



Preventing Off-Duty Employee Access

By Reyburn Lominack and Matthew Korn (Columbia)

Many employers prohibit off-duty employees from accessing the workplace. This is particularly true of employers in the hospitality, healthcare, and manufacturing industries, where there is a premium on ensuring guest, patient, and employee health and safety. Recently, the National Labor Relations Board issued yet another decision striking down an employer's off-duty employee access policy, finding the policy unlawfully interfered with the right of employees to engage in protected concerted activity. *J.W. Marriott at Los Angeles Live*

In effect, the Board has presented employers with a classic Hobson's Choice: either maintain a policy prohibiting off-duty employee access for any reason, or have no off-duty access policy at all.

Recent Decisions Limiting Off-Duty Access Policies

On September 28, 2012, the Board held that a hotel employer's policy prohibiting off-duty employees from accessing interior areas of the hotel without prior approval of management violated the National Labor Relations Act. Relying on a decision from 1974, the Board found that because the hotel's policy did not uniformly prohibit off-duty employee access to the property for *any and all* reasons, it was unlawful to prohibit access for only some reasons, particularly where approval of those reasons was subject to management's discretion.

In other words, under the Board's rationale, the policy must either allow all off-duty employees to access the property, or it must forbid all off-duty employees from accessing the property. Because the hotel's access policy gave management discretion to decide on what grounds an off-duty employee could return to the property, it was unlawful.

The Board's most recent decision follows a pair of off-duty employee access cases decided over the past year. In December 2011, the Board found that a hospital employer's rule prohibiting off-duty employees from accessing the premises except for "hospital-sponsored events," including retirement parties and baby showers, violated the Act.

Similarly, in July 2012, the Board struck down a hospital employer's policy to the extent that it prohibited off-duty employees from accessing the hospital except for "hospital-related business." In both of those cases, as in the most recent case, the access policies at issue permitted limited exceptions, which arguably did not include the right of employees to engage in protected concerted activity.

Board Not Unanimous

The Board's sole Republican Member, Bryan Hayes, (the Board currently has four members and one vacancy) dissented in all three off-duty employee-access cases decided this past year. According to Hayes, the 1974 case on which the majority relies does not require a blanket prohibition on all off-duty access. In his most recent dissent, Hayes wrote that "requiring employers to prohibit all access in order to prohibit any makes it virtually impossible for an employer to draft an enforceable rule restricting off-duty employee access."



Hayes continued, "The Act cannot reasonably be interpreted to force employers to choose between inhuman rigidity and giving off-duty employees free rein to the interior of their facilities." As Hayes implies, employers are faced with an impossible choice in determining how to safely address off-duty employee access.

Where Should Employers Go From Here

It remains to be seen exactly how rigid the Board will require employers to be with respect to maintaining and enforcing off-duty employee access policies. The Board majority's opinion suggests that, contrary to Hayes' dissent, employers need not maintain a blanket prohibition on all off-duty access in order for a policy to pass muster under the Act. Rather, the majority notes, an employer can create a narrow exception for "special circumstances." Unfortunately, the majority fails to define what those "special circumstances" are, forcing employers to act at their peril with respect to prohibiting off-duty employee access.

Without more specific guidance from the Board, and in light of the current Board's trend of finding employee conduct policies unlawful, you need to be cautious when including any exceptions in an off-duty access policy.

Our advice? Carefully review your access policies to ensure that managers do not have the discretion to decide under what circumstances an off-duty employee may access the premises. Policies should not permit access only for company events or business activities, as those exceptions would arguably exclude protected concerted activity.

Finally, remember that the Board can and will find off-duty employee access policies unlawful regardless of whether they are actually applied to discipline employees.

For more information contact the authors at RLominack@laborlawyers.com, MKorn@laborlawyers.com, or 803.255.0000.

Name, Rank and Serial Number

What you should and should not disclose when providing references

By Jim Holland (Kansas City)

True or false: When asked to give a reference for a terminated employee, you should provide only the person's name, dates of employment and, if asked, salary level? True. Furnish just about any other information and – assuming it's negative – the former employee could sue your company for, among other things, defamation.

To file a defamation lawsuit, the ex-employee first would have to obtain the information you supplied and also prove it was untrue. The possibility is slim that the inquiring employer would share your reference with a prospective employee, but it could happen.

