HRCI and SHRM credits will be provided at the end of the program—please make note of them when they are shared, as they can not be shared after the event is completed.

Today's program is general education information, not legal advice. Always consult counsel with legal questions.

“At-will” employment

Neither side is obligated to continue an employment relationship

- Employers can fire employees, and they can quit, at any time and for almost any reason
- No probationary period, cause requirements, etc.

Most US employees are “at-will”

- Notable exceptions include Montanans, union members, and some contract employees

Still some limitations on firing employees

- E.g., discriminatory reasons
- But off-duty conduct is (most of the time) fair game



When *can't* you fire an employee?

1. For discriminatory reasons

- E.g., because of their race, religion, sex, etc.

2. In retaliation for reporting unlawful conduct

- E.g., filing a claim of discrimination, reporting safety or wage and hour violations, etc.

3. For exercising legal rights

- E.g., taking leave employers are legally required to offer, participating in government investigations, unionizing, etc.

4. For engaging in off-duty conduct that implicates one of the above protections

Federal EEO Protections

Off-duty conduct tied to a protected characteristic can turn a routine termination into a discrimination claim.

Title VII

Bars firing based on race, color, religion, sex, or national origin.

Americans with Disabilities Act

Bars firing based on disability; § 12112(b)(4) separately bars firing based on association with someone who has one.

Age Discrimination in Employment Act

Bars age discrimination against employees 40 and older.

Genetic Information Non-Discrimination Act

Bars use of genetic information—including family medical history—in employment decisions.

Pregnancy Discrimination Act/Pregnant Workers' Fairness Act

Bars discrimination based on pregnancy, childbirth, and related conditions; PWFA also requires reasonable accommodation.

Risk: If a protected characteristic surfaces at or near the time of termination—even indirectly, through off-duty conduct—expect a discrimination claim unless the real reason is well documented and unrelated.

EEO red flags

Firing shortly after any of these can look like—or actually be—discrimination, even if the stated reason is something else.

Religious observance

Attending Friday prayer, Sabbath observance, or a holy day that conflicts with a schedule change.

Disability-related medical care

A hospital stay, therapy visit, or visible recovery from treatment.

Pregnancy or fertility-related activity

A fertility clinic visit, prenatal appointment, or pregnancy loss.

Conduct linked to national origin

Speaking another language, or attending a cultural or immigrant-community event.

Association with a protected-class member

An interracial relationship, or caring for a family member with a disability.

Political activity that implicates a protected class

Attending a protest advocating for greater employment protections for disability or equal rights for individuals of a certain national origin, religion, etc.

Note: Title VII has no express association clause like the ADA's, but several courts have recognized associational discrimination claims (e.g., interracial relationships) under it.

Whistleblower protections

An employee only needs a reasonable, good-faith belief that something was wrong—they don't have to be right about it.

EEO & Wage-law anti-retaliation

Title VII, ADA, ADEA, and FLSA each bar firing an employee for opposing or reporting violations of the underlying law.

Sarbanes-Oxley § 806

Protects public-company employees who report suspected securities or shareholder fraud.

Dodd-Frank

Protects employees who report possible securities-law violations to the SEC.

False Claims Act

Protects employees who file or assist a qui tam suit alleging fraud on the government.

OSHA § 11(c)

Protects employees who report workplace safety or health hazards— one of 20+ whistleblower statutes OSHA enforces.

Risk: Firing someone soon after they report a concern (even informally) creates a strong inference of retaliation, regardless of whether the underlying complaint has merit.

Retaliation red flags

When an employee engages in any of the following activities, employers must be cautious about how they proceed.

Filing an EEOC, OSHA, or SEC complaint

This applies when an employee files a complaint after hours or from home.

Cooperating with a government investigation

Includes responding to a subpoena outside (or during) work hours.

Filing a qui tam lawsuit

I.e. A civil lawsuit under the False Claims Act claiming fraud against the government.

Reporting suspected fraud, safety issues, or wage violations

E.g., Making a report to a regulator or hotline.

Consulting a lawyer about a potential claim against the company

This is likely protected even before an employee has actually filed anything, and even if they never do.

Protected legal rights

These statutes prevent employers from disciplining employees who exercise a legal right.

National Labor Relations Act § 7

Protects union activity and “protected concerted activity” among any employees, union or not.

