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Labor and Employment Alert: The Law of Unintended Consequences: Legislation Protecting Off-Duty Conduct Introduced in Ohio Senate

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Legislation was recently introduced in the Ohio Senate by Senator Joe Uecker to protect employees who engage in certain off-duty conduct from adverse job actions. At least 29 states and the District of Columbia currently have laws that protect employees to some extent from adverse action based on their off-duty activities. Most of these jurisdictions protect only employees' use of tobacco. Other states protect the use of "lawful products," while about four states protect employees who engage in "lawful activities." Ohio Senate Bill 180 would be even more all-encompassing and far-reaching.

As currently drafted, Ohio Senate Bill 180 would prohibit an employer from discharging without just cause, refusing to hire, or otherwise discriminating against a person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment, because the person:

- Exercised a constitutional or statutory right within the person's private real property; or
- Exercised a constitutional or statutory right within a motor vehicle not owned or controlled by the employer, regardless of whether the vehicle is on the employer's property.

The bill would define a "constitutional or statutory right" as "any right that is prescribed by the Constitution of the United States or this state, including any fundamental right, or that is granted under any statute of the United States or this state." An adverse job action would be considered an act of "discrimination" under the Ohio Civil Rights Act, and so the full remedies under the Ohio Civil Rights Act would apply – compensatory damages, punitive damages, attorney's fees, litigation costs, and individual liability for supervisors.

There is no definitive list of constitutional or statutory rights for an employer to reference. "Fundamental rights," in particular, are an amorphous concept, for they evolve as courts interpret and reinterpret the U.S. and Ohio Constitutions. Typically, fundamental rights are related to a person's right to autonomy or privacy and currently include,

among others, the right to marry and to procreate, the right to birth control, the right to freedom of speech, the right to freedom of association and the right to freedom of religion.

Senate Bill 180 was just introduced, so there have been no committee hearings yet where the intent of the legislation is discussed. But Senate Bill 180 may have unintended consequences. For example, an employer could not refuse to hire a person because the employer learns that he holds meetings of racist or anti-Semitic groups on his “private real property” (which is within the person’s fundamental right to freedom of speech and association). It is unclear whether this behavior would provide an employer with “just cause” under the bill to terminate such an employee. In the end, employers considering adverse action against an employee because of the employee’s off-duty conduct would be left to guess whether the conduct falls under a constitutional or statutory right – exposing employers to significant liability.

We will continue to monitor the bill as it proceeds through the General Assembly. Please contact your Vorys lawyer if you have questions about the bill or the legislative process.