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# Addressing Off-Duty Conduct

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# Agenda

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- General Guidelines and Considerations
- Criminal Conduct
- Lawful Conduct
- Moonlighting





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# General Guidelines and Considerations

A wider lens on workplace law

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- In general, what an employee does on his/her own time and outside the workplace is the employee's business

BUT . . .

- There are exceptions to this principle which arise when off-duty conduct has a connection to the employee's position and/or the employer's operations



# Legitimate Employer Concerns

The employee's involvement in certain types of off-duty conduct can raise employment concerns and may constitute legitimate grounds for discipline or termination

Examples:

- Protecting employer's reputation
- Disruption in the workplace
- Impact on the employer's operation/mission
- Liability Risk Exposure



# Assessing the Conduct . . .

## Is there a real/material connection between the conduct and the workplace?

- Nature of employee's duties
- Employer's expectations for employee's conduct
- Nature and seriousness of employee's conduct
- Impact of employee's conduct on employer's operation/mission and reputation
- Impact on fellow employees



# Constitutional Implications

- **First Amendment** – Freedom of speech, religion, right to assemble
- **Fourth Amendment** – Prohibition on unlawful searches and seizures
- **Fifth Amendment** – Right Against Self-Incrimination
- **Fourteenth Amendment** – Provides for equal protection and due process



# First Amendment

Applies to any on or off-duty speech or expression (e.g., social media posts, graphics on clothing, bumper stickers)

Principles to Consider:

1. Is their speech or expression a matter of public concern?
2. Apply a balancing test to weigh the employer's interests against the employee's interest in making the speech/expression
3. Is the speech/expression a substantial reason for the discipline or discharge?
4. Would the same decision have been made in the absence of protected conduct?





# Constitutional Considerations

## During Investigation – 4<sup>th</sup> and 5<sup>th</sup> Amendments

- Can require participation in investigations, but
- Cannot threaten with termination if they invoke the 5<sup>th</sup> Amendment Right
- What do you do if they do invoke?

## Pre and Post-Discipline/Termination – 14<sup>th</sup> Amendment

- Consistent Application of Policies
- Notice that behavior is prohibited (prior counseling/handbook)



# Fourteenth Amendment

## Is a pre- and post- discipline hearing required?

- Generally, not required for at-will employees.
- **BUT** - is there a property interest in continued employment?
- “Just Cause” or similar language creates a Property Interest
- Review also: Personnel policies, charters, ordinances, Etc.

## Is a name-clearing hearing required?

- Yes, for any public employee, even at-will employees
- Has a liberty interest been implicated?
  - Usually for terminations, forced resignations, or serious discipline
  - For stigmatizing reasons that are made public



# Other Concerns

## Protected Concerted Activity

- State's Public Employers Relations Act & National Labor Relations Act
- An activity is “**concerted**” if it is undertaken by two or more employees, or by one employee on behalf of others.
  - This means that even if one employee is acting alone and the action could encourage others, that employee receives the protection of the act
- Discussions of wages, hours, or terms and conditions of employment

## Statutory Prohibitions

- Remote employees outside of Florida
- Electronic Monitoring Laws





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# What Can You Do If An Employee Engages in Criminal Conduct?

# Arrests and Criminal Conduct

**First Question** – Are they accused, or have they been convicted?

**Second Question** – What are the underlying facts?

EEOC's Position on *Arrests*

- Possible Disparate Treatment/Disparate Impact Claims
- Individualized assessment (offense, job, business necessity)
- Consistent application of policies
- What are the underlying facts?

Balancing Act – Potential claims under Title VII vs. Negligent Hiring/Retention Claims under State Law

- Job related and consistent with business necessity



## EEOC's Position on *Convictions*

- Conviction will usually serve as sufficient evidence of criminal conduct. Provided that
  - 1) it is job related and
  - 2) consistent with business necessity.
- Fact Inquiry – how long ago, what was the conviction for, etc.



# Off-Duty Domestic Violence

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- Criminal Action v. Civil Action (i.e., allegations during a contentious divorce)
- When the employee is the victim
  - FMLA Leave
  - Florida's Domestic Violence Leave
- When the employee is the accused



# Drug Testing

BEFORE YOU DISCIPLINE OR DISCHARGE OVER A DRUG TEST, REMEMBER:

- Pre-employment and random testing should be limited to safety-sensitive positions or those for whom there is a “special need” to test
- No “suspicionless” testing unless it’s a safety-sensitive or “special need” position
  - This is true for post-accident testing, too
- Reasonable suspicion testing needs to be conducted close in time to the circumstances giving rise to the reasonable suspicion







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# Can You Discipline An Employee for Engaging in Otherwise Lawful Conduct?