Family and Medical Leave Act

Protects eligible employees who take or request job-protected leave; § 2615 bars interference and retaliation.

Uniformed Services Employment and Reemployment Rights Act

Protects employees who serve in the uniformed services, including National Guard and Reserve duty; § 4311 bars discrimination.

Fair Labor Standards Act

Protects employees who raise unpaid-wage or overtime concerns; § 215(a)(3) bars retaliation.

Risk: Firing someone soon after they report a concern (even informally) creates a strong inference of retaliation, regardless of whether the underlying complaint has merit.

Unsettled: NLRB composition and enforcement priorities have shifted repeatedly amid 2025–2026 board-quorum litigation, but the Section 7 right itself—and an employee's ability to file an unfair-labor-practice charge—remain in place regardless of the Board's makeup.

Rights red flags

Each of these is a legal right an employee is exercising, not a reason for discipline.

Engaging in union activity

Including attending a union meeting, organizing drive, or handbilling outside of work

Discussing pay or working conditions with coworkers

This could be in person, over the phone, or on social media, and conversations (or posts) shared with people outside your organization are likely protected too.

Taking approved FMLA leave

This applies to all types of protected leave, regardless of what the employee uses it for.

Serving a National Guard or Reserve drill weekend

Or engaging in any other official activity related to an employee's membership in the armed forces

Raising a wage-and-hour concern

Like concerns about unpaid overtime or improperly calculated work hours

Before you discipline over off-duty conduct:

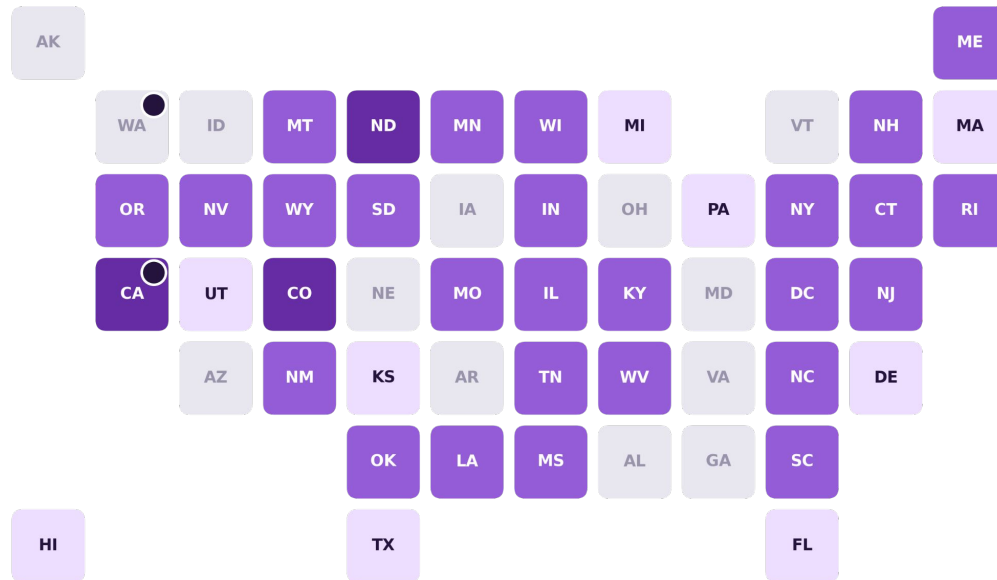
1. **Ask “why now?”**—did the conduct surface only after a protected disclosure, leave request, or protected trait became known?
2. **Document the legitimate, nondiscriminatory reason** before the decision: Don’t wait until after a claim is filed.
3. **Treat close timing between protected activity and discipline as a red flag** worth a second look.
4. Remember: **Many states layer additional “lawful off-duty conduct” protections** on top of this federal baseline.

This overview is general information, not legal advice. Consult counsel before acting on a specific discipline decision.

