Regional Employees Association of Professionals February 2017 News

"Moonlighting"… Does the County Have the Right to Interfere with My Other Job?

Given many families' dire circumstances today, it's not unusual for employees to have to take second jobs or start side businesses. This is, of course, perfectly legal. But if you are a public employee it's not quite that simple. Yes, this *is* America and yes, you *do* have a constitutional right to privacy. However, **if you're a public employee, your employer <u>does</u> have the right to information about your outside employment, and, in some cases, to tell you that you must choose between the two kinds of work.**

There's some legal history to this. In the 80s and 90s several unions sued over their members' "right to privacy" when employers insisted on information about their outside employment. For several reasons, these suits have consistently failed: the Courts determined that public employers do have the right to some legitimate control over the "collateral employment" of their workforce. So, on what grounds can your employer demand information about your second job – and possibly tell you to terminate one job, if you want to keep the other? Here's a summary:

Your Right to Privacy…

The Bill of Rights was essentially forced upon our Founding Fathers by a vocal minority who wanted to make sure that citizens would be protected against a tyrannical government. It covers your freedom of religion, of speech, and assembly (including the right to speak and assemble *against* the government) protection against "search and seizure," against imprisonment without due process, etc. The right to privacy is implicit in the Bill of Rights and, over the years, the Courts have rendered thousands of decisions to protect individuals from the "long arm of government." Hence, from the employment perspective, employees at public agencies in California are now (since 1978) protected against the government's "seizure" of your property at your job without due process. More recent decisions have determined that (unless you are a sworn safety officer) you have the right to a private identity when you are not working. Thus, you cannot be disciplined at work, for activities in your private life which the County finds "unbecoming to a representative of the County." **You are NOT a representative of the County when you are not working.**

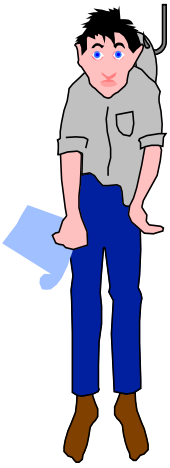
In the year 2000, the California legislature passed a law supporting your right to outside employment as a matter of "civil liberty" and asserting that "allowing any employer to deprive an employee of any constitutionally guaranteed civil liberties … is not in the public interest." Labor Code 96(k) specifically says that employers may not demote, suspend, or discharge employees "for lawful conduct occurring during nonworking hours away from the employer's premises," and employees so disciplined may file suit against their employers for loss of wages if this occurs. The bottom line: the County does not have the right to fire you, or even to threaten to fire you, for "lawful activity conducted away from its premises…"

How then, can your employer compel you to provide information on your second job? Even worse, how can it tell you that you can't run a seasonal tax service, or work for a contractor, or own a neighborhood ice cream store during your free hours?

The answer is that the courts have *also* found that employers – <u>especially those managing the public's money</u> -- have the responsibility to ensure that their employees are not doing anything that might conflict with, take advantage of, or do damage to the interests of the public. This has been interpreted to mean that they have the right to ask questions about what you do outside the job and establish policies (which are negotiable, by the way) to restrict the possibility that you could do damage.

"Damage" has been pretty carefully defined. It doesn't mean "reputational damage." (The courts have upheld the right of an elementary teacher not to be fired, although she was moonlighting as a stripper.) But it can mean wasting the public resources, including the "resource" of your time. Most "moonlighting" policies retain the right to restrict outside employment only when it either does, or holds the potential to:

1) Detract from the employee's ability to perform the employee's job with the County; or
2) Present a conflict of interest with the employee's position with the County; or
3) Involve the use of County resources.



