



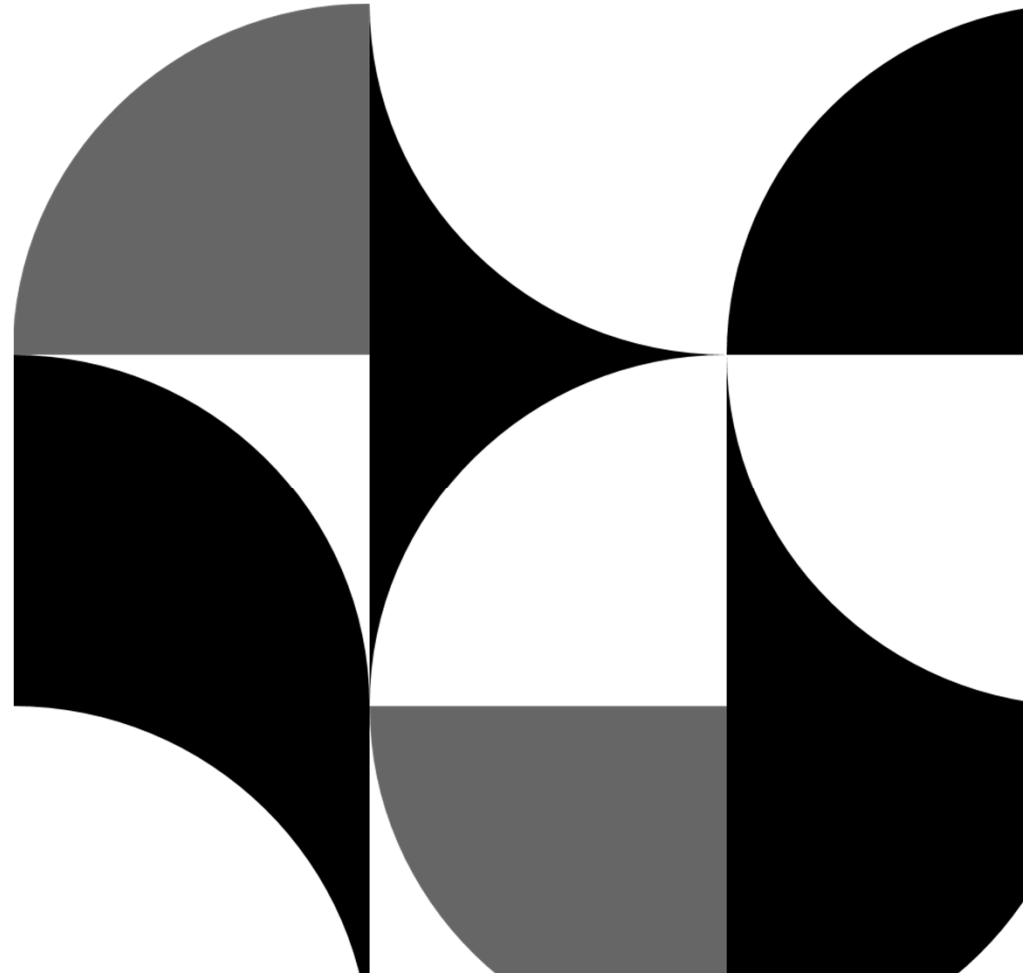
Employee Off Duty Conduct

Considerations and Strategies for
Employers

March 13, 2024

Seyfarth Shaw LLP

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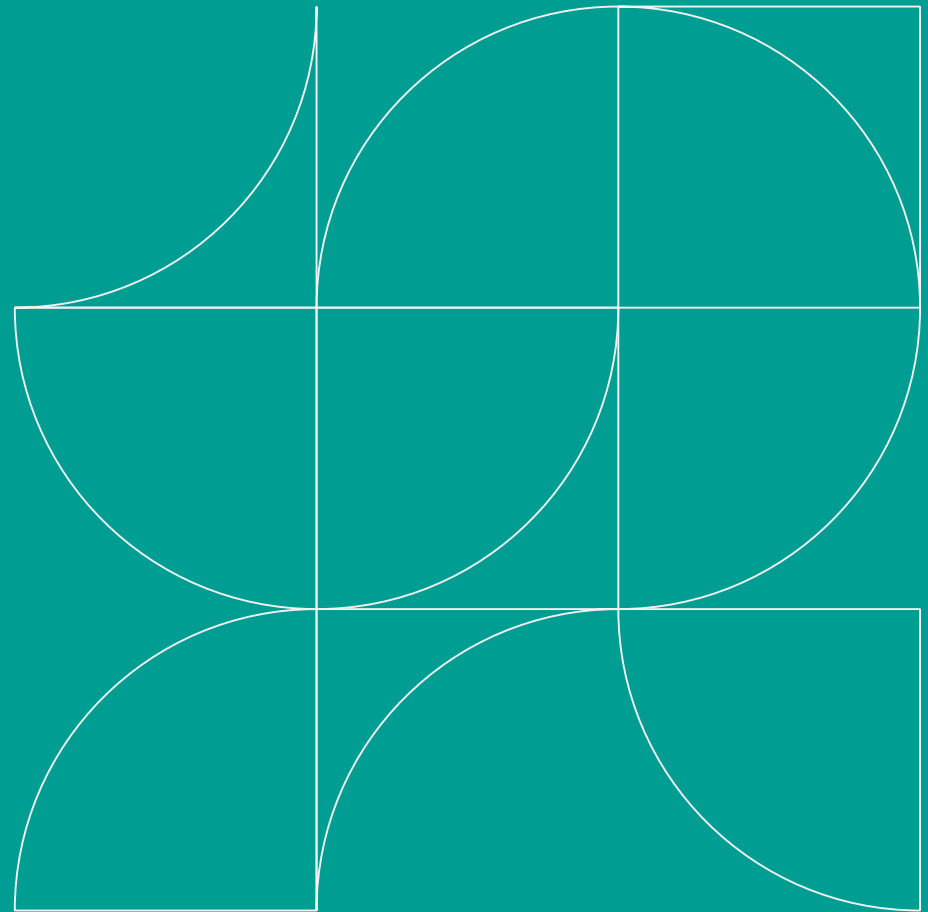


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Agenda

- 01** State Laws on Off Duty Conduct
- 02** The NLRB's Approach to Off Duty Conduct
- 03** Title VII Considerations
- 04** Scenarios and Questions

State Law Overview



State Laws Off Duty Conduct – the Jump

A Diverse Panoply of State Laws

- The starting point of this analysis is the so-called employment at-will doctrine, which generally provides that an employee can be terminated at any time without cause.
- However, every state has some form of anti-discrimination law that forbids terminating an employee based on a variety of protected categories. These laws, however, vary greatly depending on jurisdiction.
- Because this presentation is too short for a general summary of every jurisdiction's off-duty conduct laws, it will focus on the kinds of laws that must be followed in various jurisdictions, as well as some examples of the same.
- As a general conclusion, many might be surprised to find that an employer's ability to regulate off-duty conduct is quite discretionary, especially in the more conservative jurisdictions.

Right To Privacy- Seclusion / Wrongful Discharge In Violation Of Public Policy

Common Law Protections

- Privacy: While some common law tort theories for invasion of privacy exist, the case law reflects a limited application such as prohibiting an inquiry into a sexual orientation of an employee, an employee's sexual relations with others, and such other types of probing into clearly private conduct that would truly offend basic sensibilities of privacy.
- Public Policy: Similarly, common law courts developed protections to inoculate employees from employer pressure to undertake illegal activities such as committing perjury or evading jury service.
 - The wrongful-discharge-and-discipline tort protects employees against employer discrimination based on their actions in support of *public policy*.
 - While the phrase “public policy” could be read broadly, courts have given this tort a narrow reading. The crux of the tort is the protection of socially-advantageous behavior.
 - “[P]ublic policy must concern behavior that truly impacts the public in order to justify interference into an employer's business decisions.”
 - Often, a public policy can be established through violation of a statute, such as the FEHA in California

Off-Duty Conduct Statutes

Protected Off-Duty Product Use

- Most states have statutes prohibiting employers from disciplining employees for using certain products during non-working hours.
- The most salient example are statutes protecting off-duty use of tobacco, which is an offshoot of intense lobbying efforts from Philip Morris et al
- Off-duty statutes protecting the use of certain products tend to be stronger and subject to less exceptions than those aimed at off-duty speech or actual conduct.
- AB 2188, signed by Governor Newsom in 2022, prohibits an employer from discriminating based upon the person's use of cannabis away from the workplace or "[a]n employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their" body.