What can ex-employers do to protect themselves from legal action? Enforce a name-rank-and-serial-number only policy when giving references for terminated employees? Here are two basic rules for giving and getting references involving terminated employees:

1. If you are the former employer, say as little as possible.
2. If you are the prospective employer, collect as much information as you can.

That advice normally generates a lot of “what ifs:”

What if the prospective employer asks if the terminated employee is eligible for rehire? If you are the ex-employer being asked this question, it is best to simply state that your company does not provide that information. If you are the prospective employer seeking the reference, always ask this question. Former employers will often respond, and a “no” response speaks volumes.

What if the terminated employee was talented, but just wasn't right for the job? It is okay to give a positive reference, but beware of the pitfall. The prospective employer will inevitably ask about the employee's shortcomings. If you discuss weaknesses, you've put your company at risk for a lawsuit. To avoid a misstep, if you choose to give a good recommendation, put it in writing and let it speak for itself.

What if you can't give a good reference? Is there a way to safely tip off the prospective employer that you wouldn't recommend the former employee? Again, the safest approach to protect your company is to provide just “name, rank and serial number.” If you feel compelled to provide more, the safest way to send the message that the prospective employer should look elsewhere is to simply state: “Do you have any other candidates you're considering?”

What if the terminated employee committed a crime, such as embezzlement, at your firm, then commits the same crime with the new employer? Can the new employer sue you for withholding information? Yes, there have been cases where the new employer sued the former employer for not disclosing negative information. But despite that, we think sticking to a policy of providing only name, employment dates and salary for all former employees is still the best approach.

What if you're hiring, and the previous employer discloses only the basics? How can you get enough information on which to base a hiring decision? Rather than going through their human resources department, try contacting the prospective employee's former supervisor, who may be more likely to give you information. Of course, it's wise for a company to require that all reference inquiries be directed to one source, typically the HR department, but not every company has such a policy.

If you expect your company could be asked to provide a reference for a terminated employee, establish a strict “name, rank and serial number” policy now. While you may wish to subtly warn the pursuing employer about a risk, it's best to remain tight-lipped. This is one time when saying very little should say a lot.

For more information contact the author at JHolland@laborlawyers.com or 816.842.8770.



With the presidential election coming on November 6, employers will be faced with employees wanting to take time to vote. Although most states have laws that afford employees the right to take time off from work in order to vote, these laws vary substantially from one state to the next.

For example, a few states go so far as to require paid time off, while others entitle employees the right to use accrued personal leave. Several states allow employers to require advance notice or proof of participation in the voting process. Others will actually impose criminal penalties upon those employers who discharge or otherwise penalize employees for taking time off to fulfill their voting responsibilities.

At least one – New York – requires employers to post a notice of employees' rights to take time off to vote in the workplace at least 10 days before the election. We've posted a 50-state chart on our website at www.laborlawyers.com, which set out the requirements in each state. You should review it for each state in which your company conducts operations and confirm that you are in compliance with the applicable laws and regulations.

As always, if you have any questions, please contact your regular Fisher & Phillips attorney.

The Hidden Safety Hazard – Domestic Violence

By Betsy Weintraub (Memphis)

As the holidays are approaching, you notice that Susan, one of your longtime employees with a near perfect attendance record, has missed several consecutive days of work due to an unspecified illness. When she returns to work, Susan looks like she has spent the past several days in the tanning bed. It seems unusual because Susan is so health conscious, but you shrug it off. Susan calls in sick again the next day.

When she returns to work this time, her face is plastered with heavy makeup. Even though it is warm in the office, Susan leaves her winter scarf snug around her neck for the next several days. Susan's department manager reports to you that Susan's work performance is sliding – she is not nearly as productive and efficient as she used to be. The manager also expresses concern over Susan's behavior. She seems withdrawn and edgy, sometimes overly emotional when the manager asks her about her work performance. You assure the manager that you will talk to Susan after the holidays.

A few weeks later, you invite Susan to your office for an informal meeting. She sits down in the chair across from you. That is when you notice the bruises. Her arms are covered with them, in various colors and sizes. Her fake tan is starting to fade. You try not to stare as you chat with Susan about her work. She assures you that she will do better; she has just had trouble concentrating lately.

As Susan returns to her desk, you flip through the employee handbook, even though you know that there is not a policy to guide you through this situation. You call your supervisor and tell him that you think one of the employees is a victim of domestic violence. "Are you sure?" he asks. You admit that you do not have any proof, but you have a strong feeling that something is going on at home. After a moment of silence, your supervisor tells you the best thing to do is just let it go. "It's a personal matter," he says, "we would not want to embarrass her or invade her privacy. Just let her be."