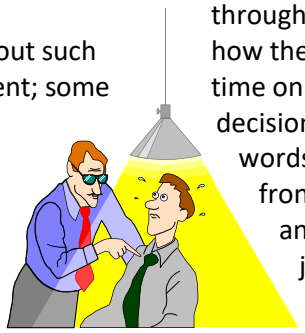
Under these circumstances, the courts have upheld the termination of a state auditor conducting an auditing business on the side, and upheld the County of Glendale's right to compel all employees to fill out a "collateral employment" form. The employer has the absolute right to make sure that you are not performing outside work that could influence your decision-making in your County job. This includes work where a "leak" of information could ultimately do damage or influence the political process. This is obviously why County employees can't work for contractors who might bid for public contracts, can't do private work for public officials, can't work for competitor agencies, etc. But it also applies to people who might have access to staff reports or "inside information" about the doings of the County Council.

Section 96(k) also allows employers to take disciplinary action when the non-work activity causes the employee's work performance to suffer. This means that an outside job which takes time away from your County job, or may leave you too tired to perform that County job, can be cause for suspicion. It's not unusual for an employer to discover that an employee has an outside job, for example, only after he files a workers compensation claim. One of the reasons for the prohibition on some jobs is that the County does not want to pay for your time off and medical bills incurred in your line of duty for another employer. (It is not illegal, by the way, for your employer to follow you, or even videotape you, on days that you claim to be sick or injured to see if you are actually going to another job…)

What questions can the County ask? What right do <u>YOU</u> have to defend yourself?

In most counties the policy on collateral employment is spelled out in the Personnel rules. It usually explains that employees must report and request approval to engage in non-county work. Sometimes, an actual form is provided to each employee, during the orientation period – but usually not. The form may ask you to give the name of the employer, to describe the duties, acts and functions to be performed, and the hours you expect to be working.

It usually requires you to agree that you will not do outside work on County time or use County resources.

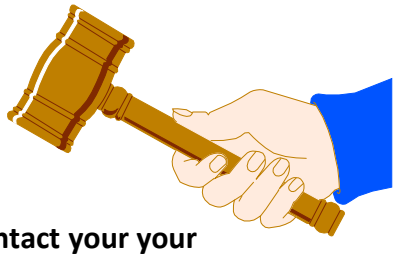


Some employers' rules say that you must fill out such a form *before* taking any collateral employment; some only ask you for information at the point of discovering that you're *doing* another job or already have an outside business. If you're supposed to fill out the form *before* you take an outside job, and fail to do this, you can be disciplined. So, it's a good idea to be proactive: tell your department if you're planning to work a second job. Unless there's some obvious conflict of interest, you'll have every right to conduct this "lawful activity away from County premises."

On the other hand, if there *has been* (or obviously might be) some conflict between your public job and your "collateral employment," the County has the right to tell you that you must terminate the outside job – or face termination from the County. Under these circumstances, if you refuse, you do have the right to due process. This means that you may go through the hearing process attempting to explain how the outside business does *not* interfere with your time on the job or doesn't jeopardize impartial decision-making or confidential information. In other words, you do have the right to defend yourself in front of a "reasonably impartial" hearing officer and, quite possibly, to argue that you are not jeopardizing the interests of the public in any manner.

You should know, though, that it's not a particularly useful defense to say, "everyone knew" about your side business or that "other people haven't been required to sign any forms." There's no legal obligation, on the employer's part, to make sure that everyone reports his/her collateral employment. In fact, it's probable that a great deal of outside employment is undetected – until something goes wrong.

MAJOR LEGAL DECISIONS



The following are significant decisions that further the rights of public employees in California. Each case is unique. If you have a specific legal question or problem, contact your your Board Rep or Association Staff at (562) 433-6983 or cea@cityemployees.net.

EMPLOYEES WHO WIN REINSTATEMENT ARE ENTITLED TO RETROACTIVE PERS CREDIT

A new law, AB 2028, is important for employees who are improperly terminated and then win their jobs back through the disciplinary appeals procedure. This law insures that an employee who wins his or her case really IS "made whole," including restoration of lost PERS payments by the employer.

This law took effect January 1st, 2017, but unfortunately does not cover employees who were wrongfully terminated before this date. Employees terminated earlier would need to go to Court to secure the lost benefits.

