

National Conference of State Legislatures

Discrimination Laws Regarding Off-Duty Conduct

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The issue of employees' rights to engage in certain off-duty activities and in the competing authority of their employers to prohibit them from doing so has received significant attention from lawmakers and other policymakers. In total, 29 states and the District of Columbia have statutes that protect employees' from adverse employment actions based on their off-duty activities. These statutes provide three different levels of protection 1) use of tobacco only; 2) use of lawful products; and 3) any and all lawful activities.

- 18 jurisdictions have enacted "tobacco only" statutes. These include: Connecticut, District of Columbia, Indiana, Kentucky, Louisiana, Maine, Mississippi, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Virginia, West Virginia, and Wyoming.
- 8 states protect the use of lawful products. These are Illinois, Minnesota, Missouri, Montana, Nevada, North Carolina, Tennessee, and Wisconsin.
- 4 states offer statutory protection for employees who engage in lawful activities. These are California, Colorado, New York, and North Dakota.

State	Statute	Description
Alabama	None	
Alaska	None	
Arizona	None	Ariz. Rev. Stat. Ann. § 36-601.02 (2004) prohibiting discrimination on the basis of the use or nonuse of tobacco products was repealed effective May 1, 2007.
Arkansas	None	
California	CA Labor Code § 96(k)	Authorizes the California Labor Commissioner to take assignment of claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises.
	CA Labor Code § 98.6	Provides that no employee shall be discharged or otherwise discriminated against for conduct described in § 96(k). Entitles any employee who is discharged, threatened with discharge, demoted, suspended, or discriminated against in any manner in the terms and conditions of his or her employment to reinstatement and reimbursement for lost wages and work benefits.
Colorado	Colo. Rev. Stat. § 24-34-402.5 (2004)	Makes it illegal for an employer to terminate an employee because that employee engaged in any lawful activity off the employer's premises during nonworking hours unless the restriction 1) relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees; or 2) is necessary to avoid, or avoid the appearance of, a conflict of interest with any of the employee's responsibilities to the employer.
Connecticut	Conn. Gen. Stat. § 31-40s(2003)	Prohibits an employer from requiring that an employee or prospective employee refrain from smoking or using tobacco products outside the course of his employment, or otherwise discriminating against any individual with respect to compensation, terms, conditions or privileges of employment on that basis. Exempts any nonprofit organization or corporation whose primary purpose is to discourage the use of tobacco products by the general public.
Delaware	None	
District of	D.C. Code Ann.	Prohibits employment discrimination on the basis of tobacco use except where

Columbia	§ 7-1703.03 (2004)	tobacco-use restrictions or prohibitions constitute bona fide occupational qualifications.
Florida	None	
Georgia	None	
Hawaii	None	
Idaho	None	
Illinois	Ill. Rev. Stat. ch. 820, § 55/5.	Prohibits workplace discrimination on the basis of the use of lawful products except where the employer is a non-profit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public. Provides that an employer may offer, impose or have in effect a health, disability or life insurance policy that makes distinctions between employees for the type of coverage or the price of coverage based upon the employees' use of lawful products.
Illinois	Ill. Rev. Stat. ch. 820, § 40/9	Prevents an employer from gathering or keeping a record of an employee's associations, political activities, publications, communications or non-employment activities, unless the employee submits the information in writing or authorizes the employer in writing to keep or gather the information.
Indiana	Ind. Code Ann. § 22-5-4-1	Prohibits an employer from discriminating against an employee or prospective employee based on his/her use of tobacco products outside the course of employment. Allows an employer to implement financial incentives intended to reduce tobacco use or related to employer-provided health benefits.
Iowa	None	
Kansas	None	
Kentucky	Ky. Rev. Stat. Ann. § 344.040 (2004)	Makes it unlawful for an employer to discriminate against an employee because the individual is a smoker or nonsmoker , as long as the individual complies with any workplace policy concerning smoking. Further prohibits an employer from requiring that an employee or applicant for employment abstain from smoking or using tobacco products outside the course of employment.
Louisiana	La. Rev. Stat. § 23.966 (2004)	Prohibits an employer from discriminating against an individual with respect to discharge, compensation, promotion, any personnel action or other condition, or privilege of employment because the individual is a smoker or nonsmoker as long as the individual complies with applicable law and any workplace policy regulating smoking. Makes it unlawful for an employer to require that an individual abstain from smoking or otherwise using tobacco products outside the course of employment. Provides for a fine of up to \$250 for the first offense and up to \$500 for any subsequent offense.
Maine	Me. Rev. Stat. Ann. tit. 26, § 597 (2004)	Prohibits an employer from requiring, as a condition of employment, that an employee or prospective employee refrain from using tobacco products outside the course of employment, as long as the employee complies with any workplace policy regarding tobacco use.
Maryland	None	
Massachusetts	None	
Michigan	None	Note: A bill that would protect employee's from discrimination based on off-duty activities passed the House on May 16, 2008, and is now in the Senate.
Minnesota	Minn. Stat. Ann. § 181.938 (2003)	Prohibits an employer from refusing to hire a job applicant or disciplining or discharging an employee for using lawful consumable products , if the products are used off the employer's premises outside of working hours. Provides for an exception related to a bona fide occupational requirement that is reasonably related to the employment activities or responsibilities of a particular employee or group of employees or where it is necessary to avoid a conflict of interest or the appearance