You try to ignore it. When Susan shows up at work one day with her arm in a cast, you accept her story that she fell in her driveway. When two of Susan's co-workers tell you that Susan came to work with a swollen lip and discolored cheek, you tell them to respect her privacy. When the receptionist mentions that Susan's husband has been calling ten to fifteen times a day, you send Susan an email reminding her of the company policy on personal calls at work. Susan's husband stops calling, but starts showing up at the office.

The first time, Susan seems a little nervous, but she smiles when her husband produces a bouquet of flowers from behind his back. When he shows up the next time, however, he doesn't have flowers. He takes Susan outside to the parking lot. When she returns to her desk fifteen minutes later, Susan seems upset, but you don't say anything. You would not want to embarrass her.

His visits become more and more frequent, and he always takes Susan outside the office to talk to her. Sometimes, when you leave work, you notice him sitting in his car, waiting in the parking lot. This goes on for weeks until, suddenly, one day, it stops. Susan's husband seems to have disappeared. He doesn't call or come by the office, and Susan seems to be returning to her old self. Her work and attendance improves and she stops wearing so much makeup. You feel a sense of relief, thinking that she must have finally left him. Your supervisor was right: the problem took care of itself.

A month or so later, your heart stops when you pull into the company parking lot. There are police cars everywhere. An ambulance. You run up to the EMTs just as they are loading Susan inside. There is so much blood on her face and hair that you hardly recognize her. She is unconscious. You turn around and see her husband as the police load him into the back of a



car. Another officer carefully picks up a hammer off the ground and places it in a plastic evidence bag. His latex gloves are covered in blood.

A Personal Problem?

When the effects of domestic violence reach into the workplace, employers need to address it as promptly and aggressively as they would address any other safety hazard. At the same time, domestic violence is unlike any other safety hazard. While many victims of domestic violence commonly exhibit some of Susan's behaviors described above, such as concealing or lying about injuries, erratic attendance, and work performance issues, they are not always easy to recognize. Similarly, perpetrators of domestic violence typically act out in private; in public settings, perpetrators may just seem overly protective of their partners or spouses.

But just because domestic violence occurs outside the workplace does not mean that employers should ignore it. The truth is that domestic violence and stalking is widespread in the United States. According to a 2010 report by the Centers for Disease Control and Prevention, one in four women and one in seven men have experienced "severe physical violence by an intimate partner at some point in their lifetime." One in six women has experienced stalking, much of which occurred through technological communications such as phone calls and text messages. Annually, approximately 12 million men and women are victims of intimate partner violence in the form of rape, physical violence or stalking. That averages out to 24 people per minute. Don't think it happens to your employees? Think again.

Do Something

Despite the prevalence of domestic violence in the United States, more than 70% of employers in this country do not have a program or policy that addresses any type of workplace violence. According to the Bureau of Labor Statistics, of the minority of companies that have policies addressing workplace violence, only 44% specifically address domestic violence. Most policies focus on coworker violence, customer/client violence, and criminal violence.

As a result, when a member of management does recognize signs of domestic violence, he or she is often in the uncomfortable position of the individual described above, unsure of what to do and afraid of embarrassing the employee. Likewise, a victim of domestic violence is not likely to communicate her fears, concerns about safety, physical injuries or emotional distress to management without clear guidance on who to talk to and assurance that such communication will not place her job in jeopardy.

There is not a solution to domestic violence, but there are ways to protect your employees, particularly in the workplace. First and foremost, do *something*. Even something as simple as recognizing Domestic Violence

Continued on page 4

The Hidden Safety Hazard – Domestic Violence

Continued from page 3

Awareness Month in October, supporting a charity event to stop domestic violence, or putting up a sign with law enforcement resources for victims, communicates to your employees that they do not have to keep their experiences to themselves. Your recognition of the problem as a community issue, not a personal issue, is important to encourage victims to come forward.

An even better way to encourage victims of domestic violence to communicate their fears to management is to tell them that it is okay to talk about it and who to talk to. Step out of the 70% of companies without a formal domestic violence workplace policy and create one. It's easier than you may think. Check with your Fisher & Phillips attorney. Or you can begin to create a basic policy in about 20 minutes by clicking on the "Create Your Policy" link at www.workplacesrespond.org.

