

Burke, Warren, MacKay & Serritella's Fall 2025 Employment Law Update



October 28, 2025



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Employee Off-Duty Conduct: From Coldplay to Social Media

By: Rachel Bossard and Brittany Martin



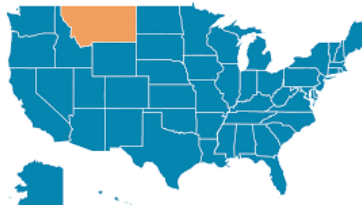
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At-Will Employment

- **Different rules for public employers**
- **All states except Montana have at-will employment**
 - Special rules for public employers
- **Federal Law - NLRA**
- **Some states provide additional protections**
 - Illinois
 - California
 - Colorado
 - New York



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What Constitutes Off-Duty Conduct?

- **Conflicts of Interest:** Outside employment or other conduct that violates company policies or competes with the employer's business.
- **Illegal Activities:** Off-duty conduct involving criminal behavior may raise concerns about an employee's ability to perform their role or align with company values.
- **Social Media Posts:** Discriminatory or otherwise inflammatory online comments that can harm a company's reputation or workplace culture.



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What happens at the Coldplay Concert...



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Astronomer Statement Following Incident

As stated previously, Astronomer is committed to the values and culture that have guided us since our founding. Our leaders are expected to set the standard in both conduct and accountability, and recently, that standard was not met.

Andy Byron has tendered his resignation, and the Board of Directors has accepted. The Board will begin a search for our next Chief Executive as Co-founder and Chief Product Officer Pete DeJoy continues to serve as interim CEO.

Before this week, we were known as a pioneer in the DataOps space, helping data teams power everything from modern analytics to production AI.

While awareness of our company may have changed overnight, our product and our work for our customers have not.

We're continuing to do what we do best: helping our customers with their toughest data and AI problems.

ASTRONOMER



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Brown v. Department of the Navy, Federal Circuit 2000

- Michael J. Brown was removed by the Navy from his position of Program Manager, Morale, Welfare and Recreation Department, Operations Division, for misconduct after he was found to have engaged in an inappropriate personal relationship with the wife of one of the Marine Corps officers from one of the units he was charged to support.
- The decision to remove him was based on the finding that his conduct had jeopardized the trust, credibility, and integrity essential to Mr. Brown's effective job performance.
- Appellate Court found that agency had shown the necessary nexus between petitioner's misconduct and his job responsibilities.



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Who Can Forget January 6th, 2021?



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Snyder v. Alight Sols., LLC

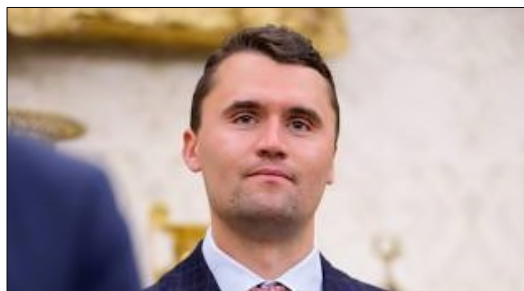
- California case (which provides special employee protections)
- Court found there was a question of fact for the jury as to whether the plaintiff “was fired for a political motive” after posting about being at the U.S. Capitol during the January 6th Insurrection
- Case settled short of trial



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Most Recently...



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Gomez v. Garda CL Great Lakes, (N.D. Ill. 2014)

- Employee of a private security company, \$10,000 went missing following a shift.
 - Employee cooperated with internal investigation .
 - But invoked 5th amendment rights in criminal investigation.
- Brought retaliatory discharge claim (Illinois tort claim).
- Court found there was “no authority to support the proposition that asserting the privilege shields a person from **private** consequences.”



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Rhino v. FedEx Ground Package Sys., Inc., (E.D.N.Y. Sep. 29, 2025)

- Employee was out on FMLA leave, posted a video on Instagram riding an electric scooter.
 - Video contradicted statement made by Plaintiff to employer that she could not move her knee.
 - She was terminated for violating the Acceptable Conduct Policy by lying to the company about her condition.
- Plaintiff brought suit for FMLA retaliation and under NY law.
- Court found there was no retaliatory intent where employee terminated for the social media post.



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Legal Considerations of Monitoring Off-Duty Conduct

- **Employee Privacy:**
Employees have a right to privacy, especially in jurisdictions with robust privacy laws.
- **State Laws:**
Laws governing off-duty conduct vary by state.
- **At-Will Employment vs. Discrimination Protections:**
Employers must avoid actions that could be perceived as discriminatory based on protected characteristics such as race, religion, or political affiliation.
- **Company Policies and Contracts:**
Employers must maintain and adhere to their policies regarding social media, codes of conduct, or clauses in employment contracts that outline expectations for employee behavior.



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Ethical Considerations in Managing Off-Duty Conduct



- **Consistency:** Apply policies uniformly to avoid perceptions of favoritism or bias.
- **Transparency:** Clearly communicate expectations around off-duty conduct through codes of conduct or employee handbooks.
- **Cultural Sensitivity:** Avoid punitive measures that may disproportionately impact certain groups.
- **Restorative Actions:** When possible, focus on education or dialogue instead of punitive measures.



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Should You Take Action?

- Is there a relationship between the off-duty conduct of the employee and the performance of the employee's job?
- Does the employee's off-duty conduct put your business in an unfavorable light with the public?
- Does the employee's conduct have a potential for harming the business?



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Intelligent Policies for Artificial Intelligence – A Litigator's Perspective

By: Joshua Cauhorn



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Need a policy if...

