

Session 3
The Impact of Off-Duty
Conduct on the Job

The Impact of Off-Duty Conduct
on the Job
Session 3

2016 Employment Law Conference – *Strength in Balance*

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Agenda

- Introduction
- Privacy Laws
- Off-Duty Conduct
- Action Steps for Off-Duty Misconduct

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Today, employers have the technological means and inclination to find out what employees are doing on their own time. Remember, your right to monitor employee actions off the job – or make decisions based on that conduct is limited.

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Off-Duty Conduct

Does An Employer Have Jurisdiction
Over Conduct That Occurs Off Duty and
Away From An Employer's Premises?



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Off-Duty Conduct

If you can show that the employee's off-duty conduct hurts the way the employee does his or her job or reflects negatively on the business, you may be able to address the conduct.

Don't forget...it makes a difference who the employer is

Don't forget...at-will employment

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The "Nexus" Requirement


- 1) Does the off-duty conduct adversely affect the company?
- 2) Is there a rational relationship between the employee's off-duty misconduct and the nature of the employee's employment?

Deegan v. City of Mountain View (1999) 72 Cal.App.4th 37

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Off-Duty Conduct

Threshold Issues: Is there a sufficient nexus between the employee's job duties and the off-duty conduct?



What rules/policies does the company have addressing off-duty conduct?

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Privacy Laws & Employees' Off-Duty Conduct

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Sources of Employee Privacy Rights

The Fourth Amendment of the Constitution establishes "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the persons or things to be seized." In *O'Connor v. Ortega*, the Supreme Court extended Fourth Amendment protections to the public workplace. However, the employee must have a reasonable expectation of privacy to trigger protections under the Fourth Amendment. The Court determined on a case-by-case basis that certain "inalienable rights" including privacy, are not subject to a cause of action against the government if the plaintiff establishes: 1) that the plaintiff engaged in conduct that creates a privacy interest, 2) that plaintiff had a reasonable expectation of privacy in the interests invaded, 3) that the invasion was serious, and 4) that the invasion caused plaintiff to suffer injury, damage, loss, or harm.



United States and State Constitutions, Common Law, Statutes

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Privacy Laws

- Federal constitutional rights – public sector, government & public entities – largely protected from monitoring
- State constitutions – private sector. Some states specifically include a right to privacy. *Example:* CA prohibits employers from taking action for off-duty conduct in some circumstances
- Unreasonable – employees have a reasonable expectation of right to privacy

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Reasonable Expectation of Privacy?

- Potential Factors:
 - Clear written policy?
 - Company-owned equipment?
 - Private area or in front of others?



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Notice Can Reduce an Expectation of Privacy


- *TBG Insurance Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443

Tip: Put employees on **notice** of the employer's right to conduct search of employer-owned computers, including emails.

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Protected Concerted Activity


- Section 7 of the National Labor Relations Act provides that employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities to the purpose of collective bargaining or other mutual aid and protection
- Employees have the right to communicate with each other



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Protected Concerted Activity

- Employees have the right to communicate with third parties
- New NLRB webpage on protected concerted activity
- www.nlrb.gov/concerted-activity contains synopses of more than a dozen recent cases involving protected concerted activities
- No union required to be protected



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Off-Duty Conduct



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Protected Areas



- Union Activity
- Drug Testing
- Political and Religious Activities and Beliefs
- Marital Status
- Off-Duty Arrests/Violence
- Moonlighting


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Drug Testing

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Depending on the employer's jurisdiction, employers may conduct drug testing in five circumstances. They are as follows:

- 1 Pre-Employment Testing
- 2 Random Testing
- 3 Reasonable Suspicion
- 4 Post-Accident Testing
- 5 During a Physical Examination



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Reasonable Suspicion Testing

Reasonable suspicion testing is more likely to be upheld if the proper safeguards are built into the policy. Such safeguards could include factors such as

- Direct observation of drug use;
- Physical symptoms of being under the influence;
- Abnormal or erratic behavior;
- Information provided by reliable sources and independently corroborated;
- Prior arrest or conviction for a drug-related offense.

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Marijuana and Workplace Drug Testing

Further compounding the challenges faced by employers who are considering the implementation of a drug-testing policy is the current legal status of marijuana in various states.

