

PAUL
HASTINGS

OFF-DUTY CONDUCT

Carson Sullivan

Sarah Besnoff

Lesley Marlin



OVERVIEW

- **How We Got Here**
- **Competing Interests of Employers and Employees**
- **3 Key Off-Duty Conduct Topics**
 - **Social Media**
 - **COVID-19**
 - **Off-Duty Drug/Substance Use**
- **Q&A**

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HOW WE GOT HERE

HOW WE GOT HERE

- What is the workplace? What is “at work” versus “at home” when employees are working from home?

The New York Times

Opinion

You Are Not Working From Home

How to make sure the rise in remote work doesn't mean the death of work-life balance.

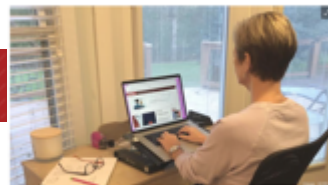


By Charlie Warzel

Mr. Warzel is an Opinion writer at large.

May 26, 2020

#WFH Chronicles: Time to sharpen the lines



CHARLOTTE
BUSINESS JOURNAL

Harvard Business Review

Building Work-Life Boundaries in the WFH Era

How to help yourself — and your employees — find time and space to be productive. by Nancy P. Rothbard

July 15, 2020

The Implications of Working Without an Office

Early research on how people are — and aren't — adapting and how leaders can help. by Ethan Bernstein, Hayley Blunden, Andrew Brodsky, Wonbin Sohn, and Ben Waber

July 15, 2020

HOW WE GOT HERE

The Facebook logo, consisting of the word "facebook" in white lowercase letters on a blue rectangular background.

- Facebook has nearly 2.7 billion active users.
 - 1.82 billion daily active users alone

The YouTube logo, featuring the word "You" in black and "Tube" in white inside a red rounded rectangle.

- Over 1 billion videos are viewed on YouTube every day.
 - Over 500 hours of video are uploaded to YouTube every minute.

The Twitter logo, featuring the word "twitter" in blue lowercase letters followed by a blue bird icon.

- Twitter has 187 million daily active users
 - 500 million tweets are sent each day.

HOW WE GOT HERE

- **There has been a collision of forces affecting the modern workplace:**
 - Newer generation white collar workers feel powerful on their own (a challenge for unions)
 - However, COVID-19 has led to an increased interest in unions

The New York Times

Employee Activism Is Alive in Tech. It Stops Short of Organizing Unions.

By [Kate Conger](#) and [Noam Scheiber](#)

July 8, 2019



Los Angeles Times

OP-ED

Op-Ed: Coronavirus is unleashing righteous worker anger and a new wave of unionism

By STEVEN GREENHOUSE

JULY 28, 2020 | 3 AM

HOW WE GOT HERE

- **There has been a collision of forces affecting the modern workplace:**
 - A cultural shift: we live online
 - A cultural shift: we value workers who challenge hierarchy and “think different”



HOW WE GOT HERE

- **Half of Millennial Employees Have Spoken Out About Employer Action on Hot-Button Issues”**

Have ever spoken up to support or criticize employer's actions over a controversial issue that affects society				
	Total U.S. Employees	Millennials	Gen Xers	Boomers
	%	%	%	%
Yes	38	48*	33	27
No	59	49	64*	70*
Prefer not to respond	3	3	3	3

Right of Employees to Speak Up				
	Total U.S. Employees	Millennials	Gen Xers	Boomers
	%	%	%	%
In support of their employer	84	85	84	84
Against their employer	75	82*	76	65

Source: *Employee Activism in the Age of Purpose: Employees (UP)Rising*, Weber Shandwick, United Minds, & KRC Research (2019)

HOW WE GOT HERE

- **Employee Activism Has Changed**
 - Use of the press / social media (*no need for passwords to view content!*)
 - Using online platforms to tell the employee's story and then sending it to the press
 - Employer responses to the press are challenged through social media "comments"
 - Efforts to impact employers' ability to recruit
 - Invitations to politicians and influencers to weigh in

HOW WE GOT HERE

- **Employee Activism Movements**
 - Diversity, Equity, & Inclusion (Black Lives Matter)
 - Handling of COVID-19 Precautions
 - Handling of #MeToo Issues and Settlements
 - Employment Practices
 - Arbitration Programs, Confidentiality Provisions
 - Investigations Policies
 - Pay Practices
 - Hazard Pay
 - Sick Leave

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COMPETING INTERESTS OF EMPLOYERS AND EMPLOYEES

Employer Rights/Interests	Employee Rights/Interests
<p>CIVILITY: Right to maintain a professional and civil workplace</p>	<p>STATE LAWS ON OFF-DUTY CONDUCT:</p> <ul style="list-style-type: none"> • Right to engage in political/social activism in off-duty time • Right to privacy in private social media activity • Off-duty drug/substance use
<p>EEO: Right to seek a more diverse workforce, and take action to address and <u>prevent</u> violations of EEO policies</p>	<p>TITLE VII and STATE COROLLARIES:</p> <ul style="list-style-type: none"> • Right not to suffer discrimination (even in an attempt to prevent it elsewhere) • Right to hold religious beliefs and adhere to religious practices

Employer Rights/Interests	Employee Rights/Interests
<p>PRODUCTIVITY: Right to insist that employees work during their shifts and work hours, and right to discipline insubordination</p>	<p>NLRA: Right for non-supervisory employees to speak out about policies and programs <i>(even when workforce is not unionized!)</i></p>
<p>SAFETY: Right to develop safety procedures that may affect off-duty conduct</p>	<p>OSHA: Right to a safe workplace</p> <p>ADA and STATE COROLLARIES: Right to protection for discrimination on basis of disability</p>