		of a conflict of interest.
Mississippi	Miss. Code Ann. § 71-7-33 (2004)	Makes it unlawful for an employer to require that an employee or applicant for employment abstain from smoking or using tobacco products during nonworking hours, provided that the individual complies with laws or workplace policies regarding smoking.
Missouri	Mo. Rev. Stat. § 290.145 (2004)	Makes it unlawful for an employer to refuse to hire, or to discharge, any individual because of his/her use of lawful alcohol or tobacco products off the premises and outside working hours, unless such use interferes with the employee's duties and performance, the duty and performance of the employee's coworkers, or the overall operation of the employer's business. Allows an employer to provide health insurance benefits at a reduced premium rate or deductible level for employees who do not smoke or use tobacco products. Exempts religious organizations, church-operated institutions, and not-for-profit organizations whose principal business is health care promotion.
Montana	Mont. Code Ann. §§ 39-2-313 and 314 (2004)	Provides that an employer may not refuse to employ, license, or discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment because the individual uses a lawful product off the employer's premises during nonworking hours, unless such use 1) affects an individual's ability to perform job-related employment responsibilities or the safety of other employees; 2) conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment; 3) contradicts with a professional service contract where the unique nature of the services provided authorizes the employer to limit the use of certain products; or 4) is prohibited by a nonprofit organization employer that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public. Permits an employer to take action based on the belief that the action is permissible under an established substance abuse or alcohol program or policy, professional contract, or collective bargaining agreement. Allows an employer to offer, impose, or have in effect a health, disability, or life insurance policy that distinguishes between employees for the type or price of coverage based on the employees' use of a product.
Nebraska	None	
Nevada	Nev. Rev. Stat. Ann. § 613.333 (2004)	Makes it unlawful for an employer to fail or refuse to hire a prospective employee or to discharge or otherwise discriminate against an employee concerning his compensation, terms, conditions or privileges of employment, because he engages in the lawful use of any product outside working hours and off the employer's premises if that use does not adversely affect his ability to perform his job or the safety of other employees.
New Hampshire	N.H. Rev. Stat. Ann. § 275:37-a (2004)	Prohibits an employer from requiring, as a condition of employment, that an employee or applicant for employment abstain from using tobacco products outside the course of employment, as long as the employee complies with any workplace policy.
New Jersey	N.J. Stat. Ann. § 34:6B-1 (2004)	Prohibits an employer from refusing to employ any person or from discharging or taking any adverse action against any employee with respect to compensation, terms, conditions or other privileges of employment because that person does or does not smoke or use other tobacco products , unless the employer has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee.
New Mexico	N.M. Stat. Ann. § 50-11-3 (2004)	Makes it unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual is a smoker or nonsmoker , provided that the individual complies with applicable laws or workplace policies regulating smoking. Further prohibits an employer from

		requiring, as a condition of employment, that any employee or applicant for employment abstain from smoking or using tobacco products during nonworking hours. Allows an employer to prohibit any activity that materially threatens an employer's legitimate conflict of interest policy when that policy is reasonably designed to protect the employer's trade secrets, proprietary information or other proprietary interests; or relates to a bona fide occupational requirement and is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees.
New York	N.Y. Labor Code § 201-d (2004)	Makes it unlawful for an employer to make hiring or firing decisions, or otherwise discriminate against an employee or prospective employee because of that individual's legal use of consumable products or legal recreational activities outside of work hours, off of the employer's premises, and without use of the employer's equipment or other property.
North Carolina	N.C. Gen. Stat. § 95-28.2 (2004)	Prohibits an employer from refusing to hire a prospective employee, or discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee or prospective employee lawfully uses lawful products off the employer's premises during nonworking hours and such use does not adversely affect the employee's job performance or the person's ability to properly fulfill the responsibilities of his position or the safety of other employees. Provides that an employer may: - Restrict the use of lawful products by employees during nonworking hours if the restriction relates to a bona fide occupational requirement and is reasonably related to the employment activities. Limits the restriction only to a particular employer or group of employees to whom it reasonably relates; - Restrict the use of lawful products by employees during nonworking hours if the restriction relates to the fundamental objectives of the organization; and - Discharge, discipline, or take any action against an employee because the employee fails to comply with the requirements of the employer's substance abuse prevention program or the recommendations of substance abuse prevention counselors employed or retained by the employer. Allows an employer to offer, impose, or have in effect a health, disability, or life insurance policy distinguishing between employees for the type or price of coverage based on the use or nonuse of lawful products.
North Dakota	N.D. Cent. Code § 14-02/4-03 (2003)	Makes it a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to treat a person or employee adversely or unequally with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.
Ohio	None	
Oklahoma	Okla. Stat. tit. 40, § 500 (2004)	Makes it unlawful for an employer to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment, because the individual is a nonsmoker or smokes or uses tobacco products during nonworking hours; or to require as a condition of employment that an employee or applicant for employment abstain from smoking or using tobacco products during nonworking hours.
Oregon	Or. Rev. Stat. § 659A.315 (2003)	Provides that it is an unlawful employment practice for any employer to require, as a condition of employment, that any employee or prospective employee refrain from using lawful tobacco products during nonworking hours, except when the restriction relates to a bona fide occupational requirement. Exempts applicable collective bargaining agreement that prohibit the off-duty use of tobacco products.

