



SMOKING, TATTOOS, WEAPONS: CAN MY COMPANY BAN THAT?

Our HR HelpDesk frequently receives questions from employers about the actions they are permitted to take to promote a safe and productive work environment. Often these questions address topics such as prohibiting marijuana use, visible tattoos and piercings, and weapons in the workplace. In this Tip, we address seven areas in which employers may question their degree of control.

SMOKING/E-CIGARETTES:

Many states ban smoking in the workplace, certain outdoor spaces, and within a certain distance of entrances and ventilation systems. Regardless of the state, employers are free to prohibit smoking in their workplace and on company property. Employers may also prohibit e-cigarettes, which deliver a mixture of water and nicotine (or flavoring) in vapor form. In fact, some states have expressly included e-cigarettes in their indoor smoking bans.



VISIBLE TATTOOS AND PIERCINGS:

In general, employers have discretion when determining what restrictions to impose on body art. Employers must make sure, however, that their policies on body art, appearance and grooming standards are applied consistently, and do not create an undue burden for any protected class of employees. In addition, although employers have broad discretion in creating and enforcing dress code policies, they must provide **reasonable accommodations** as appropriate. For instance, under federal and some state laws, employers must provide a reasonable accommodation for an individual's sincerely held religious beliefs or practices, absent undue hardship on the company. Since some religious practices involve tattoos, piercings, and certain types of garb, employers may be required to provide a reasonable accommodation for an employee's body art or dress.

Note: In June 2015, the U.S. Supreme Court ruled that employers may be held liable under Title VII of the Civil Rights Act if their motive in making employment decisions is to avoid a religious accommodation, regardless of whether the individual has notified the employer of the need for an accommodation. However, the ruling does not mean employers should ask applicants or employees directly if they are wearing certain body art or attire for religious reasons. Interviewers should be familiar with the company's dress code (or any other policy that might call for a religious accommodation) and be ready to consistently ask applicants if they can comply, with or without a reasonable accommodation. This question can spark a discussion over possible accommodations, if applicable.

SOLICITATION:

Employers generally are permitted to prohibit solicitation on their premises by non-employees, as long as the policy is applied in a nondiscriminatory manner. A blanket policy that bars all solicitation by employees, however, may violate the National Labor Relations Act (NLRA), particularly if it bans union-related solicitations during non-work hours. Non-solicitation policies therefore must be carefully worded and consistently applied so as not to be construed to apply to employees during non-work hours. Employers should work with legal counsel when drafting non-solicitation policies.



WEAPONS

Employers have the right to prohibit employees from carrying weapons in the workplace, even if the employee has a concealed weapon permit. In some states, however, employees are allowed to store and transport their lawfully-possessed firearms in their locked personal vehicles on company parking lots. Employers should review their state law to ensure their weapons policies are compliant.

DISCUSSIONS ABOUT PAY:



Employers are prohibited from having policies that prevent employees from discussing their pay, as well as other terms and conditions of employment, with co-workers. Under [Section 7 of the NLRA](#), employees have, among other things, the right to act together to improve wages and working conditions and to discuss wages, benefits, and other terms and conditions of employment. These protections apply to both non-unionized and unionized employees. The NLRA covers virtually all employers.



GAMBLING:

Some states have enacted laws that specifically prohibit gambling in the workplace. Even in states that don't prohibit gambling, employers have the right to ban gambling in the workplace and on company property. It is a best practice to have a written policy that: 1) prohibits all forms of gambling in the workplace, 2) includes a definition and examples of gambling, and 3) indicates that employees who violate the policy may be subject to disciplinary action. Like all policies, it must be enforced consistently.



MEDICAL AND RECREATIONAL MARIJUANA:

While nearly half of U.S. states currently permit the use of medical marijuana, and four states (Alaska, Colorado, Oregon and Washington) and the District of Columbia also permit the recreational use of marijuana, no state requires employers to allow marijuana in the workplace or during work hours. Thus, regardless of the state, employers may ban both recreational and medicinal marijuana on the job and enforce zero-tolerance policies as to use, possession, or impairment in the workplace and on company property. However, it is strongly advised that employers exercise caution, consult legal counsel in drafting and enforcing those policies, and apply the same performance standards and scrutiny to medical marijuana users as other employees.

Pre-Employment Drug Screening

In jurisdictions that permit individuals to use marijuana for medical or recreational purposes, employers may continue to conduct pre-employment screening as permitted by law. However, several state laws explicitly offer some form of protection from employment discrimination for medical marijuana users. In states with such protections, the employer may be required to:

- Give the individual the opportunity to produce proof that the positive result was due to medicinal use; and
- Make an individualized assessment as to whether the medicinal use of marijuana would interfere with the candidate's essential job duties and responsibilities.

Note: In June 2015, the Colorado Supreme Court ruled that an individual's use of marijuana is not protected by the state's off-duty conduct law, which prohibits employers from taking adverse action against employees for legal off-duty conduct. The Court ruled that the conduct must be lawful under both federal and state law to be protected.

In states with no employment protections for medicinal or recreational marijuana users, employers are cautioned not to implement a blanket policy of rejecting all candidates who test positive for marijuana. Work closely with legal counsel to determine your rights and responsibilities when a prospective employee tests positive for marijuana.

Employers must also be mindful of other obligations, such as state and federal rules governing safety-sensitive positions. For example, the Department of Transportation's Drug and Alcohol Testing Regulation (49 CFR Part 40, at 40.151(e)) excludes medical marijuana as a valid medical explanation for a transportation employee's positive drug test result.

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