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3 KEY OFF-DUTY CONDUCT TOPICS

(1) Social Media (2) COVID-19 (3) Off-Duty Drug/Substance
Use

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SOCIAL MEDIA

Legal Framework & Practical Framework

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SOCIAL MEDIA: LEGAL FRAMEWORK

LEGAL FRAMEWORK

- **First Amendment**
- **State Laws on Off-Duty Conduct** (Social Media Privacy and Political Freedom)
- **National Labor Relations Act** (Not just for unions!)
- **Whistle-Blower and Anti-Retaliation Law** (Title VII, Sarbanes-Oxley, OSHA, and state law equivalents)

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FIRST AMENDMENT

FIRST AMENDMENT

- First Amendment “Freedom of Speech” generally does not apply to private employers disciplining its employees for engaging in prohibited conduct.
- Exception is Connecticut, which prohibits employers from taking any adverse action against employees for exercising their First Amendment rights, provided that such activity does not interfere with the employee’s job performance or the employment relationship. See Connecticut General Statute § 31-51q.

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STATE LAWS ON OFF- DUTY CONDUCT

Social media privacy rules and protecting political freedom

50 STATE SURVEY ON PROTECTIONS FOR OFF-DUTY CONDUCT

- **Trends: Off-Duty Conduct**

- Majority of states do not have laws regarding off-duty conduct.
- Most states with laws about off-duty conduct are about:
 - (1) protecting employee privacy for social media activity, and/or
 - (2) protecting the political freedom of employees of private employers.
 - (3) off-duty legal drug/substance use (*to be covered in next section!*)

SOCIAL MEDIA PROTECTIONS IN STATE LAWS

- **Trends: Social Media Privacy**

- Employers are allowed to look at publicly available social media content.
- Many states have passed laws banning employers from requiring that employees share social media usernames or passwords. There are some very limited exceptions, which vary by state law. *See Appendix A for Full Survey of State Laws on Social Media Protections.*

SOCIAL MEDIA PROTECTIONS IN STATE LAWS

- **DMV Focus**

- **Maryland:** An employer “may not request or require that an employee or applicant disclose any user name, password, or other means for accessing a personal account or service through an electronic communications device” or take an adverse action against the employee or applicant for refusing to disclose this information. ***There is an exception for investigations***, and the section does not prevent an employer: “(1) Based on the receipt of information about the use of a personal Web site, Internet Web site, Web-based account, or similar account by an employee for business purposes, from conducting an investigation for the purpose of ensuring compliance with applicable securities or financial law, or regulatory requirements; or (2) Based on the receipt of information about the unauthorized downloading of an employer’s proprietary information or financial data to a personal Web site, Internet Web site, Web-based account, or similar account by an employee, from investigating an employee’s actions...” Md. Labor and Employment Code Ann. § 3-712(b)(1); (e)(1)–(2).
- **Virginia** has a similar law, but also allows an exception where the employee is being investigated for “allegations of an employee's violation of federal, state, or local laws or regulations or of the employer's written policies.” Va. Code Ann. § 40.1-28.7:5.
- **D.C.** does not have a similar law.

See Appendix A for Full Survey of State Laws on Social Media Protections.

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POLL: A PRACTICAL
PAUSE

POLL: A PRACTICAL PAUSE

- **POLL QUESTION: Would you encourage hiring managers at your company to check an applicant's public social media accounts before making a hiring offer?**
 - A. Yes – A public social media profile is part of a modern resume.
 - B. No – No news is good news; better not to know!
 - C. Sort of – Wouldn't let the actual hiring manager check, but someone might look.
 - D. Sorry, I was too distracted reading Twitter to hear the question.

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POLL RESULTS

SOCIAL MEDIA PROTECTIONS IN STATE LAWS

- **Trends: Political Freedoms**
 - Majority of states have no laws regarding employees' off-duty political conduct.
 - States that have laws about employees' off-duty political freedom are generally narrowly tailored, or construed by courts to be narrowly tailored, to electioneering or political work on behalf of candidates or political parties.
- **Note Colorado:** It is an unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless it relates to a bona fide occupational requirement, or is necessary to avoid a conflict of interest. C.R.S.A. § 24-34-402.5.

50 STATE SURVEY ON PROTECTIONS FOR OFF-DUTY CONDUCT

- **Focus on DMV**

- **D.C.** prohibits employers from discharging, refusing to hire, or otherwise discriminating against an employee with respect to employment because of the employee's present or past political affiliation or lack of political affiliation. While plaintiffs have tried to argue that they were terminated for off-duty political participation, courts take narrow view of this law, limiting it to protect political party membership, and not activism within a political group or movement. 4 DCMR § 515.
- **Maryland** does not have any laws about off-duty conduct. But it does prohibit any threats in the workplace "intended to influence the political opinions or actions of the employer's employees." Md. Election Law Code Ann. § 13-602(7)–(8).
- **Virginia** has no relevant laws.

See Appendix B for Full Survey of State Laws on Political Freedom.

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NATIONAL LABOR RELATIONS ACT

Not just for unions!

THE NATIONAL LABOR RELATIONS ACT (NLRA)

- The NLRA Section 7 can apply to protect employees' social media activity—***even in a non-unionized workforce***
- It is an unfair labor practice for an employer to interfere with the rights of employees to organize; form, join, or assist labor organizations; bargain collectively; **or engage in other concerted activities** for the purpose of collective bargaining or other mutual aid or protection. (29 U.S.C. § 158 (“Section 7”).)
- **Protected concerted activities** include:
 - Challenging an employer's pay practices.
 - Protesting unsafe working conditions.
 - Complaining about work schedules.

