

The Law vs. Real Life: Managing Employee Off-Duty Conduct

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Why the tension?

Employment in California is presumed to be ***at will*** (Labor Code 2922)

BUT...

California law protects ***seventeen*** classes:

- Gender
- Race
- Color
- National Origin
- Ancestry
- Citizenship
- Age (40+)
- Religion
- Sexual Orientation
- Marital Status
- Pregnancy
- Disability
- Medical Condition (including cancer and HIV/AIDS)
- Military/Veteran Status
- Political Affiliation
- Genetic Characteristics
- Gender Identity/Expression

Why do we care what our employees do on their own time?

- Harassment/discrimination lawsuits
 - “Knew or should have known”
- Disruption to business
- Company culture/reputation

Employee Privacy

Legally:

- **Federal law:** Reasonable expectation of privacy
- **State law:** Article I, Section 8 – constitutional right to privacy

Practically:

- Intrusion into employees' own time
- Potential to know “too much”/can't “unknow” something

Lawful, Off-Duty Conduct

California Labor Code Section 96(k) makes the following conduct illegal: "... *demotion, suspension, or discharge from employment for lawful conduct occurring during **nonworking** hours **away** from the employer's premises.*"

Hot Topics:

1. **Social Media** – what to do with employees' personal (and sometimes not-so-private) beliefs?
2. **Drug and alcohol use** – where to draw the line? Medicinal marijuana? A drink after work? Heroin?
3. **Criminal activity** – what happens if my employee is arrested over the weekend?

Other touchy situations:

- Dating/relationships
- Moonlighting
- Union issues
- Whistleblowing

SOCIAL MEDIA!



Social Media

What's the “law”?

- Course and scope of employment?
- “Bystander liability”
 - Harassment directed at someone else
 - “Bystander” feels harassed

KFC worker fired after Facebook photos show her licking potatoes

Worker who snapped photos also fired

Published On: Feb 21 2013 07:10:19 AM EST

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Employee fired from Taco Bell for licking shells



A photo of an unnamed employee licking Taco Bell shells



guess where I work. #pissolympics #nachobellgrande http://t.co/VLmyQJiQ



Amanda Francis RN

Jan 13 at 12:15 PM

Sooooo sleepy here in the ICU. Will someone please code and give me something exciting to do? #isthatbad? — feeling bored at UNM Sandoval Regional Medical Center.



UNM Sandoval Regional Medical...



Celia @Celia

Ew I start this f---ing job tomorrow

2/5/13, 11:43 PM

Social Media



Social Media

Takeaway:

- Is the harassing conduct committed within the course and scope of employment?
- Is it in a work-related context if it takes place outside of work or is there any link to the workplace?
- Is the employee viewing the discriminatory/harassing social media content just a “bystander” or is the content directed at the employee/workplace?

Social Media

50 Shades of Social Media	
Social media shows membership in the National Rifle Association?	Social media shows membership in ISIL?
Social media indicates presence at a political rally?	Social media indicates presence at a KKK rally?
Social media shows employee smoking a joint?	Social media shows employee shooting up heroin?

Social Media

Let's discuss some real-life applications:

- Supervisor's Facebook page shows he is a member of an anti-immigrant group
- Employee "likes" her church's Instagram post about anti-gay conversion therapy
- Coworker sends racist Snap

Drug & Alcohol Use



Drug & Alcohol Use

What's the law?

- Alcohol/Recreational marijuana (in CA): 21+
- Marijuana: Recreational use is now lawful under state law, but NOT under federal law
- Employers may still test for drugs and/or alcohol subject to certain standards/limitations

Drug & Alcohol Use

Are employers required to accommodate employees' drug & alcohol use?

- Alcoholism is covered by the ADA as a disability
- Employers must accommodate requests to obtain treatment/enter rehabilitation so long as those requests are made PRIOR to any violation of any drug/alcohol policy
- In California, employers are NOT required to accommodate medicinal marijuana use, even if it is prescribed

Drug & Alcohol Use

What about real life?

- Retail employee smokes marijuana in the parking lot after work?
- Locker search discovers marijuana gummies?
- Employee shows up to work reeking of alcohol and with bloodshot eyes?
- Route driver employee gets a DUI over the weekend?

Criminal Activity



Criminal Activity

What's the law?

- Labor Code § 432.7 generally prohibits employers from relying on the following information before making an employment decision (including hiring, firing, promotion, discipline, etc.):
 - Arrests that do not result in a conviction;
 - Dismissed, expunged, or sealed convictions;
 - Referral to, or participation in, a diversion program; and
 - Juvenile criminal history, including adjudications
- Employers may NOT use/consider Megan's Law information about an employee except in certain limited circumstances

Criminal Activity

What about real life?

- Employee arrested over the weekend but released in time for Monday shift
- Employee discovers coworker on Megan's Law website and refuses to work with him alone

Food for Thought: Other Off-Duty Issues That Could Arise

- Dating/relationships
- Moonlighting
- Union issues
- Whistleblowing

Any Questions?

Thank You for Attending!



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