PUBLIC EMPLOYER CANNOT DELETE VACANT POSITIONS WITHOUT BARGAINING

A recent Court decision (El Dorado County Deputy Sheriffs' Association v. County of El Dorado) helps answer the question about whether an agency may delete vacant positions without "extending the opportunity to meet and confer." The Court of Appeals agreed with the union that the county had violated its local rules. Under these rules, the County had a duty to give notice and consult with the organization before deleting positions. The County failed to do so.

The County claimed that it had the management right to delete positions under state law, and was only required to "meet and consult" over the effects of its decision on the remaining unit employees. The court disagreed, finding that "meet and consult" and "negotiate" mean essentially the same thing -- and that these discussions must occur BEFORE the employer takes action. The court overturned the deletion of the positions and directed the County to rehire the employees until bargaining could be completed.

EMPLOYER HAS OBLIGATION TO BARGAIN WHEN IT REORGANIZES

A California Court of Appeals has upheld an injunction for a Police Officer's union against the City of Indio. In this case, the City announced plans to reorganize the Police Department's command structure with demotions, bumping, and layoffs. Despite a clause in the Union's MOU requiring the City to meet to discuss alternatives prior to layoffs, the City Manager told the Union it had no right to submit a response to its plan. The Union then sued in superior court to enforce the MMBA's "meet and confer" requirement and sought an injunction against the City.

The court granted the injunction, ordering the City not to reorganize until it demonstrated it had met the law's bargaining requirement. The court also granted the Union's attorneys' fees to compensate for the expense it had incurred in bringing the case. Specifically, the court agreed that the Department's reorganization plan was subject to bargaining because "a major purpose of the plan was to save labor costs by transferring job duties out of the bargaining unit" which would have significant and adverse effect on wages, hours, or other working conditions.

EMPLOYERS MUST PROVIDE EVIDENCE OF "IMMINENT AND SUBSTANTIAL THREAT" IN ORDER TO STOP A STRIKE

In a major decision, the Public Employment Relations Board (PERB) has denied the Sacramento Superior Court's request to block certain employees from striking, based on the Court's claim that they were essential employees. PERB reaffirmed the fact that public employees have the right to strike unless their employer can demonstrate on a case-by-case basis that their participation would create an "imminent and substantial threat" to public health and safety.

Under the law, PERB has the power to decide whether a public employees' strike is unlawful. If an employer wants to block a strike it can ask PERB (or the Superior Court) to put an injunction in place to stop it. The employer must convince PERB that that the strike is dangerous because the absence of these "essential employees" from the workplace would create a health or safety to the public. In this case, the employer received notice that its courtroom clerks and reporters were planning a two-day strike. The Court asked PERB for an injunction to stop the strike, but PERB rejected the request because it found the Court could not demonstrate that this work was essential to public health and safety. PERB said that the employer had failed to demonstrate that it could not use managers or supervisors to perform the functions of the clerks or court reporters, or that it could not find replacement employees from other agencies.

What's a "Confidential" Employee?

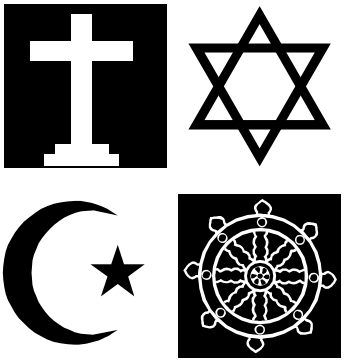
They're not what you think. A confidential employee is NOT someone who has access to your personnel file. She's not the employee who handles grievances or workers' compensation claims. He's not the guy who can access the County's financial information or plumb the depths of the computer systems. Being confidential has nothing to do with privacy, except in terms of the privacy of meetings between the County board and top management on the subject the details of contract negotiations. According to the Meyers-Milias-Brown Act (MMBA), the state labor law, a confidential employee is:

"…an employee who is required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information contributing significantly to the development of management's bargaining positions…"

In other words, confidential employees are the support staff who either sit in with the Council during executive session when bargaining is discussed or process Management's paperwork relating to bargaining. The definition was established to allow employers to separate employees, usually clerical staff, who have access to confidential negotiations information, from the general employees' bargaining group. The theory is that employers have a legitimate need to make sure that the staff who see and hear their strategies cannot sit "on the other side of the table."