Despite attempts at the state and federal levels to either decriminalize marijuana or allow the users of medicinal marijuana to receive some type of exemption with regards to a positive drug test result, employers still are within their rights to enforce a drug-free policy in their workplace, which continues to include marijuana.

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Off-Duty Drug Use

- Current drug use not a “disability”, however, former drug use may be protected
- Off-duty drug testing has been struck down
- Duty to bargain with unions regarding drug/alcohol testing



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Political and Religious Activities and Beliefs

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Political/Religious Activities

- An employee's off-the-job political and religious activities are off limits to the employer. However, an employee who brings politics or religion to work, by proselytizing or attempting to convert others, as an example, may be subject to discipline by the employer.

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Marital Status

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Marital Status

- Most states make it illegal to keep track of an employee's marital status.
- Employers may not keep track of whether their employees are single, married, or divorced, except as may be necessary for providing certain health benefits.

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Moonlighting

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Moonlighting

- Generally, working more than one job is lawful
- An employer has the right to limit after-hours work that is in conflict with the employer's own business

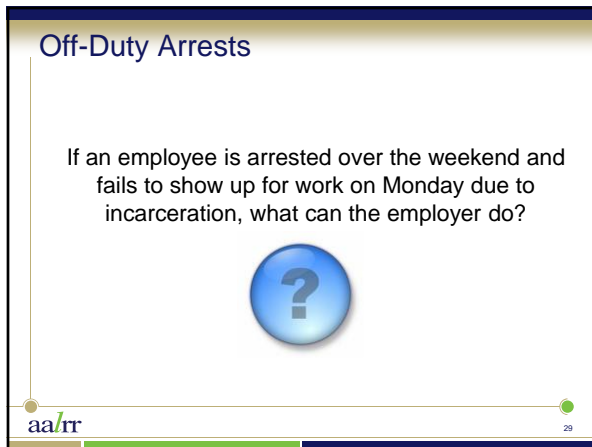
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A slide titled "Off-Duty Misconduct" featuring a photograph of a person in a suit holding a red card. The slide includes the "aa/rr" logo and the number 27 in the bottom left corner.



A slide titled "Employee Misconduct" with a circular image of hands covering eyes. A bulleted list includes: Off-Duty Arrests, Off-Duty Violence, and Off-Duty Social Media Use. The slide includes the "aa/rr" logo and the number 28 in the bottom left corner.



A slide titled "Off-Duty Arrests" with the text: "If an employee is arrested over the weekend and fails to show up for work on Monday due to incarceration, what can the employer do?" Below the text is a blue circle with a white question mark. The slide includes the "aa/rr" logo and the number 29 in the bottom left corner.

Off-Duty Violence

- Even if there is no apparent direct relationship between the conduct and the employee's job duties, certain situations, such as those involving violence or dishonesty, may still warrant action.
 - Example: Is an employee engaged in violent behavior outside the workplace?
 - Duty to provide a safe work environment

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Off-Duty Social Media Use

A Venn diagram with three overlapping circles. The top circle is light blue and labeled 'EMPLOYER MONITORING'. The bottom-left circle is light red and labeled 'OFF-DUTY BEHAVIOR'. The bottom-right circle is light green and labeled 'SOCIAL MEDIA USE'. A yellow star is placed in the central area where all three circles overlap.

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Issues Associated with Employee Use of Social Networking Sites


A photograph of a document with the word 'Problems' written in large, bold, white letters on a dark background. The document also shows some smaller text and a graph.

- Harm to employer reputation
 - Defamation
 - Breach of duty of confidentiality
- Insubordination
- Harassment/threats
 - Vicarious liability
 - Can be inadvertent or intentional

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Cyber Bullying

- Action or behavior intended to hurt or harass
- *Blakey v. Continental Airlines, Inc.*
- Corrective action
- Duty to monitor
- Employer liability



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Employee Misconduct ~ Areas to Consider

- Impact on employer's business
 - Reputation/defamation/trade secrets
 - Ability to manage workplace
 - Harassment/discrimination claim
- Impact on co-workers, customers, clients
- Relevance of policies
 - Violation
- Role of discipline

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Action Steps For Off-Duty Misconduct

- 1 Is the conduct lawful or illegal conduct?
- 2 Is there an applicable state law that protects the employee's off-duty conduct?
- 3 What is the risk/cost the employer is seeking to mitigate?
- 4 Is the employer willing to apply the policy consistently?
- 5 What effect will the policy have on employee morale?

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