

# When is an employee's off-duty conduct a work-related issue?

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## Workplace Solutions

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While in-house counsel have enough challenges dealing with the legal and compliance issues arising from employees' conduct at the workplace, television cameras, smartphones, and social media mean the impact of employee conduct does not stop at the company's gates.



Whether it's sexist comments made to a television reporter on camera, or racist comments on a Facebook page, employers are increasingly required to consider the workplace impact of off-duty conduct.

It is an implied term of every employment relationship that the employee faithfully perform his or her duties, including refraining from behaviour that negatively impacts, or is likely to negatively impact, the employer's legitimate business interests.

Generally speaking, this occurs where:

- The nature of the conduct prevents the employee from continuing to perform his or her duties (e.g., loss of credibility in a position of trust)
- Co-workers are reluctant to continue to work with the employee as a result of learning about his or her conduct
- There is a risk of injury to co-workers or members of the public
- The conduct has harmed or will harm the employer's reputation or brand

In these circumstances, an employee has failed to fulfil his or her fundamental employment obligations and the employer may take disciplinary action, up to and including termination of employment.

### **For cause or not for cause, that is the question**

Not every good reason to terminate an employment relationship amounts to just cause to do so. To establish just cause, the employer will have usually engaged in a proper investigation, prove the events in question, and demonstrate why the conduct was a fundamental breach of the employee's obligations. A unionized employee may only be terminated for just cause. Where the employer fails to discharge its legal onus, the employee may be reinstated to employment, usually with full back pay to the date of termination.

In a non-union setting, an employer has more flexibility. Where there is just cause, termination, no notice, or payment *in lieu* of notice is required. Otherwise, provided the basis for the decision to terminate isn't discriminatory or otherwise in violation of legislative restrictions (such as whistleblower legislation), a non-union employer can terminate the employment relationship on a without-cause basis.

This requires providing notice of termination either in accordance with the terms of legislation, any written employment agreement, or on a common law standard.

### **What proactive steps can employers take?**

Provided the employee has given consent and the company otherwise complies with relevant legislation (such as privacy and credit check legislation), it is possible to perform a background check on a prospective employee. However, care must be taken regarding the results of a background check. For instance, information gained through a background check may suggest a person suffers from a disability (*i.e.*, drug dependency). If the applicant is not hired, he or she may claim that perception rendered that decision unlawful, exposing the company to a human rights claim. To minimize this risk, a background check can be conducted by someone other than the individual(s) making the hiring decision, and only relevant, permissible information passed along to the decision-maker(s).

### **Social media checks**

More employers are performing a "social media check" on prospective, and even existing employees. Once again, it is necessary to ensure compliance with any relevant privacy legislation, and it's prudent to have such checks performed by someone other than the decision-maker(s).

### **Codes of conduct**

Many employers are developing and enforcing codes of conduct. Making clear what types of behaviour will, and will not, be tolerated can help prevent incidents or aid in exiting an employee when misconduct occurs.

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