Off-Duty Conduct Statutes

Protected Off-Duty Speech / Conduct

- Many states have “off-duty” conduct statutes of one type or another, but the vast majority of these are in fact very narrow.
- Remember, though, that employment is at-will, and the First Amendment does not apply to the private sector .
- There is a dizzying smattering of statutes and local ordinances that protect employees from interference with their political activities .
 - The various statutes governing off-duty political conduct are typically very narrowly drafted, related to specific issues such as the right to vote, or direct participation with political parties, or political affiliation, but not tangentially related activities which might be deemed political in a layman’s sense, or speech which would be ordinarily thought of as covered by the First Amendment.
 - The present maze of statutes and balancing tests require private employees to conduct advanced legal research and analysis before determining whether they are protected under the law against employment retaliation for expressing political opinions.
 - Indeed, typically, courts construing the various statutes have interpreted them to be even narrower than the language would suggest.

Off-Duty Conduct Statutes

Business Necessity Exception

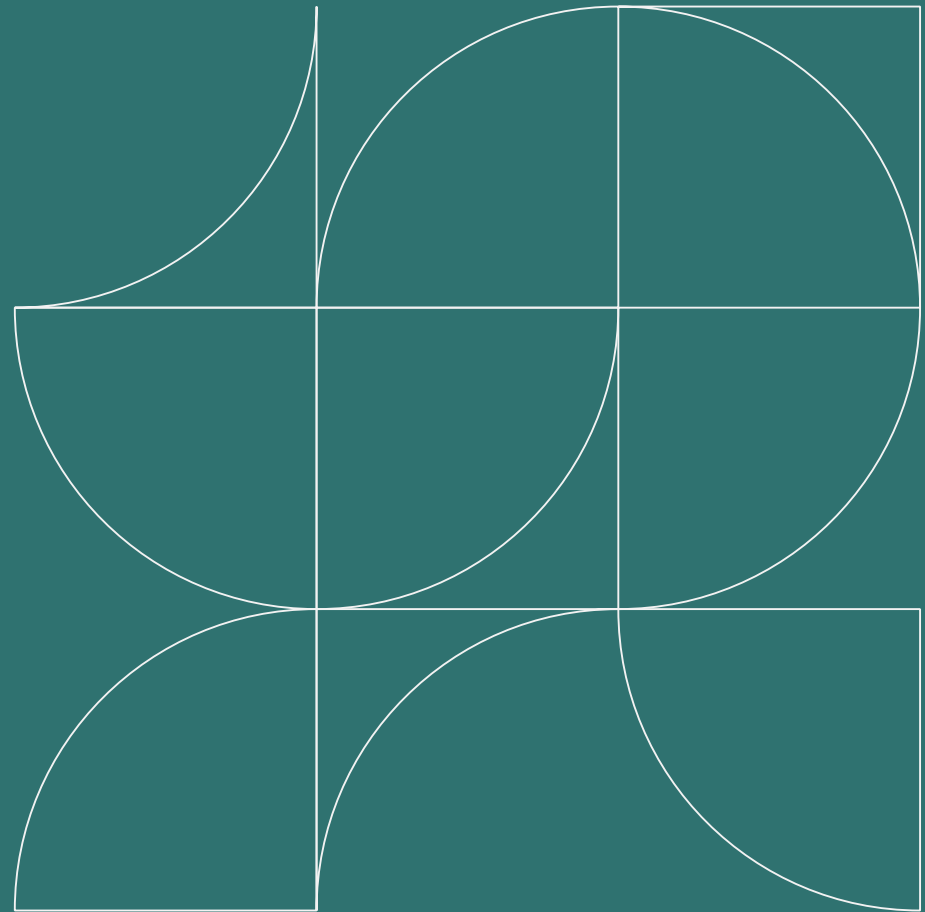
- In the first instance, it should be noted that these statutes vary greatly in scope and are almost invariably still limited by a qualification if the conduct in question has a demonstrable relationship to the employer's business.
- No statute provides an absolute protection to "off-duty" conduct except for in very limited areas such as voting, right to participate in jury trials, and other narrow conduct going to the basic operation of our political structure.
- CAL. LABOR CODE § 96(k) is instructive in that the language of the statute does not provide a business necessity exception, but the courts have read such an exception into the statute. See *Agabao v. Delta Design, Inc.*, No. D039642, 2003 WL 194950, at *3 (Cal. Ct. App. Jan. 30, 2003)

Off-Duty Conduct Statutes

Concluding Thoughts

- Employers have a great deal of discretion in regulating “off-duty” conduct if there is a rational relationship to work, even in those states with specific “off-duty” conduct statutes. As an example, requiring employees to take reasonable steps to decrease chances of exposure to COVID-19 virus (as determined by accepted practices) would seem to meet this test.
- Could an employer tell an employee not to attend large crowds generally? And does the fact these crowds have a political bent change the analysis? Is there a different analysis if the employee is attending a rock concert versus a rally for Black Lives Matter, protesting a shelter in place order, or protesting the current conflict in the Middle East?
 - Typically, the answer is yes, and the employer has discretion to prohibit attendance, assuming the rules are evenly applied and widely communicated without regard to the purpose of the gathering *i.e.*, not applied in a discriminatory fashion, and the prohibition has some relation to a business necessity.
 - There are obvious public relations issues to consider.

NLRB Approach to Off Duty Conduct



National Labor Relations Act

What is Protected Concerted Activity?

- Section 7 of the National Labor Relations Act (“NLRA”) protected certain “concerted activities” of employees for purposes of “mutual aid or protection
- “Protected” means:
 - Employees acting together for collective bargaining **or** mutual aid or protection (*e.g.*, working conditions, compensation, hours, and other terms and conditions of employment)
 - Peaceful and lawful activity in support of NLRA rights (no takeover, sabotage, etc.)
- “Concerted” means:
 - Activity by two or more employees **or** with the object of initiating or inducing group action
 - Can be *individual action* with this express or implied purpose
- Ex: Facebook post: “I’m refusing to come to work until this safety concern is addressed. Who’s with me?”
- Does not include individual gripes that do not express group concerns

Application to Social Media

How do these laws and policies apply?

- Generally, Company policy does not control the off-duty activities of non-management employees
- Examples of exceptions:
 - threats of violence
 - violations of the anti-discrimination and anti-harassment policy, e.g., off-duty conduct that adversely affects the work environment
 - breach of confidentiality obligations
- When conduct could adversely affect the work environment.

Political Speech/Conduct



Political Speech/Conduct May Qualify as “Concerted Protected Activity” Under the NLRA

- Cannot retaliate against employees who participate in **outside** political activities that relate to **labor** or **working** conditions.
 - Contacting legislators, testifying before agencies, or joining protests and demonstrations.
- Protections for political speech/conduct at work
 - 1 Discussions re: minimum wage or working conditions.
 - 2 NLRB says a rule broadly prohibiting discussion of topics that may be considered “objectionable or inflammatory” is unlawful.
 - 3 NLRB says a rule stating “don’t pick fights” on the internet is unlawful; could be construed to restrict protected discussions.

Current leadership expanding PCA



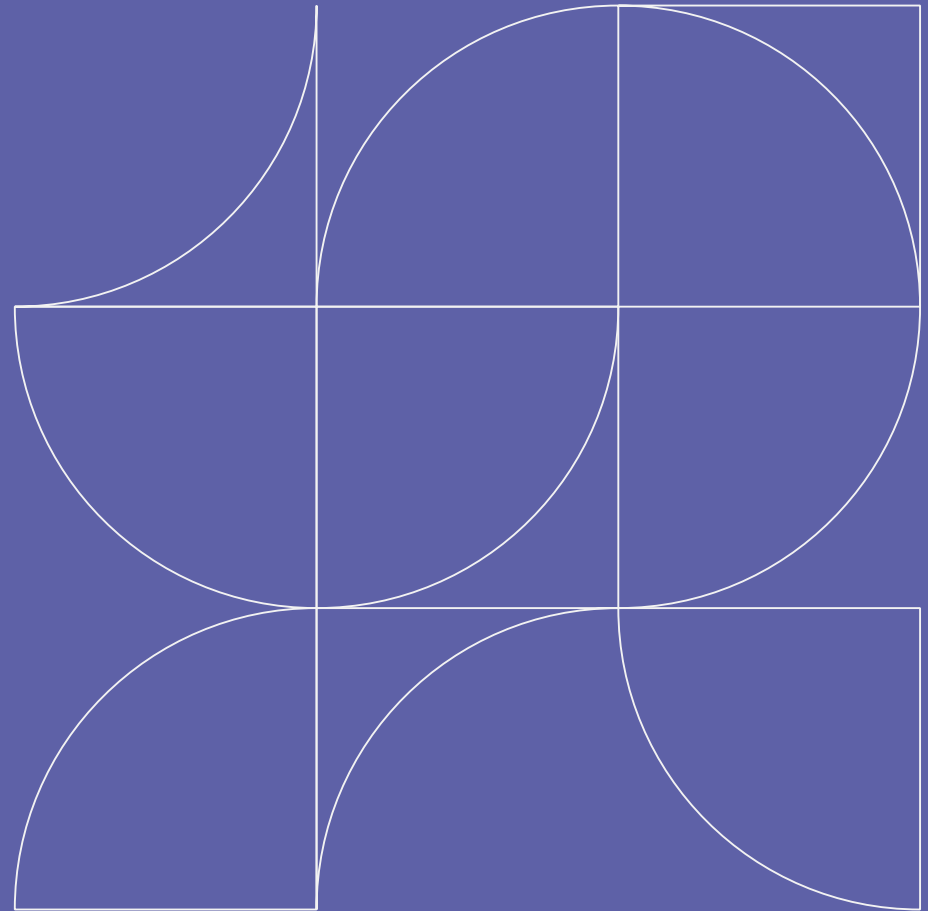
General Counsel's Agenda

- NLRB GC Abruzzo decides which cases get prosecuted and which ultimately come before the NLRB
- Bloomberg Interview on December 7th—she defined protected concerted activity as including “social justice, economic justice, racial justice advocacy...it would include symbolic speech like wearing a BLM slogan on your mask.”
- Prosecution against many large employers
- Consistent with GC Memorandum 21-03 (Ohr)
 - Expands mutual aid or protection even if the activity is not connected to workplace concerns, including political and social justice advocacy with a direct nexus to employment.
 - Finds certain conduct to be inherently concerted even if the conduct in its inception involves only a speaker and a listener as it may be an indispensable preliminary step to self-organization. Contemplation of group activity not always a required element.

***Home Depot, 18–
CA–273796
(2/21/24)***

- Dress code and apron policy prohibited displaying causes or political messages unrelated to workplace matters.”
- GC alleged employer discharged employee who wore BLM on apron, engaged in conversations with co-workers and management about ongoing discrimination and harassment.
- The majority said mask was "logically related to employees' prior protected concerted activities opposing racism in the workplace”
- Board did not reach argument of the GC protests of racial discrimination are inherently concerted, regardless of whether workers are acting together.