WHAT ABOUT THIS TWEET?

- Customer writes: “Free Chipotle is the best thanks”
- Employee responds:

“Nothing is free, only cheap #labor. Crew members only make \$8.50hr how much is that steak bowl really?”

THE NLRB SAID...

- Protected concerted activity because it pertained to group complaints, and there was a link between the activity and matters concerning the workplace or employees' interests as employees.
- It was following up on tweet from the employee to the Company's communications staff sending a news article about hourly workers having to work on snow days.
- ***A general rule of thumb***: social media posts that involve the terms and conditions of employment, and which involve or target other employees, are concerted activity and thus protected.

WHAT WOULD YOU DO?

- **Employee's Facebook post:**
- **Bob is such a NASTY MOTHERF***ER don't know how to talk to people!!!! F**k his mother and his entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!**
- The Company terminated the employee immediately.
- Employee filed a charge with the NLRB.

(Note - Asterisks were added because we are polite lawyers....)

CAN YOU BELIEVE IT?

- **Ruled Protected Activity.** The NLRB and the Court of Appeals for the Second Circuit found that the post was protected under the National Labor Relations Act:
 - “[E]ven though [the employee’s] message was dominated by vulgar attacks on [his supervisor] and his family, the ‘subject matter’ of the message included workplace concerns—management’s allegedly disrespectful treatment of employees, and the upcoming union election.”

Nat’l Labor Relations Bd. v. Pier Sixty, LLC, 855 F.3d 115 (2d Cir. 2017).

BUT NLRB RECENTLY CHANGED COURSE!

- Company suspended union committee person three times following three separate incidents in which he had engaged in profane or racially offensive conduct toward management or at bargaining meetings in the course of union activity.
- ALJ held that employee's conduct retained the protection of Section 7, despite his violent and racist outburst, in one of the three instances, when the conversation was ostensibly about debating overtime coverage.
- Both parties appealed.
- See *General Motors LLC and Charles Robinson*, Case Number 14-CA-208242 (July 21, 2020), <https://www.nlr.gov/case/14-CA-208242>.

BUT NLRB RECENTLY CHANGED COURSE!

- **Not Protected.**
- **Board explicitly overruled *Pier Sixty***—retroactively found that the employer would have been justified to terminate the employee over the **NASTY MOTHERF***ER** tweet.
- Employers can discipline or terminate employees for abusive conduct occurring in the context of Section 7 activity when the discipline is causally linked to the abusive conduct, and not to the protected concerted activity.
 - “[A]busive conduct that occurs in the context of Section 7 activity is not analytically inseparable from the Section 7 activity itself.”
- See *General Motors LLC and Charles Robinson*, Case Number 14-CA-208242 (July 21, 2020), <https://www.nlrb.gov/case/14-CA-208242>.

CURRENT STANDARD

- Adopts *Wright Line* Burden Shifting Framework:
 - “If the General Counsel alleges discipline was motivated by Section 7 activity and the employer contends it was motivated by abusive conduct, causation is at issue. As in the *Wright Line* case, the General Counsel must make an initial showing that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity.”
 - If the GC makes the case, the burden shifts to the employer to show that it would have taken the same action even in the absence of the employee’s protected concerted activity.
 - Then burden shifts to GC to show that this is pretextual.

WHAT WOULD YOU DO?

- **QUESTION: When does activist speech threaten legitimate employer interests in ensuring equal employment opportunity?**
- Employee sends widely circulated email arguing that women are not as biologically suited for technical roles at the company as men.
- Employer fires employee and employee files an NLRB complaint.

THE NLRB SAID...

- **NLRB Advice Memo upheld Google's termination decision.**
 - “[E]mployers have a strong interest in promoting diversity and encouraging employees across diverse demographic groups to thrive in their workplaces.... [E]mployers must be permitted to ‘nip in the bud’ the kinds of employee conduct that could lead to a “hostile workplace,” rather than waiting until an actionable hostile workplace has been created before taking action.”
 - “Where an employee’s conduct significantly disrupts work processes, creates a hostile work environment, or constitutes racial or sexual discrimination or harassment, the Board has found it unprotected even if it involves concerted activities regarding working conditions.”
- See NLRB Advice Memo re: *Damore v. Google*, issued January 16, 2018.

FUTURE OF THE NLRB

- *GM Case* Harmonizes NLRB with EEOC requirements—before, employers faced liability under one law when relying upon the other
- Is this change here to stay?
 - The current General Counsel's term ends in November 2021.
 - NLRB Board remains majority Republican-appointed until at least August 2021.

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WHISTLEBLOWER AND ANTI-RETALIATION LAWS

WHISTLE-BLOWER AND ANTI-RETALIATION LAWS

- Title VII makes it unlawful for an employer to discriminate against any employee “because he has opposed any” unlawful employment practice. 42 U.S.C. § 2000e-3(a).
 - Includes action (e.g., protesting alleged racial discrimination) and non-action (e.g., refusing to follow an order that is perceived as discriminatory).
 - Remember: most states have equivalent laws, some defining more areas of protected classes than Title VII.
- Sarbanes-Oxley protects employees who report fraud.
- OSHA protects employees who complain about unsafe working conditions.