Our Advice

As an employer, you have a legal responsibility to maintain a safe work environment for your employees. As a human being, you have an even bigger responsibility to watch out for dangers to your employees that are not readily apparent. Stalking, by definition, is "pursuing or approaching stealthily." Some abusive partners stalk their victims out in the open, constantly calling them at work or showing up at their workplaces unannounced.

A 1999 survey by the U.S. General Accounting Office found that approximately 50% of employed victims of domestic violence had experienced harassment at the workplace by their abusers. Often, however, an employer may not be aware that one of his or her employees is a victim of stalking until it is too late.

Victims of stalking often feel very alone, scared, and trapped. Some victims take extreme measures to hide from their stalkers, such as moving to another residence, changing phone numbers, changing their names and leaving their jobs. Imagine that one of these victims works at your

company. (In fact, you do not have to use your imagination if you employ at least six women; statistically, one of them has probably experienced stalking victimization).

Imagine that she began working for your company after going through the prolonged process of leaving an abusive spouse, obtaining an order of protection, moving to another part of the city, changing her email address and phone number, resigning from a job she loved, disassociating with her friends and even family members out of fear that he might hurt them, and now, finally, she is starting to feel safe again. No one at the company knows about her past, so no one thinks to ask whether she wants her picture from the company picnic posted on the website.

Stalkers know how to use Google just like anyone else. They also know that, if their victims change jobs, they are probably going to stay in the same profession. So while it may seem like a hassle to ask employees for permission before using their names or images on the company website, you could actually be saving their lives.

You can be even more active by encouraging employees who feel in danger to talk to Human Resources about it. Let them know that you want to protect them and you want them to always feel safe at work. Most workplace domestic violence occurs in the parking lot. Offer to have a security guard or a coworker escort them to and from their cars. Ask them if you can give a photo of the stalker to security or the receptionist, so that they know to call the police immediately if he is spotted on the premises. Alert those handling incoming phone calls that they are never to verify that she works there. Most importantly, be mindful of her situation – even if you don't know who she is.

The author is a former prosecutor and was Assistant District Attorney General for Memphis and Shelby Counties. She may be contacted at BWeintraub@laborlawyers.com or 901.526.0431.

The *Labor Letter* is a periodic publication of Fisher & Phillips LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have. Fisher & Phillips LLP lawyers are available for presentations on a wide variety of labor and employment topics.

Office Locations

Atlanta phone 404.231.1400	Houston phone 713.292.0150	New Orleans phone 504.522.3303
Boston phone 617.722.0044	Irvine phone 949.851.2424	Orlando phone 407.541.0888
Charlotte phone 704.334.4565	Kansas City phone 816.842.8770	Philadelphia phone 610.230.2150
Chicago phone 312.346.8061	Las Vegas phone 702.252.3131	Phoenix phone 602.281.3400
Cleveland phone 440.838.8800	Los Angeles phone 213.330.4500	Portland phone 503.242.4262
Columbia phone 803.255.0000	Louisville phone 502.561.3990	San Diego phone 858.597.9600
Dallas phone 214.220.9100	Memphis phone 901.526.0431	San Francisco phone 415.490.9000
Denver phone 303.218.3650	New England phone 207.774.6001	Tampa phone 813.769.7500
Fort Lauderdale phone 954.525.4800	New Jersey phone 908.516.1050	Washington, DC phone 202.429.3707

Are You A Federal Contractor?

You might be wondering why we would ask that question, but many employers sometimes don't know that they are considered a federal contractor. That's because companies often have contracts with other organizations that are contracted with the federal government – which indirectly makes them subject to affirmative action requirements.

It's important to ensure that you are ready for new compliance requirements soon to be imposed by the Office of Federal Contract Compliance Programs (OFCCP). Federal contractors will likely be required to provide statistics and track specific outreach efforts for disabled and veteran employees, as well as comply with new regulations on compensation.

We expect the new regulations to become final shortly. Now is the time to review your status to see if these regulations apply to you and to determine how to prepare to comply. Our OFCCP Practice Group attorneys can help. If you would like to learn more about OFCCP and how its new regulations could impact your organization, please contact your Fisher & Phillips attorney or the co-chairs of the OFCCP Practice Group: Cheryl Behymer CBehymer@laborlawyers.com or Tom Rebel at TRebel@laborlawyers.com.

Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters