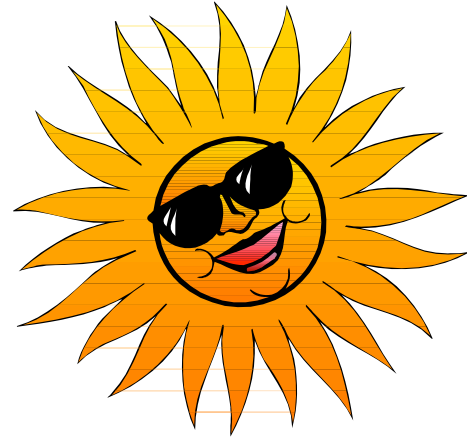


Glendale City Employees Association August 2007 News



“Moonlighting”... Does the City Have the Right to Interfere with My Other Job? By Shereen Faltas and Robin Nahin, CEA Staff



Given the skyrocketing cost of living, it's not unusual for employees to have second jobs or “side businesses.” This isn't illegal, of course, but for public employees it can be problematic. The question about whether the City has the right to ask about, or possibly interfere with, your other job comes to up regularly, and despite the fact that, yes, this *is* America and yes, you *do* have a constitutional right to privacy, the overwhelming answer is **Yes: the City does have the right to information about your outside employment.**

Several unions have, in fact, sued over their members' “right to privacy” regarding outside employment -- and they have consistently lost. For several reasons the Courts have found that public employers do have the right to some legitimate control over the “collateral employment” of their workforce. So, how do these two “rights” (yours, to privacy; theirs, to control) intersect? On what basis can your employer demand information about your second job, or possibly even tell you to terminate one job, if you want to keep the other? Here's a summary of the current state of the law.

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 the property of 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 City finds “unbecoming to a representative of the City.” **You are NOT a representative of the City 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 City 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 – especially those managing the public’s money -- 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 city; or**
- 2) **Present a conflict of interest with the employee's position with the city; or**
- 3) **Involve the use of city resources.**

Under these circumstances, the courts have upheld the termination of a state auditor conducting an auditing business on the side, and upheld the City of Los Angeles’ 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 City job. This includes work where a “leak” of information could ultimately do damage, or influence the political process. This is obviously why City 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 City 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 City job, or may leave you too tired to perform that City 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 City 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 City ask? What right do I have to defend myself?

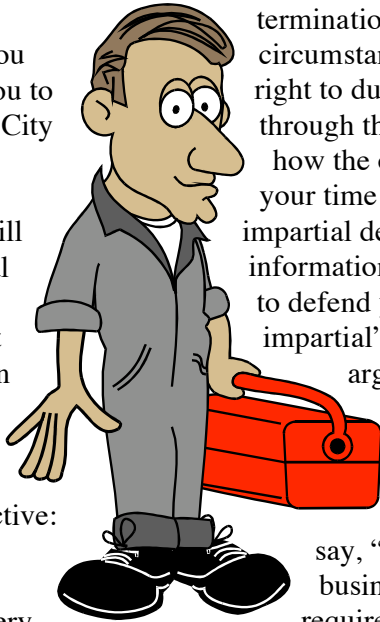
In most cities the policy on collateral employment is spelled out in the Personnel rules. It usually explains that employees must report and request approval to engage in non-City work. Sometimes, an actual form is provided to each



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 City time or use City 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 City premises."

On the other hand, if there *has been* (or obviously might be) some conflict between your public job and



your "collateral employment," the City has the right to tell you to terminate the outside job – or face termination from the City. Under these circumstances, if you refuse, you do have the right to due process. The 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.

"The Social Security Fairness Act"

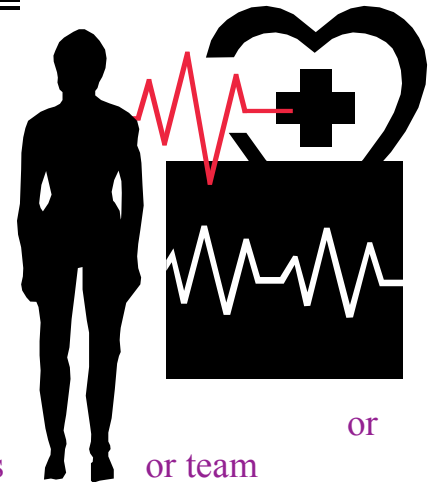


In January of 2007 two congressmen introduced HR82, also known as "the Social Security Fairness Act." If passed, this bill would revoke the Government Pension Offset (GPO), and the Windfall Elimination Provision (WEP) - both of which reduce the Social Security benefit of employees who held private sector jobs prior to retiring as public. In other words, this bill would enable retirees to enjoy the full value of their social security benefit, with no deductions caused by their participation in the PERS system.

The "GPO" reduces Social Security spousal benefits if the recipient has another government pension based on work that was not covered by Social Security. It takes two thirds of the government pension and subtracts that from the spousal benefit. If two thirds of a person's government pension exceeds his/her spousal benefit, that person does not receive the spousal benefit. The "WEP" reduces Social Security benefits for people who also have public retirement, such as PERS. Both of these provisions, which may now be revoked, cause public employees in California to lose either PERS benefits or Social Security benefit, for no other reason than the fact that they worked in both systems. If HR82 passes, retirees will no longer have to worry about losing the value of one pension because they are "cashing in" on the other.

“Deaf Rights”

A significant portion of our population is either born with, or develops, hearing impairments over the course of their work lives. Although illegal, discrimination against people with hearing problems is common. At work, the discrimination can take several forms: not being considered for jobs (or promotions,) not providing training that can enable the employee to broaden his her skills, failure to include the hard-of-hearing person in meetings activities, or failure to provide equipment that can facilitate or improve the employee’s performance.



All of these are examples of potential violations of the Americans with Disabilities Act (ADA), but deaf people are – like most employees – reluctant to press their cases, legally. The unfortunate outcome is that, with little expense, hearing-impaired people can perform almost any job that an unimpaired person can perform.

Title I of the ADA protects hearing-impaired employees (and ALL disabled workers) against discrimination by establishing that employers must make reasonable accommodation to the physical or mental limitations of their employees. Reasonable accommodation refers to modifications or adjustments to a job or the work environment, to enable an otherwise qualified person to perform the work. For people with hearing problems accommodation might include telecommunication devices for the deaf (TTYs), instant messaging software, amplified telephones, visual alarms, provision of qualified sign language interpreters, or other equipment.

It doesn’t matter whether an employee *becomes* hard-of-hearing in the course of his employment, or is hired with this problem. It doesn’t matter whether the hearing loss resulted from a work injury or from some other source. **Employers are responsible for ensuring that ALL employees are able to communicate effectively.** Since the needs of each person may be different, the burden is on the employer to make sure that a disabled employee who may be having difficulty has the proper equipment or services to carry out the duties of his or her job.

Finally, with regard to *public* agencies the ADA has a role in protecting the rights of deaf people to participate in education and government. Colleges and universities are required to provide equipment or “signers” who enable deaf people to have equal access to education. The ADA also states that places used for public business cannot discriminate against people with disabilities. Thus, City offices and council chambers must be “accessible,” even to the hard-of-hearing. The ADA requires all organizations open to the public to provide aids, so that anyone who is deaf may benefit from its meetings.

Watch Out for those “Watchdogs” Again

Another group of public employee “watchdogs” are trying to crack down on that “taxpayer waste” of what they call our *exorbitant* retirement plan. Specifically focused on “reforming” CalPERS, the Public Employee Benefits Reform Act would both slash *and* cap the state and city employees’ retirement plans. If passed, the Act would:



1. Change the salary-basis for calculating retirement to the average of the highest five years. (Now, in most agencies, it’s the last, highest year or the average of the last three.)
2. Change the maximum percentage, multiplied by years of service
 - a) For sworn employees, to 2.2%. (Now, for most sworn officers, it’s 3%.)
 - b) For non-sworn employees, to 1.5% (Now, for most it’s 2% to 3%)
3. Change the minimum age of retirement
 - a) For sworn officers, to age 55
 - b) For “general” employees, to the date of social security eligibility.



Although this “Act” is not a piece of proposed legislation yet, the group is seeking a sponsor in the state legislature. Even if sponsored, the proposal is so radical that it would be unlikely to pass in the legislature. (And, even if it passes, it would fly in the face of hundreds of negotiated agreements – and might well be tied up in the courts for years.)

For these reasons, our “watchdogs” may also begin gathering signatures to qualify their reform programs as an initiative on the ballot. You may want to begin warning friends and relatives to be careful about what they sign. Crazy initiatives have been known to pass...

Employment



Answers to Your Questions about Work-Related Problems

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific work-related problem, feel free to talk with your Board Rep or professional staff at 562-433-6983 or cea01@charter.net BEFORE taking action.

Q: Last Friday I turned in a doctor’s slip for time off, starting a week from Wednesday. I’m going to be under a doctor’s care. Yesterday, my supervisor asked me if I could reschedule the time off (because it is an elective procedure) for a week or two. I told him I would look into it. This afternoon my supervisor informed me that I had to reschedule the operation in order to cover another employee’s vacation time off. Can they make me reschedule the operation?

A. Absolutely not. You might want to *voluntarily* reschedule the procedure, for the sake of helping the department out. But they’ve got no right to



require it – and you have every right to use sick leave as your doctor sees fit.

Q: How many days does an employee have to respond to management about statements made on performance evaluations?

A: Your MOU may establish a specific number of days to respond, but most do not. You should either ask your supervisor or assume that you’ve got no more than about 30 days. If it’s going to take you awhile for you to get the response together, you should let management know that you *do* intend to respond, so they don’t consider the matter closed.

Q: We have always counted vacation and sick leave, used in the middle of the week, as “time worked” toward the calculation of overtime. In other words, if someone is sick, but then must work on the weekend, he gets overtime pay for the weekend. Now, management is saying that this is a mistake and that sick leave and vacation will be considered time off, so we only get overtime after working 40 hours. Can they do this?

A. NO! Unless there’s specific language in your MOU, saying that sick leave or vacation shall not be counted as “time worked” for the calculation of overtime, it sounds as if you’ve got a strong past practice that’s been established. In order to change this, the City would need to negotiate with your Association – during negotiations time. This is one of the functions of having a contract in place.

If there is no clear past practice, however, the employer does have the right to “fall back” on the state of the law to establish overtime payment practices. Under the FLSA (Fair Labor Standards Act) overtime for public employees is due only after 40 hours **of work**. (So beware...you may need to have documentation to prove that your past practice exists...)

Q: Can take time off under FMLA to care for my daughter who will be having twins?

A: The FMLA guarantees job security and continuation of benefits for up to 12 weeks for an employee to care for themselves or an immediate family member suffering a serious illness. Under the FMLA, a pregnancy disability qualifies as a serious health condition, so *if your daughter is in your household and/or needs medical care*, you can take time off to care for her.

Q: I heard that my Association Board has met with the City to modify our Bilingual Pay policy. My question is: is this considered a modification of our MOU? Don’t the members have to vote on this?

A. Yes, this is considered a modification of your MOU, but strictly speaking, every time a job description is modified or salary is adjusted, this may be considered a modification of the MOU. Your elected Board has considerable right (and responsibility) to negotiate on behalf of its members. It’s up to the Board, in conjunction with your Bylaws, to decide when a vote of the entire membership is necessary. Normally, the membership should be asked to vote when there are significant impacts on the entire

workforce or widespread changes in “terms and conditions of employment.”

Q: I am being told that I can’t apply for a position (graffiti abatement) because I don’t speak Spanish. Is this legal? It sounds like reverse discrimination to me.

A: Yes, it’s completely legal. The City may establish that speaking Spanish is an essential skill for the performance of the duties of the job, just as “computer literacy” is an essential skill for clerical work or the ability to drive a truck is essential for a Heavy Equipment Operator.

Q: It appears that sometime within the next nine months, the City will begin opening our library on Sundays. I am wondering if employees can be compelled to work on Sundays when scripture clearly says otherwise. (Exs.20, verses 8-11).

A. This is actually a complicated question. Under the Meyers-Milias-Brown Act, employers must “meet and confer” with your association over changes in “hours, wages and conditions of work.” Because the City would be establishing a new shift on Sundays when there never was one, it would be obligated to negotiate with the Association over this change in work hours. This would give your representatives an opportunity to discuss “accommodation” for employees who object to working on Sundays because of their religions.

Under Title VII of the Civil Rights Act, employers are prohibited from discriminating on the basis of religion. This can be interpreted to mean that they cannot discipline you for practicing your religion. You have the right to request not to work on Sundays, for religious reasons, and under Title VII, the City is required to attempt to accommodate you. “Accommodation” means that the employer must try to come up with solutions to your problem. ***But it need not be the solution that you are requesting***, and it is not required to sacrifice its legitimate business needs to accommodate you. For example, the City might agree to a *voluntary* shift change among employees on Sundays, but might not be willing (nor legally be required) to *compel* the shift change.

The City does not have to resolve the individual’s problem if it would “create undue hardship” or adversely affect other employees. Call your Association staff and they can help guide you through the process of requesting religious accommodation.