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SOCIAL MEDIA

Practical Framework

PRACTICAL FRAMEWORK: INVESTIGATING SOCIAL MEDIA COMPLAINTS

- Employers generally have an obligation to address complaints of unlawful harassment or discrimination, including those made via social media, or complaints made about other employees' social media conduct.
- *DO:*
 - Promptly investigate to reduce or avoid liability. If an employer learns of an allegation of unlawful harassment or discrimination made by an employee on social media, it should be processed just as the employer would address a properly filed complaint under your HR policies.
 - Review any information submitted to the company from social media.
- *Do NOT:*
 - Try to gain access to private social media without permission (this runs afoul of various privacy laws and Stored Communications Act).
 - Create fake accounts to try to “friend” someone.

PRACTICAL FRAMEWORK: SHOULD YOU DISCIPLINE?

- **PART I: NLRA Protections**

- Question: Is the speaker a manager / supervisor? (If yes, skip next two questions, go to PART II.)
- Question: Is the speaker complaining about the workplace (terms and conditions of their employment, work environment, workplace policies and programs)? (If yes, move to next question.)
- Question: Is the speaker arguably trying to improve the workplace for other employees too? (If yes, the speech may be protected under the NLRA. Move to PART II.)

- **PART II: EEO, Whistleblower, and Political Speech Protections**

- Question: Is the speaker arguably advancing a view that is protected by law (e.g., religious or political)? (If yes, analyze applicable statutes and cases in your jurisdiction for needed balancing.)
- Question: Is the speaker arguably complaining about an actual or perceived violation of law? (If yes, beware of protections for whistleblowers and those “opposing” unlawful employment practices.)

- **PART III: Press and Brand Damage**

- Question: Even if we are legally entitled to interfere with what this speaker is saying, will the optics of doing so bring bad press or brand damage?

PRACTICAL FRAMEWORK: RESPONSE TO A SOCIAL MEDIA CRISIS (VIRAL VIDEOS, ETC.)

- Be prepared and plan ahead.
- Critical considerations:
 - Speak with one voice.
 - Tell the truth.
 - Express empathy.
 - Make positive points.
 - Correct false narratives.
- Know the protocol for a response:
 - Reporting chain?
 - Who needs to know and when?
 - Who decides on the substance of the response?
 - Who makes the statement?
 - Who helps with reputation restoration?

PRACTICAL FRAMEWORK: CREATING POLICIES

- **Narrowly Tailor!**
- **Generally, never ok:**
 - Policies that ban an employee from running for office, or electioneering for a particular candidate or political party.
 - Policies that require an employee to reveal their social media conduct to their employer.
- **Generally ok:**
 - Neutral non-discrimination and non-harassment policies that extend to off-duty conduct.
 - Policies protecting trade secrets and proprietary information.
 - Policies advising employees that the Company reserves rights to monitor information and communications employees make on Company computers or network.
 - Policies that employees should refrain from using social media during work time, and even policies that ban employees from using company email addresses to register for social media.

SO CAN WE SAY THIS?

- (1) “Distinguish personal social media and work social media. Personal opinions should be stated as such. [C]olleagues who choose to mention or discuss their work, [Employer], colleagues, or [Employer] products or services in personal social media interactions must identify themselves by their real name and, where relevant, title or role. You must also identify that you work for [Employer] and make clear in your postings that you are not speaking for or on behalf of [Employer].”
- (2) “Our Code of Conduct makes clear the importance of protecting the privacy and security of [protected health information], [personally identifiable information], and employee information. It is not permissible to disclose this information through social media or other online communications.”

BOTH WERE SHOT DOWN BY THE NLRB

- (1) “We conclude that this rules’ requirement that employees identify themselves by name if they mention the Employer or discuss their work on social media...is facially unlawful...The Board has recognized that requiring employees to self-identify in order to participate in collective action would impose a significant burden on Section 7 rights. And, while the Employer has a legitimate interest in ensuring that readers know that employees’ social media postings are not being made on its behalf, the Employer maintains other facially lawful rules...that protect this interest.”
- (2) “We conclude that the restriction on disclosing ‘employee information’...is unlawful. ‘Employee information’ would reasonably be read by employees to include employee contact information and other non-confidential employment-related information, in which case prohibiting its disclosure would significantly restrict employees from engaging in core Section 7 activities...The rule contains no limiting context or language that makes clear that ‘employee information’ does not include employee contact information or terms and conditions of employment.”

See September 5, 2018, NLRB Advice Memorandum.

LET'S TRY #1 AGAIN

- “Employees should express only their personal opinions. They should never represent themselves as a spokesperson for the Company. Employees are not authorized to speak on behalf of the Company unless given specific prior written approval from the Company. If the Company is a subject of the content employees are creating, employees should be clear and open about the fact that they are an employee and make it clear that their views do not represent those of the Company, fellow employees, or people working on behalf of the Company.”

LET'S TRY #2 AGAIN

- “Employees must maintain the confidentiality of the Company’s non-public information. Such information may include information regarding [list examples, i.e., unreleased financial data, potential acquisitions, internal analyses, pricing, etc., ensuring that the list does not reference employee personnel or compensation information], and other information pertaining to the Company’s processes.
- Employees are prohibited from posting internal reports, memoranda, policies, procedures, work product or attorney-client privileged communications, or other internal Company-related confidential communications.
- Employees must not violate copyright, trade secret, fair use, privacy, libel and defamation, federal securities, and financial disclosure laws.”

SOCIAL MEDIA OFF-DUTY HYPOTHETICAL

- Company publishes an internal email supporting Black Lives Matter and announcing that all employees will receive Election Day off. The Company is included in a media article by Huffington Post praising companies who have publicly supported the Black Lives Matter movement.
- On his personal Twitter, a Senior Manager in the Company's Quality Control group links to the Huffington Post article, and writes: "My company doesn't care who is looting us versus who protects us. Who wants a Tuesday off anyway? This Italian demands Columbus Day!"
- Shortly after, HR receives complaints from multiple employees in the Quality Control group who follow the Senior Manager on Twitter stating that this tweet was overtly racist, in violation of company EEO policy, and that they no longer feel safe working for this person.
- Separately, the Senior Manager writes to HR complaining that the company's tying together of Election Day off and support for Black Lives Matter has encouraged his coworkers and supervisors to harass him at work because of his conservative political beliefs.

What should the Company do?

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POLL: SOCIAL MEDIA
HYPOTHETICAL

POLL: SOCIAL MEDIA HYPOTHETICAL

- **POLL QUESTION: What would you do?**
 - A. Counsel the tweeting employee about the post.
 - B. Counsel the tweeting employee and all coworkers.
 - C. Discipline the tweeting employee for the post.
 - D. Terminate the tweeting employee for the post.
 - E. Do nothing.
 - F. I didn't catch that, I was watching a funny new video on TikTok.

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POLL RESULTS

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COVID-19

HYPOTHETICAL 1 – WORKING “FROM HOME”

- DC-based team is working remotely during the COVID-19 crisis. Manager of the team does not follow any of her direct reports on social media. But she gets an anonymous email with a screenshot of that same employee’s Instagram. The Instagram picture appears to have been posted at noon on a day the employee claimed to be working. The employee has geotagged their location at a Florida beach. The photo has them on a beach, and a drink in hand. The caption says:
 - “My WFH > Your WFH”
 - **Should manager take any action?**

HYPOTHETICAL 2 – RETURNING “FROM HOME”

- Same employee shows up to the office the next day. DC currently requires 14-day quarantine for anyone returning from Florida. Company COVID policy states that everyone needs to comply with local laws. Manager’s only evidence that employee was out of state is the anonymous Instagram screenshot.
- **Should the manager take any action?**

HYPOTHETICAL 3 – EXPENSES FROM HOME

- A different employee submits an expense report asking for full coverage for her home Internet, a new computer screen, and a new printer.
- **How should management respond?**

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POLL: EXPENSES FROM
WORK FROM HOME

POLL: SOCIAL MEDIA HYPOTHETICAL

- **POLL QUESTION: How are you handling reimbursement issues for employees who are working from home during COVID?**
- A. Reimbursing all internet costs for each month and costs of at-home equipment.
- B. Paying everyone a one-time stipend of a particular amount meant to reimburse for internet or other costs.
- C. Only providing a stipend to employees in the states like California that appear to require it.
- D. Have not addressed it on a company-wide basis, but we are responding to individual demands or requests on a one-off basis.
- E. I'm on line shopping, so it's hard to pick one of these.

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OFF-DUTY DRUG USE

What if it's legal?

OFF-DUTY DRUG USE – TRENDS

- Almost every state in the country now allows medicinal marijuana use; 15 states and the District of Columbia have fully legalized marijuana.
- State laws are split on whether they grant medical marijuana users employment discrimination protections, for example, whether an employer is required to accommodate medical marijuana use in the work place. Some states build in non-discrimination protections, some explicitly disclaim such protections, some require it for medicinal marijuana use only and distinguish that from recreational use.
- Note: even states that do protect marijuana users tend to clarify that employers may ban use at work or while on-duty, and can apply a different standard if they risk violating federal law or losing benefits under federal law.

OFF-DUTY DRUG USE – DMV

- **DMV Focus**

- **D.C.:** DC permits marijuana use for both medicinal and recreational purposes for adults over 21. Employers may not test prospective employees for marijuana prior to making an initial offer of employment, but may require prospective employees to pass a drug test to be officially hired. There are no other employment-protections for marijuana users by private employers (there are protections for marijuana users employed by the D.C. government).
- **Maryland:** Maryland has legalized marijuana for medicinal purposes only; but does not provide any employment-protections for marijuana users.
- **Virginia:** In summer 2020, Virginia started to open the state's medical marijuana program for narrow exceptions for individuals with certain medical conditions; marijuana is still not legalized generally, and there are no employment-protections for marijuana users. Many analysts predict legalization could come in the next year.

See Appendix C for Full 50 State Survey on Employment Protections for Marijuana Use.

OFF-DUTY DRUG USE – NO PROTECTIONS

- *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 435-36 (6th Cir. 2012) (Michigan's medical marijuana statute, which provides protection against disciplinary action by a "business," does not impose restrictions on private employers);
- *Stanley v. Cty. of Bernalillo Comm'rs*, 2015 WL 4997159, at *5 (D.N.M. July 31, 2015) (citing cases in which courts have "rejected the plaintiff's claims that state anti-discrimination laws prohibit private employers from terminating employees for state-authorized medical marijuana usage.");
- *Coats v. Dish Network, LLC*, 350 P.3d 849, 853 (Colo. 2015) ("Coats's use of medical marijuana was unlawful under federal law and thus not protected.");
- *Roe v. TeleTech Customer Care Management*, 171 Wash.2d 736, 760 (Wash. 2011) ("[Washington State Medical Use of Marijuana Act] does not prohibit an employer from discharging an employee for medical marijuana use, nor does it provide a civil remedy against the employer.").

OFF-DUTY DRUG USE CASE LAW - PROTECTIONS

- *Barbuto v. Advantage Sales & Mktg., LLC*, 78 N.E.3d 37 (Mass. 2017) (employee who used medical marijuana for Crohn's disease fired for positive drug test under zero-tolerance policy; court held that employer failed to engage in the interactive process to see if medical marijuana use could be reasonably accommodated);
- *Callaghan v. Darlington Fabrics Co.*, 2017 WL 2321181 (R.I. Super. May 23, 2017) (finding violation of the state's medical marijuana law where an employer refused to hire an applicant because of medical marijuana use).
- Both courts rejected any federal pre-emption argument.

OFF-DUTY DRUG USE HYPOTHETICAL

- An employee in D.C. is on a Zoom team call and seems “out of it.” A co-worker takes a screenshot showing what appears to be a bong visible behind the employee. The employee is working from home during the COVID-19 epidemic.
- **Can the employer demand the employee take a drug test?**
- **If the drug test is positive, can the employer take any action?**

OFF-DUTY DRUG USE: PRACTICAL FRAMEWORK FOR DMV EMPLOYERS

- **Part I: Compliance with Federal Law**

- Is there a federal law or regulation that prohibits marijuana use or requires drug testing for the specific job?
 - If yes, the state law is trumped by the federal law, and the federal law's provisions for discipline or termination should be followed.
 - If no, continue to Part II.

- **Part II: Evaluate Reason for Marijuana Use**

- Is the marijuana for medical purposes?
 - If no, then no need to accommodate.
 - If yes, continue to Part III. If not, there is not requirement for accommodation.

- **Part III: Does the Employee Have a Disability?**

- If the marijuana is for medical purposes, does the person have a disability?
 - If no, then no need to accommodate.
 - If yes, then the conservative approach is to engage in an interactive process to accommodate the disability (not necessarily the drug use) per the ADA.

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PAUL

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PH SPEAKERS



Carson Sullivan

Employment Partner
Washington D.C.

carsonsullivan@paulhastings.com

+1.202.551.1809

Carson Sullivan is the chair of the Washington, D.C. Employment Law Department. She represents employers in all aspects of employment law, with an emphasis on the defense of class and collective action suits. She also has a particular focus on litigation involving trade secrets and restrictive covenants and is a member of the firm's Employee Mobility and Trade Secrets practice group. Ms. Sullivan also focuses on legal issues and cutting-edge trends relating to social media and electronic discovery. She is particularly skilled at developing strategies for the efficient review and production of data from all sources, including e-mail systems, document management systems, and human resources databases. Ms. Sullivan has also conducted numerous investigations involving allegations against executives, and she works with clients to develop and deliver anti-harassment training to employees at all levels. Since the onset of the COVID-19 crisis, Ms. Sullivan has been speaking, writing, and advising numerous clients regarding the many employment-related issues stemming from the pandemic, including issues related to government guidance, orders, regulations and return-to-work planning. She is also a member of the Paul Hastings COVID-19 Task Force, participating in a multidisciplinary approach to addressing the legal issues presented by COVID-19.

PH SPEAKERS



Sarah Besnoff

Employment Associate
Washington D.C.

sarahbesnoff@paulhastings.com

+1.202.551.1847

Sarah Besnoff is a Senior Associate in the Washington, D.C. Employment Law Department. She represents employers in all aspects of employment law, with an emphasis on the defense of wage and hour and employment discrimination class action suits, and executive compensation and corporate governance disputes. Ms. Besnoff also counsels employers on all aspects of the employer-employee relationship, and conducts investigations, with a recent focus on COVID-19. Ms. Besnoff serves as the associate chair of the DC Office's Pro Bono Committee. In her own pro bono practice, Ms. Besnoff advises non-profits on a range of employment issues, and leads direct service and class-action impact litigation work in asylum, housing, and veterans' benefits cases. This year, Ms. Besnoff won a class-wide judgment valued at hundreds of millions of dollars on behalf of Vietnam Blue Water Veterans and their families. Ms. Besnoff is a Lecturer at the University of Pennsylvania Law School and the Fels Institute of Government.

APPENDIX A: SOCIAL MEDIA PROTECTIONS IN STATE LAWS

- **Arkansas:** A.C.A. § 11-2-124; **California:** California Lab. Cod. § 980; **Colorado:** Colo. Rev. Stat. § 8-2-127; **Connecticut:** C.G.S.A. § 31-40x; **Delaware:** 19 Del. C. § 709A; **Illinois:** 820 ILCS 55/10; **Louisiana:** La. R.S. § 51:1952-53; **Maine:** 26 M.R.S. § 616-17; **Michigan:** MCLS § 37.273-75; **Montana:** Mont. Code Ann. § 39-2-307; **Nebraska:** R.R.S. Neb. § 48-3503; **Nevada:** Nev. Rev. Stat. Ann. § 613.135; **New Hampshire:** RSA 275:73-74; **New Jersey:** N.J. Stat. § 34:6B; **Oklahoma:** 40 Okl. St. Ann. § 173.2; **Oregon:** Or. Rev. Stat. § 659A.330(1). ; **Rhode Island:** R.I. Gen. Laws § 28-56-2; **Tennessee:** Tenn. Code Ann. § 50-1-1003; **Vermont:** 21 V.S.A. § 495l.; **Washington:** Wash. Rev. Code § 49.44.200; **West Virginia:** W. Va. Code § 21-5H-1(a); **Wisconsin:** Wis. Stat. § 995.55(2)(a)

APPENDIX B: 50 STATE SURVEY ON PROTECTIONS FOR OFF-DUTY CONDUCT

- **California:** Employer cannot “make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics...[or] (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.” Cal. Labor Code Section 1101. Political activity under Section 1101 does not include activities unrelated to “orderly conduct of government and the peaceful organization, regulation and administration of the government.”¹
- Further, employees cannot be demoted, suspended or discharged for lawful conduct occurring during nonworking hours, away from the employer’s premises. Cal. Labor Code Section 96(k).