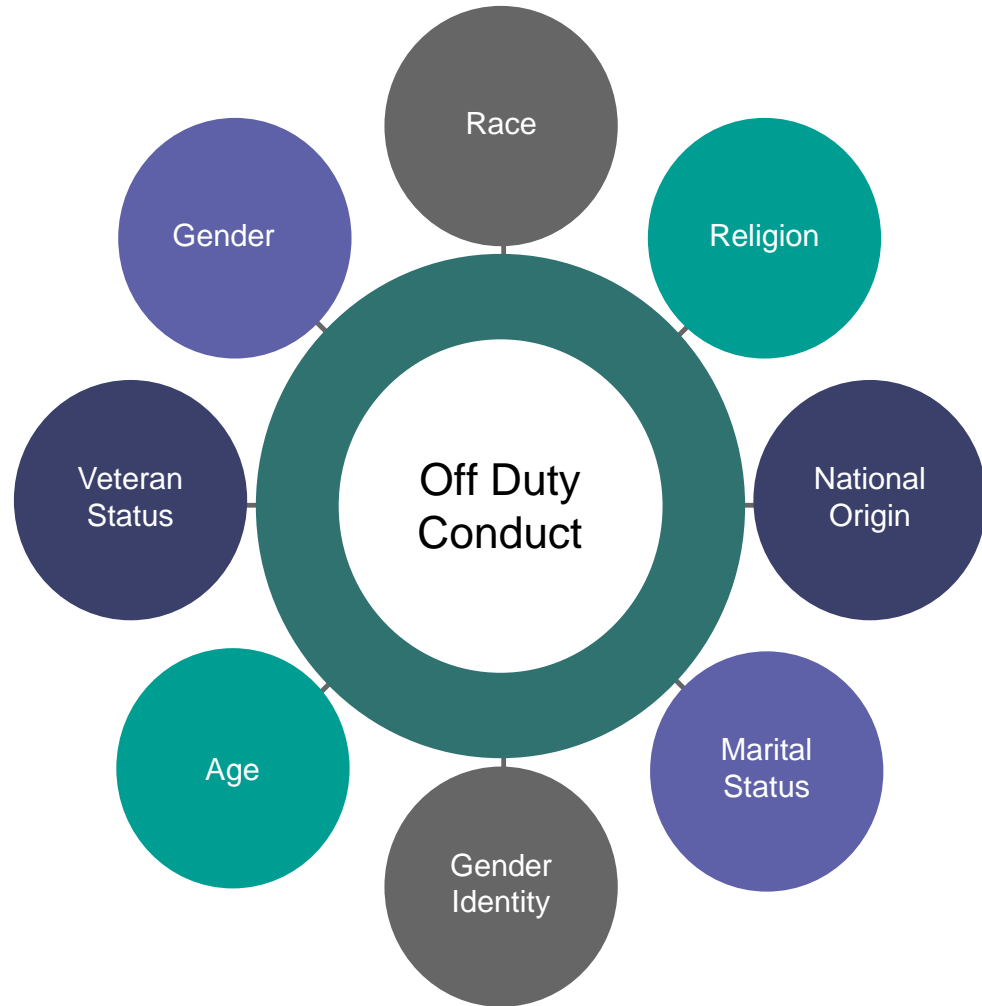
Title VII Considerations



Does the Conduct Impact the Workplace?



Does the Conduct Implicate a Protected Classification?



Does The Conduct Violate a Company Policy?



- Anti-discrimination policy
- Anti-harassment policy
- Respect for others policy
- Diversity & inclusion policy

Duty to Investigate

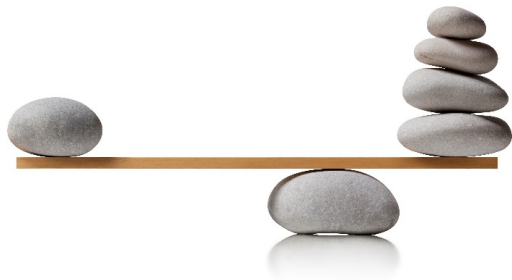


- If Company is on notice of potential report of discrimination, harassment or retaliation, it may have a duty to investigate and take prompt corrective action
- Gather relevant facts
- Don't make assumptions
- Get complainant's account
- Due process for accused
- Reasonably thorough
- Zero tolerance for retaliation



