

Can You Discipline Employees for Not Following COVID Rules When They're Off-Duty?



Discipline is problematic but self-isolation may be mandatory.

Your province is in full lockdown mode. Among other things, outdoor gatherings of more than 50 people aren't allowed. So, it troubles you to turn on the Sunday news and see hundreds of people crowding together to demonstrate right in the middle of downtown. And then you notice something else. One of those demonstrators is your employee! Worse, he's not wearing a mask! Now what? Can you discipline the employee for participating in the illegal demonstration without a mask?

Off-Duty Conduct Discipline & COVID-19

Off-duty conduct can be grounds for discipline when it hurts an employer's reputation, interferes with the employee's effectiveness and/or makes others unwilling to work with the employee. But it's unclear how these standard rules would play out in the COVID context. More precisely, no court or arbitrator has yet to address a case in which an employer disciplined an employee for not following COVID public health guidelines while they're **away from work**.

Of course, a case could be made that partaking in a political demonstration without a mask during a pandemic would be grounds for discipline, especially since the demonstration violated current COVID restrictions on public gatherings. But the employer would have a hard time selling that to a court or arbitrator. Key facts:

- The employee didn't hurt the organization's reputation because of the unlikelihood that anybody watching reports of the demonstration would have noticed the employee in the crowd, let alone recognized him as a person who works for your organization;
- Getting COVID as a result of being at the demonstration mask-less could cause the employee to catch COVID, which would potentially undermine his effectiveness; the problem is that it would be extremely difficult, if not impossible to prove that participating in the demonstration caused his infection; and
- While other workers might be unwilling to work with him if they knew that

the employee was at the demonstration without wearing a mask, they're highly unlikely to find out that he did this. Of course, you could tell them. But that could expose you to liability for privacy and disability discrimination.

Bottom Line: Under current case law, an employee's failure to follow COVID-19 protocols while off-duty is probably not enough, by itself, to constitute grounds for discipline. There may also be constitutional and human rights barriers to discipline, depending on what the employee was doing. Thus, discipline for participating in a political demonstration—even an illegal one—could violate an employee's free speech rights; discipline for attending religious services or funerals could violate religious rights.

Mandatory COVID-19 Isolation

While discipline may be tough to justify, taking part in a large demonstration without a mask in violation of current public health restrictions is clearly dangerous, even if it occurs while the employee is off-duty. After all, because COVID-19 cases are often asymptomatic, there's a pretty good chance that at least some of those demonstrators had the virus. And if the employee was in close contact with them, the employer not only can but probably should bar her from coming to work on Monday and require her to go into self-isolation immediately (unless it can effectively isolate her within the workplace, such as by scheduling her for a shift when nobody else is on duty and/or making her work in an isolated office, room or work station).

However, the employer would have to treat mandatory self-isolation as a health and safety measure rather than a disciplinary action. In effect, the self-isolation would constitute unpaid leave rather than a suspension or even termination. Leave might even have to be paid if the organization goes beyond employment standards minimums and provides for paid COVID leave.

Create Off-Duty COVID Conduct Policy to Protect Yourself

Although the case law hasn't caught up, the fact is that during these times of pandemic, the things employees do when they're away from work do have health consequences for themselves and others at the workplace. That's why you should implement a policy requiring employees to follow social distancing, mask and other COVID public health guidelines not only at the workplace but also when they're off-site, even when they're off-duty. Like the template on the HRI website, your policy should require employees to self-disclose any off-duty conduct that violates public health guidelines to their supervisors before reporting to work for their next shift. Last but not least, require employees to report violations committed by others that they witness or know about and assure them that they'll suffer no reprisals for doing so.