¹*Lockheed Aircraft Corp. v. Superior Court of Los Angeles County*, 28 Cal. 2d 481, 484-85 (1946). Note the year on this case! Case law in California interpreting California Labor Code Section 1101 is sparse.

APPENDIX B: 50 STATE SURVEY ON PROTECTIONS FOR OFF-DUTY CONDUCT

- **Louisiana:** Prohibits employers from “adopt[ing] or enforce[ing] any rule, regulation, or policy which will control, direct, or tend to control or direct the political activities or affiliations of his employees” or “coerc[ing] or influenc[ing], or attempt[ing] to coerce or influence any of his employees by means of threats of discharge or of loss of employment in case such employees should support or become affiliated with any particular political faction or organization, or participate in political activities of any nature or character.” La. Rev. Stat § 23:961. State law also prohibits discharging an employee because of his or her political opinions. La. Rev. Stat § 23:962.

APPENDIX B: 50 STATE SURVEY ON PROTECTIONS FOR OFF-DUTY CONDUCT

- **Michigan:** Michigan law prohibits an employer from gathering or keeping “a record of an employee’s associations, political activities, publications, or communications of nonemployment activities, except if the information is submitted in writing by or authorized to be kept or gathered, in writing, by the employee to the employer. This prohibition on records shall not apply to the activities that occur on the employer’s premises or during the employee’s working hours with that employer that interfere with the performance of the employee’s duties or duties of other employees.” MCLS § 423.508(1).
- “A person shall not, either directly or indirectly, discharge or threaten to discharge an employee of the person for the purpose of influencing the employee’s vote at an election.” MCLS § 168.931(d).

APPENDIX B: 50 STATE SURVEY ON PROTECTIONS FOR OFF-DUTY CONDUCT

- **Missouri:** Prohibits employers from “discriminat[ing] or threaten[ing] to discriminate against any employee in this state, with respect to his or her compensation, terms, conditions or privileges of employment by reason of his political beliefs or opinions.” R.S. Mo. § 130.028(1).
- **Nevada:** Prohibits employers from making “any rule or regulation prohibiting or preventing any employee from engaging in politics or becoming a candidate for any public office in this state.” Nev. Rev. Stat. Ann. § 613.040. Additionally, an employer may not “discharge or change the place of employment of any employee with the intent to impede or prevent the free exercise of the franchise by such employee.” Nev. Rev. Stat. Ann. § 293.710(1)(e).
- **New Mexico:** Prohibits employers from “directly or indirectly discharging or threatening to discharge such employee because of the employee’s political opinions or belief or because of such employee’s intention to vote or refrain from voting for any candidate, party, proposition, question or constitutional amendment.” N.M. Stat. Ann. § 1-20-13.

APPENDIX B: 50 STATE SURVEY ON PROTECTIONS FOR OFF-DUTY CONDUCT

- **New York:** Prohibits employers from refusing to hire, discharging from employment, or otherwise discriminating “against an individual in compensation, promotion or terms, conditions or privileges of employment because of...an individual’s political activities outside of working hours, off of the employer’s premises and without use of the employer’s equipment or other property, if such activities are legal...” NY CLS Labor § 201-d(2)(a). The law does not protect activity that “creates a material conflict of interest related to the employer’s trade secrets, proprietary information or other proprietary or business interest...” NY CLS Labor § 201-d(3)(a).
- **North Dakota:** Prohibits employers from failing or refusing to hire an applicant, discharging an employee, or engaging in adverse or unequal treatment of him or her for their participation in a lawful activity off of the employer’s premises during non-working hours that does not conflict with the employee’s business related interests. N.D. Cent. Code § 14 02.4-03(1); N.D. Cent. Code § 62.1-02-13(1)(c), (1)(e).
- **South Carolina:** It is unlawful to “discharge a citizen from employment or occupation. . . because of ... the exercise of political rights and privileges guaranteed to every citizen.” S.C. Code Ann. § 16-17-560.

APPENDIX B: 50 STATE SURVEY ON PROTECTIONS FOR OFF-DUTY CONDUCT

- **Utah:** Prohibits employers from discharging, demoting, terminating, retaliating, harassing, discriminating, or refusing to hire an employee or applicant for lawful expressive activity (including politics) outside the workplace unless the employee's expressive activity is in direct conflict with the essential business-related interests of the employer. Utah Code Ann. § 34A-5-112(2).
- **Washington:** Prohibits discriminating against an employee for failure in any way to support or oppose a candidate, ballot proposition, political party, or committee. Rev. Code Wash. (ARCW) § 42.17A.495.
- **Wyoming:** Wyoming law prohibits employers from “interfering with political rights of employees.” Wyo. Stat. Ann. § 22-26-112.

APPENDIX C: OFF-DUTY DRUG USE – 50 STATE SURVEY

- **States with Employment-Protection for Medical Marijuana Users**
- **Arkansas:** Ark. Const. amend. XCVII §§ 3, 6; **Arizona:** Ariz. Rev. Stat. Ann. § 36-2813; **Connecticut:** Conn. Gen. Stat. § 21a-408p(b); **Delaware:** Del. Code Ann. tit. 16, § 4905A; **Illinois:** 410 Ill. Comp. Stat. 130/40; **Massachusetts:** Mass. Gen. Laws Ann. Ch. 941 §§ 1-8; **Maine:** Me. Rev. Stat. tit. 22, § 2423-E; **Minnesota:** Minn. Stat. § 152.32; **Nevada:** Nev. Rev. Stat. § 453A.800; **New York:** N.Y. Pub. Health Law § 3369; **Oklahoma:** Okla.Stat. Tit. 63 § 420A; **Pennsylvania:** 35 Pa. Stat. Ann. § 10231.2103; **Rhode Island:** R.I. Gen. Laws § 21-28.6-4; **West Virginia:** W. Va. Code Ann. §§ 16A-5-10, 16A-15-4.

APPENDIX C: OFF-DUTY DRUG USE – 50 STATE SURVEY

- **States that Explicitly Clarify that Employers Do Not Need to Accommodate Marijuana Users**
- **Alaska:** Alaska Stat. Ann. §§ 17.37.010; **California:** Cal. Health & Safety Code §§ 11362.5-2.9; Cal. Health & Safety Code §§ 11362.1-.45; **Colorado:** Colo. Const. art. XCII, §§ 14, 16; **Florida:** Fla. Stat. Ann. § 381.986; **Georgia:** Ga. Code Ann. §§ 16-12-190-91; **Hawaii:** Haw. Rev. Stat. Ann. §§ 329-121-131; **Michigan:** Mich. Comp. Law §§ 333.26421-30; **Montana:** Mont. Code Ann. §§ 50-46-301-45; **New Hampshire:** N.H. Rev. Stat. Ann. §§ 126-X:1-11; **New Jersey:** N.J. Stat. Ann. §§ 24:61-1-16; **New Mexico:** N.M. Stat. Ann. §§ 26-2B-1-7; **North Dakota:** N.D. Cent. Code Ann. §§ 19-24.1-01-40; Ohio: Ohio Rev. Code Ann. §§ 3796.01-30; **Oregon:** Or. Rev. Stat. Ann. §§ 475B.413; **Vermont:** Vt. Stat. Ann. Tit. 18 §§ 4230a; **Washington:** Wash. Rev. Code Ann. § 69.51A.060

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THE AMERICAS

Atlanta

1170 Peachtree Street, N.E.
Suite 100
Atlanta, GA 30309
T +1.404.815.2400 / **F** +1.404.815.2424

Century City

1999 Avenue of the Stars
Los Angeles, CA 90067
T +1.310.620.5700 / **F** +1.310.620.5899

Chicago

71 S. Wacker Drive
Forty-Fifth Floor
Chicago, IL 60606
T +1.312.499.6000 / **F** +1.312.499.6100

Houston

600 Travis Street
Fifty-Eighth Floor
Houston, TX 77002
T +1.713.860.7300 / **F** +1.713.353.3100

Los Angeles

515 South Flower Street
Twenty-Fifth Floor
Los Angeles, CA 90071
T +1.213.683.6000 / **F** +1.213.627.0705

New York

200 Park Avenue
New York, NY 10166
T +1.212.318.6000 / **F** +1.212.319.4090

Orange County

695 Town Center Drive
Seventeenth Floor
Costa Mesa, CA 92626
T +1.714.668.6200 / **F** +1.714.979.1921

Palo Alto

1117 S. California Avenue
Palo Alto, CA 94304
T +1.650.320.1800 / **F** +1.650.320.1900

San Diego

4747 Executive Drive
Twelfth Floor
San Diego, CA 92121
T +1.858.458.3000 / **F** +1.858.458.3005

San Francisco

101 California Street
Forty-Eighth Floor
San Francisco, CA 94111
T +1.415.856.7000 / **F** +1.415.856.7100

São Paulo

Av. Presidente Juscelino Kubitschek, 2041
Torre D, 21º andar
São Paulo, SP, 04543-011
Brazil
T +55.11.4765.3000 / **F** +55.11.4765.3050

Washington, D.C.

2050 M Street, N.W.
Washington, D.C. 20036
T +1.202.551.1700 / **F** +1.202.551.1705

ASIA

Beijing

Suite 2601, 26/F
Yintai Center, Office Tower
2 Jianguomenwai Avenue
Chaoyang District
Beijing 100022, PRC
T +86.10.8567.5300 / **F** +86.10.8567.5400

Hong Kong

21-22/F Bank of China Tower
1 Garden Road
Central Hong Kong
T +852.2867.1288 / **F** +852.2526.2119

Seoul

33/F West Tower
Mirae Asset Center1
26, Eulji-ro 5-gil, Jung-gu
Seoul 04539, Korea
T +82.2.6321.3800 / **F** +82.2.6321.3900

Shanghai

43/F Jing An Kerry Center Tower II
1539 Nanjing West Road
Shanghai 200040, PRC
T +86.21.6103.2900 / **F** +86.21.6103.2990

Tokyo

Ark Hills Sengokuyama Mori Tower
Fortieth Floor
1-9-10 Roppongi
Minato-ku, Tokyo 106-0032 Japan
T +81.3.6229.6100 / **F** +81.3.6229.7100

EUROPE

Brussels

Avenue Louise 222
1050 Brussels
Belgium
T +32.2.641.7460 / **F** +32.2.641.7461

Frankfurt

TaunusTurm – Taunustor 1
60310 Frankfurt am Main
Germany
T +49.69.907485.000 / **F** +49.69.907485.499

London

100 Bishopsgate
London EC2N 4AG
United Kingdom
T +44.20.3023.5100 / **F** +44.20.3023.5109

Paris

32, rue de Monceau
75008 Paris
France
T +33.1.42.99.04.50 / **F** +33.1.45.63.91.49