

# When Is It Your Business?

*Navigating the Gray Area Between  
an Employee's Personal Life  
and the Employer's Interests*

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# Overview

- A Tangled Legal Landscape:
  - Constitutional Provisions
  - Federal and State Statutes
  - Common Law
  - Contract Law
- A Practical Approach:
  - Is it any of our business?
  - Remember Rod's Rule of Reasonableness

# The Law of Privacy

- The Constitutions
- Statutes
  - Federal Statutes: ADA, FMLA, FCRA, ECPA
  - State Statutes
- Common Law Protections
- Contract Provisions

# Privacy Law Applied

- Electronic communications
- Surveillance
- Workplace and other searches
- Background checks
- Drug testing
- Disclosure of medical or other information

# Managing Privacy Rights

- Employee expectations are critical
- Eliminate unintended privacy issues with sound policies.
- Police use of systems and facilities
- Limit intrusion to that reasonably required by the workplace situation

# The Law Regarding Free Speech

- Preliminary Requirements:
  - Was the employee speaking as a citizen?
  - and*
  - Did the employee speak on a matter of public concern?
- If the answer is “yes” to both, how do the employer’s and employee’s interests fare in the *Pickering* balancing test?

# Free Speech Law Applied

- The *Garcetti* Cases
- Likely Protected Speech
- Likely Unprotected Speech

# Analyzing Free Speech Issues

- What was said?
- Who said it?
- To whom was it said?
- How was it said?
- What was the effect?

# Responding to Off-Duty Misconduct

# Nexus Between Off-Duty Misconduct and Employment?

- Does behavior harm employer's reputation or mission?
  - Publicity?
  - Public perception of employer if employee's conduct became known?

# Nexus Between Off-Duty Misconduct and Employment?

- Does behavior render employee unable to perform duties or appear for work?  
mission?
  - Incarceration
  - Loss of license
  - Uninsurable
  - Duty to accommodate?

# Nexus Between Off-Duty Misconduct and Employment?

- Does behavior lead to refusal, reluctance or inability of other employees to work with employee?
  - Safety-sensitive positions or other danger
  - Customer concerns

# Some Practical Applications

- Criminal arrest/conviction
- Intimate relations
- Abuse of position
- Smoking
- Speech or political activities