Pennsylvania	None	
Rhode Island	R.I. Gen. Laws § 23-20.10-14	No employer shall require, as a condition of employment, that any employee or prospective employee refrain from smoking or using tobacco products outside the course of his or her employment or otherwise discriminate against such employee in terms of compensations, conditions or privileges.
South Carolina	S.C. Code Ann. § 41-1-85 (2003)	Prohibits employers from taking personnel actions based on use of tobacco products outside of the workplace.
South Dakota	S.D. Codified Laws § 60-4-11 (2004)	Makes it a discriminatory or unfair employment practice for an employer to terminate an employee because the employee uses tobacco products off the premises of the employer during nonworking hours unless such a restriction: (1) Relates to a bona fide occupational requirement and is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees; or (2) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest. Provides that the sole remedy for discrimination based on the use of tobacco products is a civil suit for damages including all wages and benefits due up to and including the date of the judgment had the discriminatory or unfair employment practice not occurred. Obliges anyone bringing such a suit to mitigate his/her damages. Allows an employer to offer, impose or have in effect a health or life insurance policy that makes distinctions between employees for the type of coverage or the cost of coverage based upon the employees' use of tobacco products. Exempts full-time firefighters from the provisions of the statute.
Tennessee	Tenn. Code Ann. § 50-1-304 (2004)	Prohibits an employer from discharging or terminating an employee solely for using an agricultural product not regulated by the alcoholic beverage commission that is not otherwise proscribed by law, provided that the employee uses such agricultural products outside of working hours or complies with all applicable employer policies regarding such use during working hours.
Texas	None	
Utah	None	
Vermont	None	
Virginia	Va. Code Ann. §§ 2.2-2902 and 15.2-1504 (2004)	Provides that no employee of the Commonwealth or applicant for employment with the Commonwealth shall be required, as a condition of employment, to smoke or use tobacco products on the job, or to abstain from smoking or using tobacco products outside the course of his employment.
Washington	None	
West Virginia	W. Va. Code § 21-3-19 (2004)	Makes it unlawful for a public or private employer to refuse to hire any individual or to discharge any employee or otherwise discriminate against any employee with respect to compensation, terms, conditions or privileges of employment solely because an individual uses tobacco products off the premises of the employer during nonworking hours. Exempts any nonprofit organization which, as one of its primary purposes or objectives, discourages the use of one or more tobacco products by the general public. Allows an employer to offer, impose or have in effect a health, disability or life insurance policy which makes distinctions between employees for the type or price of coverage based upon the employee's use of tobacco products.
Wisconsin	Wis. Stat. Ann. § 111.321 (2004)	Prohibits any employer, labor organization, employment agency, licensing agency or any other person from engaging in any act of employment discrimination on the basis of the use or nonuse of lawful products off the employer's premises during nonworking hours.

Wisconsin	Wis. Stat. Ann. § 111.35 (2004)	Allows a nonprofit corporation that encourages or discourages the general public from using a lawful product as one of its primary purposes or objectives to make employment decisions based on an employee's use or nonuse of lawful products . Allows an employer to base an employment decision on the use or nonuse of a lawful product if such use or nonuse impairs the individual's ability to adequately undertake his/her job-related responsibilities or creates, or appears to create, a conflict of interest, with the employee's job-related responsibilities. Exempts fire fighters from the provision of the statute. Allows the employer to offer or have in effect life, health, or disability insurance that differs in type of coverage or price based on an individual's use or nonuse of a lawful product.
Wyoming	Wyo. Stat. § 27-9-105 (2004)	Prohibits an employer from requiring, as a condition of employment, that any employee or prospective employee use or refrain from using tobacco products outside the course of his employment, unless it is a bona fide occupational qualification. Allows an employer to offer, impose or have in effect a health, disability or life insurance policy that distinguishes between employees for type or price of coverage based upon the use or nonuse of tobacco products.

Sources:

Timothy A. Gudas, *State Lawful Products Statutes* (Chicago: American Bar Association, 2005), State statutes available on-line from official state websites, and Westlaw statutory database searches, 2010.