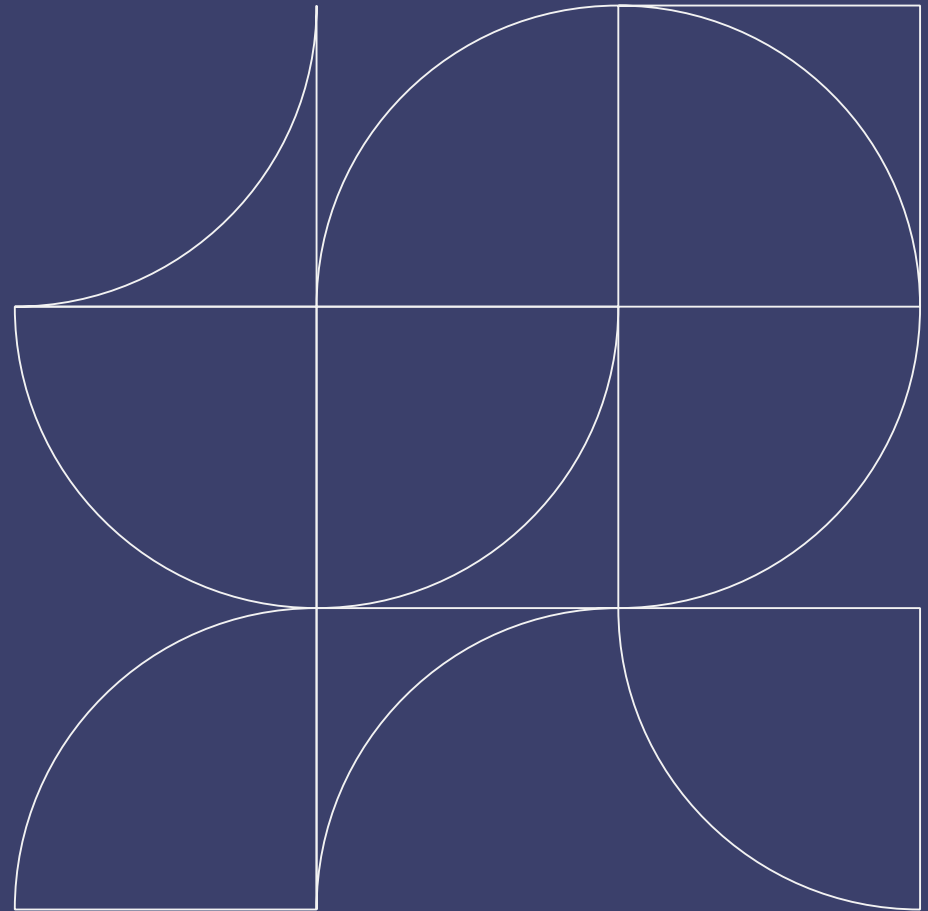
**Does the
Conduct Align
with Company
Values?**

If Substantiated, Decide on a Consequence

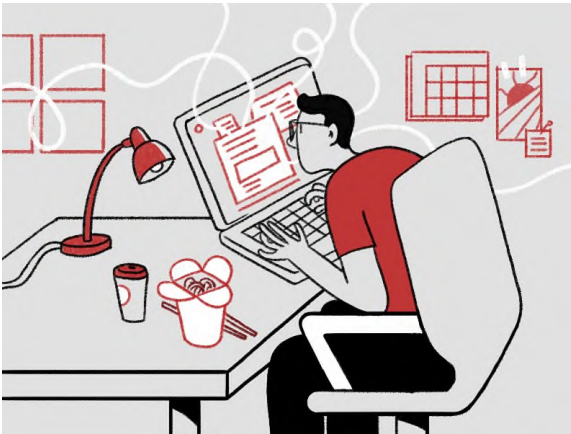


- Verbal warning
- Written warning
- Training or 1:1 coaching
- Last chance agreement
- Termination

Scenarios and Questions



Scenario # 1



Employee Mary goes to HR to report that coworker David, on his public X account, is re-tweeting offensive content that is, for example, calling for parents to ban Disney because of content that is LGBTQ-friendly. Mary, who herself is gay, tells HR that she does not feel safe working with David now that she knows his views that she believes are misogynistic and otherwise offensive.

Scenario # 2



The company becomes aware that an employee, James, has been filmed tearing down a poster of an Israeli child taken hostage by Hamas. James does not speak in the video; he tears the poster off a lamppost, crumples it into the trash can looking straight at the camera, and walks away. The video is now online and has thousands of views. An Instagram account called “@JewHaters” posts James’ LinkedIn profile which identifies him as an employee of the company. Coworkers have seen the video and sent it to HR demanding the company take action. Members of the public have tagged the company in posts demanding action. Some concerned business partners who support Israel have also reached out to ask the company’s response.

**thank
you**

contact information

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