In truth, most public agencies should have no more than half a dozen truly "confidential" employees: the staff who works intimately with the Board of Supervisors, Executive Manager, or Personnel Director. However, many employers create a much wider array of "confidential" classes. Sometimes this is due to an honest misunderstanding of the law; sometimes it is to ensure that the employees in the Human Resources feel more closely aligned with Management than with their co-workers. Sometimes, it's just to keep them out of the union.

It's not unusual for confidential employees to be told that they are "at will" or "serve at the behest of the County board." This isn't true either. Most employees (unless they are temporary or top managers) are covered by the state Skelly law. In other words, they have the right to due process prior to termination. If you or a co-worker believe that you may be designated "confidential" incorrectly, you should feel free to ask the employees association to contact the County to straighten this error out.



Your Job & Your Religion

The United States has no official Religion. Since its founding, it has guaranteed citizens the right to free choice and free exercise of religion. In public agencies, these principles are not just abstractions. There are a wide range of situations in which employees' religious beliefs can become a source of conflict. The U.S. Constitution, the California Constitution, and many state statutes all establish guidelines that are intended to (a) separate government and religion, (b) prevent discrimination in the workplace, and (c) protect individual freedom of religious expression. In practice, these rules can easily contradict one another. It's a difficult subject to manage.

Also, because religious issues can involve strong, personal beliefs on matters ranging from daily dress to the very meaning of life, they can quickly escalate to high emotional intensity. These conflicts can lead to stress, poor productivity, legal conflict, or even violence. The following are some questions and answers for people trying to address some of these common scenarios:

WHAT IF AN EMPLOYEE WANTS TO PROSELYTIZE OR SPEND TIME TALKING TO CO-WORKERS ABOUT RELIGION? WHAT IF SHE USES THE EMAIL SYSTEM TO INVITE PEOPLE TO CHURCH EVENTS?

The First Amendment of the Constitution prevents the government from creating an "establishment" of religion or from prohibiting the "free exercise" of religion or freedom of speech. Title VII, a federal civil rights statute and California's Fair Employment and Housing Act ("FEHA") prohibit employers from discriminating on the basis of religion, and require reasonable accommodation of employees' religious practices.

So, these laws can conflict with one another: public employers cannot promote religion, but cannot discriminate against people on the basis of religion. The easiest solution to this contradiction is for employers to crack down on religious discussions entirely, which is what most do. Suppression of all religious discussion in the work place is legal and common.

WHAT IF AN EMPLOYEE REQUESTS ACCOMMODATION FOR RELIGIOUS DRESS OR PRACTICES?

Employers must honor legitimate requests for workplace accommodation based on religion. These might include religious dress, such as headscarves, turbans, or burqas, or the need to leave one's desk briefly to pray. But what if an agency employee asks to have religious icons on his desk or walls? What about a Christmas tree? What if they cannot work on certain days of the week?

California law requires reasonable accommodation of employees' religious grooming and practices (including the right to some time off) unless the accommodation would impose an "undue hardship." Undue hardship means "an action requiring significant difficulty or expense." "Hardship" could be considerable expense, or impairment of workplace safety (such as interfering with the need to wear certain gear or operate equipment), or even causing disparate workloads amongst co-workers.

On the other hand, the display of religious materials or icons, which could be viewed by co-workers or members of the public, violates the barrier between religion and government.

WHAT IF EMPLOYEES WANT TO HOLD A PRAYER MEETING AT THE WORKPLACE AT LUNCH TIME?

Again, the law limits a public agency's ability to curb employee free speech and association. But the use of government property for religious activity violates the separation of church and state. Further, the presence of religious activities by some employees could well be considered evidence of a hostile environment by others. This can open your agency to a legal claim, or a claim by various religious groups for equal opportunities. So, employers are within their rights to prohibit ALL such meetings, even during non-work hours.

WAGE GARNISHMENT – THE LAW

Your wages are subject to garnishment only if someone has won a judgment against you in court, and you have not paid the judgment. Your employer is no different from any other party with regard to the protection of your paycheck. If your employer believes that you owe them money, they may discuss this with you, but if you fail to come to agreement, they cannot take it from you. Your employer cannot garnish your wages without suing you – and winning – in Court.

The law limits the amount that a garnishment can take from your paycheck; in California, the maximum is 25% of your take-home pay. You may reduce this amount by showing the Court that you and/or your family need more than 75% of your earnings to live on. (Your employer must give you a form that informs you how to apply for special treatment.)

It's illegal for employers to retaliate against employees who are subject to wage garnishment. Even if your employer believes you owe them money, it's a violation for the County to discipline you, or threaten your job (unless you have knowingly committed a violation of the law or of County rules).

WORKERS' COMPENSATION **Chris Ginocchio, Esq**.

California employees who are injured on the job have the right to file claims for workers' compensation. The state recognizes essentially two types of injuries: those that occur as the result of one incident and those that are cumulative trauma injuries, resulting from minor strains or exposure to toxins over time.

Our system recognizes physical injuries such as orthopedic, internal, cardiovascular, or neurological AND it recognizes psychiatric injuries. The term "industrial injury" is flexible enough to cover the result of almost any harm or exposure that occurs in the workplace.

WHAT DO YOU GET WHEN YOU FILE A CLAIM? The California workers' compensation system provides four basic remedies to employees who have been injured: (1) medical care and treatment; (2) temporary disability pay; (3) compensation for permanent disability (including permanent loss of employment); and (4) vocational rehabilitation. While there are some formulas for determining the amount of compensation based on the extent of injury and loss of income, each case is a unique combination of factors.

PRE-DESIGNATING YOUR DOCTOR. It is a good idea for an employee to pre-designate his primary treating physician. This means telling your employer who you want to designate as your doctor in case of injury. There are two key benefits of doing this: (1) you retain control as to which doctor will provide treatment for you and (2) you select your own doctor -- not your employer.

Most public agencies have a standardized form to allow you to pre-designate your doctor. A few criteria must be met: (1) the employee must have health care coverage, (2) the pre-designated doctor is your regular doctor, (3) the doctor agrees to be your treating physician in

case of injury, and (4) prior to the injury, you notify your employer of the doctor's name and business address.

WHEN DO YOU NEED A LAWYER? Most injured employees do NOT need a lawyer, although the staff at Leviton, Diaz and Ginocchio is always happy to answer your questions. You probably DO need an attorney if (1) your employer has denied your claim, (2) you are not getting proper medical care, or (3) you have a permanent disability so severe that you will not be able to return to your normal job. (In this case, you will want an attorney's assistance in negotiating the highest possible settlement agreement.)

Mr. Ginocchio is available at 714-835-1404. Leviton, Diaz & Ginocchio is an employment law firm, with emphasis on workers' compensation.

Questions and Answers: Your Rights on the Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your Board Rep or Association Staff at (562) 433-6983 or cea@cityemployees.net.

Question: I'm a manager in the finance department and am embarrassed to say that I made negative comments about one of my subordinates to a co-worker. My subordinate overheard me and came to me very upset. I apologized profusely, and now have questions. What could come of this? Could I be disciplined or even fired? Should I report this incident to my Director?

Answer: It sounds like you've gossiped and accidentally said something that you shouldn't have. A lot of workplaces have rules about courteous treatment of others, and what you said may have violated one of these rules -- perhaps even anti-discrimination rules. Because of this, particularly if your subordinate files a complaint, you might receive some discipline. This infraction does not appear severe enough to justify termination. It's good that you've apologized to the employee. Your decision about informing your Department Head has to do with what your comments were and whether you think your Department Head will respond in a helpful manner. Feel free to call your Association staff if you want to talk the matter over before taking further action.