State off-duty conduct protections

There is no general federal off-duty conduct law. States have created a patchwork of protections

- **Broad lawful-activity protection:**
 - CA, CO, ND
- **Lawful products, substances or tobacco:**
 - 26 jurisdictions
- **Category-specific protections:**
 - 9 jurisdictions
- **Many jurisdictions don't protect off-duty conduct**
- **Localities can add another layer:**
San Francisco, Seattle



Four jurisdictions protect (almost) everything

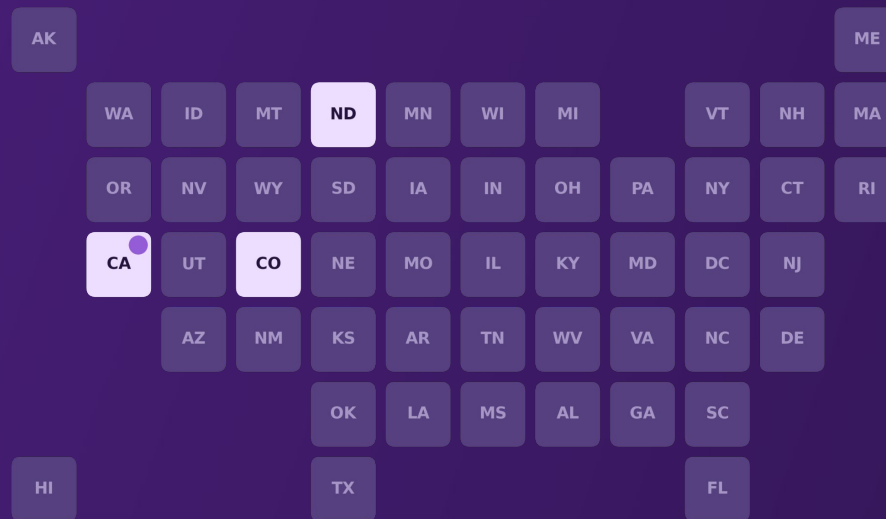


California: Any lawful conduct, off-duty, and off-premises.

Colorado: Any lawful off-duty activity. Two exceptions: a bona fide occupational requirement, or a conflict of interest.

North Dakota: Any lawful off-duty activity off the employer's premises that is not in direct conflict with the essential business-related interests of the employer

San Francisco: Any personal relationship, organization, or activity.



States layer on top of the federal floor

Most state off-duty protections aren't new categories, but instead extended federal protections.

Association or collective action
(NY, TX, San Francisco)

Federal parallel: NLRA § 7

Military & uniformed service
(NM, WI)

Federal parallel: USERRA

Reproductive health decisions
(DE, DC, HI, KS, MI, PA, NY, Seattle)

Federal parallel: Title VII & PWFA

Firearms & carry permits
(FL, IN, MI, ND, WV)

No federal parallel

Off-duty use of lawful products



Alcohol and lawful products:

IL, MN, MT, NV, NY, NC, WI

Separate tobacco protections:

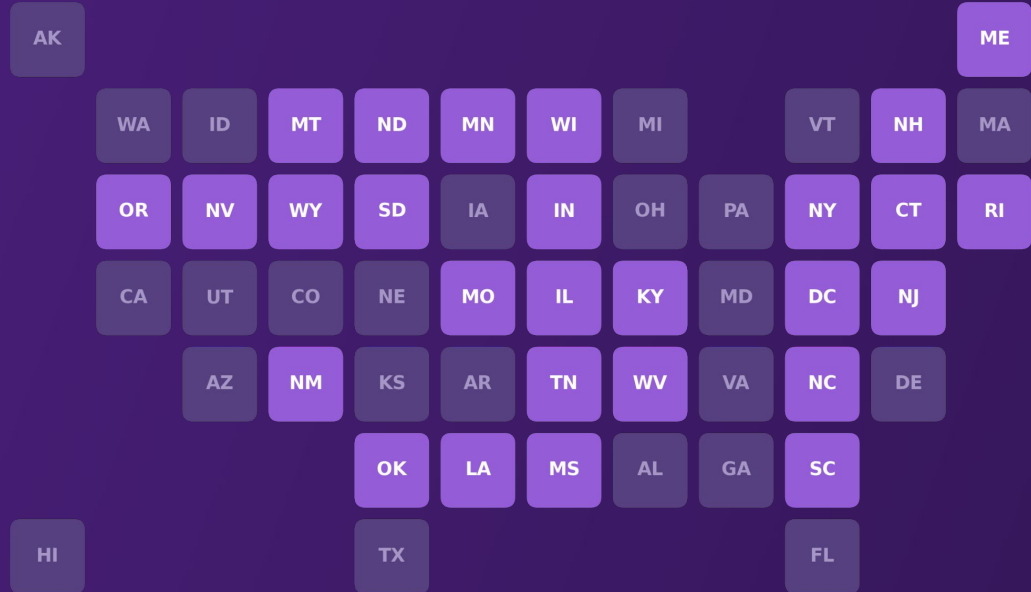
22 more jurisdictions

Often exceptions for:

Performance, safety, federal contract compliance

The carve-out that matters:

IL preserves zero-tolerance cannabis policies despite legalization



State of marijuana protections



Medical marijuana protected:

18 states

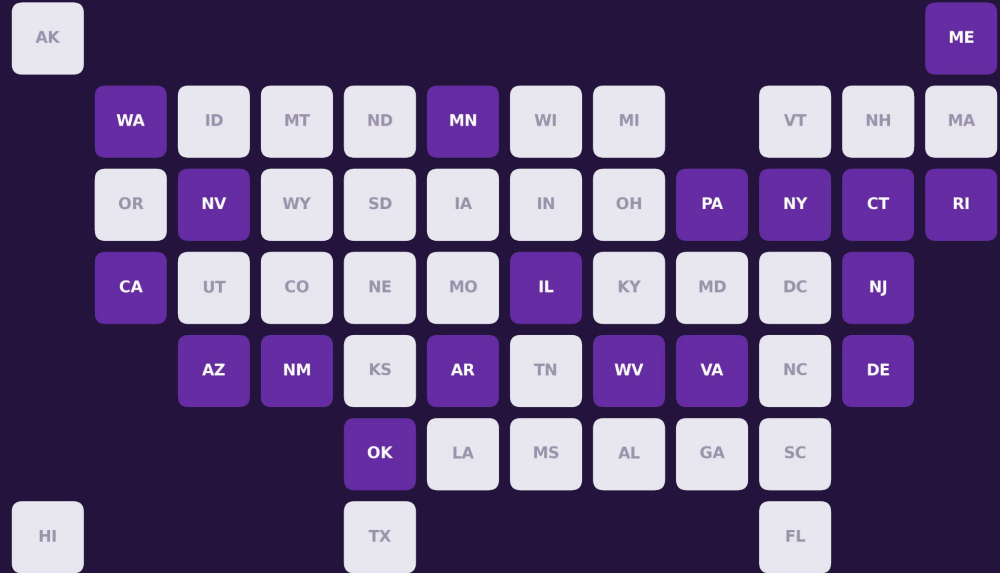
Off-duty use protected:

CA, CO, CT, MN, MT, NV, NM,
NY, WA

Pre-offer testing banned:

DC, NYC, Philadelphia

**Reminder: On-duty use or
impairment can always be
prohibited.**



The random drug testing divide

Most restrictive



Least restrictive

Banned outright

San Francisco, CA
Boulder, CO
Vermont
Rhode Island

**Safety-sensitive
roles only**

California
Connecticut
Massachusetts
Minnesota
Montana
New Jersey

**Broadly permitted
with conditions**

Maine
Mississippi
Oklahoma

No restrictions at all

Most states

Note: Reasonable suspicion testing survives everywhere, but the suspicion has to be built.

Drug testing red flags



The largest risk factor? Reusing one drug testing policy or random-testing program across all states.

Missing the written drug testing policy mandate	Boulder, ME, MN MI, OK, RI, VT
Terminating on a first positive test	VT, RI, MN
Jurisdictions that only require notice after a positive test	MD, NJ, NC
Skipping notice or not providing it early enough where it's required	CA, Boulder Colorado, CT, HI, ME, MN, MS, MT, OK, RI, VT

States with hard notice deadlines:

Oklahoma **(10 days)**

Maine & Mississippi **(30 days)**

Montana **(60 days)**

When is an employer liable for an employee's harassment?

Coworker → Coworker

Negligence

Employer is liable if it knew, or should have known, and failed to take prompt corrective action.

Supervisor → Employee

Strict liability

Generally, employer is automatically liable if harassment led to firing, demotion, punishment, bad review, or other tangible employment action

What is a “hostile work environment?”

- **Conduct must be objectively and subjectively hostile.**
 - Objective hostility: was the conduct sufficiently severe or pervasive to create a hostile work environment from the perspective of a reasonable person?
 - Subjective hostility: did the complainant actually find the conduct hostile
- **Conduct both in and outside the workplace can be considered.**
 - Was there a connection to the workplace?
 - Did it happen at an employer-sponsored event?
 - Did it happen between a supervisor and employee?