# When Can You Discipline?

Generally, when the conduct

- 1) reflects poorly on the employer,
- 2) detrimental to the employer's reputation,
- 3) is disruptive,
- 4) Negatively impacts the operation or mission of the employer  
OR
- 5) exposes the employer to liability.

But remember – **Constitutional Implications**



# Public Expression

Apply a balancing test to weigh the employer's interest in providing efficient public service against the employee's interest in making the speech/expression

## Questions:

1. Is their speech or expression a matter of public concern or a private issue?
2. Is there a real/material connection between the conduct and the workplace?
3. Is the speech a substantial reason for the discipline or discharge?
3. Would the same decision have been made in the absence of protected conduct?



# Purely Personal Communication

- A nurse of a public hospital is pulled over and issued a speeding ticket. She tells the officer she “hopes to never have him as a patient.” The hospital fires her. **Does she have a First Amendment claim?**
  - No. The speech reflects a purely personal dispute, not a matter of public concern.
  - *Leverington v. City of Colorado Springs*



# Detrimental to the Employer's Reputation

- Deputy sheriffs engaged in consensual sexual activity that was recorded and made available to paying customers online. Their faces were shown, but all activity was lawful. They were terminated after the County learned about the online videos from an anonymous complaint. **Do they have a First Amendment claim?**
  - No. The expression was not a matter of public concern and was detrimental to the reputation of the Sheriff's Office.
  - *Thaeter v. Palm Beach County Sheriff's Office*



# Speech is of Public Importance

- Director of Solid Waste Dept. appeared at board meeting. During public comment period, he criticized the decision to increase the solid waste disposal fee and to privatize waste collection. He stated, in part, that the decisions would harm the community and senior citizens. He also called the commissioner a “liar” and a “big liar.” He was terminated. **Was his speech protected by the First Amendment?**
  - Yes. The “main thrust” of his speech was of public importance.
  - *Brown v. Greene County Com’n.*



# Social Media

- An Assistant Finance Director at a local county government was terminated for his Facebook posting about a new state attorney's decision to not seek the death penalty. He posted that she "should be tarred and feathered if not hung from a tree" and that "she should get the death penalty." **Was his speech protected by the First Amendment?**
  - No, his speech clearly interfered with the operation of the office and damaged the credibility of the department.
  - Although the posts were on a matter of public concern, the employer's interest in carrying out its functions outweighed the employee's interest in the speech.



# Political Speech

- Firefighter campaigned for 2 city council candidates and lobbied some council members, focusing his efforts on removing chief. He was also publicly critical of the city manager. **Was his speech protected by the First Amendment?**
  - Yes. It was off-duty, of public concern, and in the context of political elections.
  - Based on facts from *Carter v. City of Melbourne*





# Marijuana Use

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- Varies state by state (even recreational use)
- ADA and medical marijuana
- Currently, in Florida, use of medical marijuana is not protected activity





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# Moonlighting & the Gig Economy

A wider lens on workplace law

- Moonlighting –
  - When employees work multiple jobs OR
  - Run a personal business in addition to their primary job
- Gig Economy –
  - Independent workers paid to perform discrete tasks or services ('gigs') for businesses
  - Multiple income streams in addition to primary employment
  - Digital platforms directly connect the gig workers to the consumer



# When can you discipline?

Default: At-will employees may work for another employer during non-work hours

No federal law regulating what employers can and cannot do about moonlighting

- Do you have a policy prohibiting moonlighting or addressing conflicts of interests?
- Is there a contract provision in a CBA addressing moonlighting?
- If not, then all the previously discussed principles apply

KEY: Is there a real and material connection between the conduct and the workplace?



- *Cybulski v. Cooper* (1995) – Moonlighting privileges revoked from police officer after he hindered an investigation at his second job.
  - Held: No due process violation because as a temporary and conditional source of supplemental income, plaintiff has no absolute right, nor assured right, to the moonlighting.
- “Teacher Moonlighting as Bikini Mate Cut Loose; School District Says Unexcused Absences, Not Racy Second Job, Prompted Her Release.”
  - Upheld termination when an outside employment is inconsistent with the image a company wants to present (i.e., reputation)



# Questions



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