Question: My work schedule got messed up over the holidays because I normally work on Saturdays. The County had me take New Year's Eve and Christmas Eve off, but did not give me my holiday pay. I went to Human Resources and we worked it out, and they DID agree to the holiday pay. The problem is that no one told my Department Head or payroll, and they are both saying I should NOT get the holiday pay. What can I do now?

Answer: Call Human Resources and ask them to please fix this problem. If this doesn't work, call your rep for help with a grievance. If your MOU entitles you to pay for the holidays, you should move forward to receive the pay you are due.

Question: Now that "the people have spoken" and we've got a Republican President, I imagine that he will appoint a conservative Supreme Court justice. Does this mean that the issue of Agency Shop can come up again and that it can be declared unconstitutional?

Answer: Unfortunately, yes. President Trump will appoint at least one Supreme Court justice, and we've got no reason to expect that judge to be a better friend to the Labor Movement. A case similar to the Friedrichs case (which was dismissed when Judge Scalia died last summer) is very likely to come before

the Court, and Agency Shop could well be ruled unconstitutional.

Question: I was off the job, having surgery, when my crew signed up for this year's vacations. We get to choose on the basis of seniority. When I came back, my boss said I had to pick the slots that were left over because I was sick. Isn't this illegal? I am the second highest in seniority in my crew.

Answer: Yes, it was probably somewhat illegal. Your time off the job was probably protected by both the Family Medical Leave Act and California's sick leave law. Both laws prohibit retaliation or adverse action against people for exercising their right to use sick/serious illness leave. Since your boss clearly said you were denied the right to bid because you were sick, then you should consider talking to Human Resources or calling your union staff for help with a grievance.

Question: I had a fall on the job and hurt my hand. I had surgery and am healing, but the doctor doesn't know whether I'm going to have some permanent loss of movement. I want to know if my job might be in jeopardy. I'm a 911 dispatcher. Also, do you think that I need a workers comp attorney?

Answer: There is always the possibility that your job may be at stake if you must work with equipment which can't accommodate your disability. However, before the County can terminate you, it must go through several steps, including an "interactive analysis" per the Americans with a Disability Act (ADA). Several laws give you quite a bit of leverage in this arena, so assume the best (including full recovery) until advised otherwise. And be sure to have union representation though this process.

On the subject of workers compensation, as long as you're receiving adequate treatment, you probably don't need a lawyer *UNLESS you are determined to have a permanent disability*. In this case, you probably DO need legal assistance to work out a final settlement on the injury. You DEFINITELY need a lawyer if it turns out that you may lose your job because of the injury. In this case, you want the highest settlement possible.

We suggest that you use the lawyers recommended by your union staff. They will work hard to minimize any threat to your continued employment.

FOR ARBITRATOR, REVERSES MANAGER'S DISCIPLINE

The County of Contra Costa has been ordered to reinstate a manager in who was demoted for "failure to perform" in severely understaffed work conditions. In fact, the arbitrator who heard his case said that it was "remarkable" that the manager made only four significant errors, "given the scope of his responsibilities" and the extent to which the program was "stretched to the limit on resources."

The manager had been running a psychiatric program for children and teens since 1988. When his co-worker in another division retired, he was made responsible for mental health programs throughout the county. When his administrative aide was laid off due to budget reductions, he had no choice but to take on *her* duties. Later, when he found it nearly impossible to oversee 17 staff, run the day-to-day operations of several facilities, and go through all the Medi-Cal bills for thousands of patients, his "productivity" began to decline. He was demoted for failing to submit claims fast enough (which were the basis of the program's income) and failing to discipline subordinates who were not productive enough either.

The manager appealed his discipline, and the arbitrator agreed that he should not be held responsible for maintaining "productivity standards" with a workload that was impossible for one person to meet. The arbitrator ordered him returned to his position, and chastised the County for creating his intolerable working conditions.