Scenario 1: The DM'ing Manager

A manager starts following his direct report's personal Instagram, liking and commenting on her personal photos late at night, and eventually sends her a flirtatious direct message. She never responds. She mentions it to a coworker, who reports it to HR.

Since this all happened on personal social media, off the clock, using personal devices—is the company exposed to liability?

Our take: This is a supervisor, not a coworker, so we're on the stricter track. If this had turned into a bad performance review or lost promotion opportunity after she stopped responding, the company would be in a very tough spot with almost no defense available.

Even without that, the company now has notice, and notice doesn't have to come from the victim herself or in writing to count—secondhand (like here) is enough. Just because this happened on a personal social media account and off-the-clock timing don't mean this is a problem the employer can ignore. In states like California or New York, this is an even easier case for the employee, since the bar for what counts as harassing conduct starts out lower there.

Scenario 2: An Off-Duty Assault

Several months after a new employee is hired, a coworker discloses that the new employee sexually assaulted them a month before that new employee was hired. It wasn't reported to police. The employee says they don't want to work directly with this person.

Is this a situation the employer can—or should—intervene in?

Our take: The original assault probably isn't a workplace harassment claim in the traditional sense, since it predates the job and had nothing to do with work. But that's not the end of the analysis. The moment an employee tells you this, you're on notice of a real problem: Two people who now have to coexist at work, one of whom says they don't feel safe. Your duty to act reasonably starts then, regardless of when or where the underlying conduct happened.

So yes, you can (and generally should) do something: Look into it, and seriously consider whether these two people need to keep working together. Don't just tell the employee to work it out on their own.

Scenario 3: The Holiday Party

At the company's annual holiday party—held off-site, after hours, with an employer-provided open bar—one employee repeatedly corners a coworker with unwanted advances in front of others. She reports it to HR the following Monday.

Because this happened off-site, after hours, and involved alcohol, is the company off the hook if it does nothing?

Our take: This is one of the more straightforward scenarios. Events you sponsor, host, and pay for—parties, retreats, off-sites—are treated as an extension of the workplace.

It doesn't matter that harassment happens at 9pm in a hotel ballroom. If you know, or should know, something happened there and you do nothing, you can be liable. If this had been a supervisor doing the harassing, the employer could be automatically liable.

Scenario 4: The Private Party

Two coworkers separately attend a mutual friend's private birthday party on a Saturday night—the company has no connection to the event at all. One makes repeated unwanted advances toward the other.

Does this incident expose the employer to a hostile work environment claim?

Our take: When it's purely personal, off-duty contact with no connection to the job, the underlying conduct itself is not likely to be the company's problem. But that might change if, for example, the employee reports the incident to HR.

If this comes to you as a complaint, and especially if the tension between these two people is now playing out at work in front of the team, you have a workplace issue to manage, regardless of where the initial incident happened. And in states with a lower bar for what counts as hostile conduct, that kind of spillover into the workplace alone can be enough to support a claim.

Scenario 5: The Single Comment

At a company-sponsored off-site retreat dinner, a manager makes one graphic, sexually explicit comment to a direct report, in front of several colleagues.

Is that single comment, by itself, enough to make the employer liable?

Our take: It depends on where you are. Under federal law, a single comment can technically be enough, but courts tend to want it to be genuinely extreme. Otherwise, you have to show a pattern of behavior like this to bring a claim. States like California and New York don't require a pattern at all—a single, sufficiently offensive comment can get support a hostile work environment claim.

Even if you're not in a jurisdiction where a single incident can lead to a lawsuit, this is something you need to proactively address. If you don't, a single remark that goes unchecked could lead to more similar remarks, which taken together could subject you to liability.

Off-duty harassment: Takeaways

1. **Off-duty doesn't mean off the hook.** The real question is the connection to the job.
2. **Once you have notice, act reasonably.** Once you know about harassment, wherever it took place, take prompt and reasonable action.
3. **Know your state law.** Some states like CA, NY, IL, and WA have more strict requirements than federal law.
4. **Provide harassment training that addresses off-duty conduct.** This should include specific training for managers.
5. **Address off-duty conduct in your anti-harassment policy.** This sends a clear message that you don't tolerate harassment even if it happens after work.

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