- Do we need (yet another) policy?
 - YES → High-risk uses
 - Sensitive Data
 - HR tasks
 - Creating Valuable Intellectual Property



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...and if you need one...

- What should be in it?
 - Purpose
 - What does it apply to (scope)
 - Define AI
 - Who does it apply to (e.g., contractors?)
 - Training?
 - Data Security (sensitive data)
 - IP creation
 - Regular review to accommodate new regulations
 - CO, EU, NYC
 - Accommodate other policies



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... then build in enforcement.

- Enforce and Monitor
 - IT must translate – what tools are we using?



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Are GenAI tools really free?

- GenAI tools are not run by charities.
- You donate data, they give AI.
 - Law is fuzzy.
 - Don't be the precedent.
- Study the fine print. Get what you pay for.



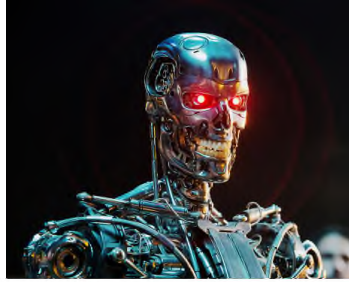
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Don't give my future opposing counsel a gift.

- Seems like a dream, but AI notetakers can come back to bite you...
- Robots taking notes
 - Don't get it right
 - Summarize incorrectly
 - May be using your data
 - Know and adjust storage settings



17	IN THE UNITED STATES DISTRICT COURT	
18	FOR THE NORTHERN DISTRICT OF CALIFORNIA	
19	JUSTIN BREWER, individually and on	Case No. _____
20	behalf of others similarly situated,	CLASS ACTION COMPLAINT
21	Plaintiff,	DEMAND FOR JURY TRIAL
22	v.	ENCLOSED
23	OTTER.AI, INC.	
24	Defendant.	
25		
26		
27		



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DEI and Reverse Discrimination in the Workplace

By: Alexandra Rogers



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Agenda

- Discussion of the *Ames v. Ohio* Decision
- Current EEOC Initiatives
- Understanding DEI and Reverse Discrimination and How it May Impact Employers



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Ames v. Ohio Department of Youth Services



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Facts

- Marlean Ames (“Ames”), a heterosexual woman, sued the Ohio Department of Youth Services (“ODYS”) after she was denied a promotion and demoted, with her previous position filled by a gay man.
- Ames applied to a newly created role within the ODYS and it hired a lesbian woman for the position Ames sought. It then hired a gay man to replace Ames in her program position after she had been demoted.
- Ames alleged that this adverse employment action was taken because of her sexual orientation, in violation of Title VII’s disparate-treatment provision.



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Procedural Facts

- Ames brought suit against ODYS in the U.S. District for the Southern District of Ohio, alleging that she suffered adverse employment actions due to her sexual orientation in violation of Title VII’s disparate-treatment provision.
- The Southern District Court of Ohio granted summary judgment in favor of ODYS.
- On appeal, the 6th Circuit affirmed the district court’s finding that Ames failed to establish the “background circumstances” needed to support a “reverse discrimination” claim under Title VII.
- The “background circumstances” in “reverse discrimination” matters under Title VII had been adopted by several Circuit Courts of Appeal, including the Sixth, Seventh, Eighth, Tenth, and D.C. Circuits, requiring plaintiffs who were asserting “reverse discrimination” claims to demonstrate that their employer had “reason or inclination” to discriminate against the majority group (e.g., men, whites, heterosexuals).



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Holding

- The Supreme Court held that the Sixth Circuit erred in applying the “background circumstances” requirement in “reverse discrimination” matters.
- Justice Jackson authored the majority opinion stating that “[b]y establishing the same protections for every ‘individual’—without regard to that individual’s membership in a minority or majority group—Congress left no room for courts to impose special requirements on majority-group plaintiffs alone.”
- Justice Jackson also stated that “the background circumstances test rule flouts [the] basic principle” of discrimination claims—which is that demonstrating discrimination in a case like Ames’ “does not vary based on whether or not the plaintiff is a member of a majority group.”



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Current EEOC Initiatives



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EEOC and Understanding DEI

- Diversity, Equity and Inclusion (“DEI”) is a broad term that is not defined in the statute.
- DEI discrimination can appear in many forms:
 - Disparate Treatment
 - Limiting, Segregating, and Classifying
 - Harassment
 - Retaliation



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Disparate Treatment

Disparate treatment can include an employer making an employment decision based in whole or in part, by race, sex, or another protected characteristics. Title VII prohibits discrimination against applicants or employees in the terms, conditions, or privileges of employment, including:

- | | |
|--|-------------------|
| • Exclusion from training | • Hiring |
| • Exclusion from mentoring or sponsorship programs | • Firing |
| • Exclusion from fellowships | • Promotion |
| • Selection for interviews (including placement on candidate slates) | • Demotion |
| | • Compensation |
| | • Fringe benefits |



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Limiting, Segregating, and Classifying

Title VII prohibits employers from limiting, segregating, or classifying employees based on race, sex, or other protected characteristics in a way that affects their status or deprives them of employment opportunities. Impermissible conduct may include:

- Limiting membership in workplace groups, such as Employee Resource Groups (ERG) or other employee affinity groups, to certain protected groups.
- Separating employees into groups based on race, sex, or another protected characteristic when administering DEI or other trainings, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources.



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Harassment

- Title VII disallows workplace harassment, which may occur when an employee is subjected to unwelcome remarks or conduct based on race, sex, or other protected characteristics.
- Harassment is illegal when it results in an adverse change to a term, condition or privilege of employment, or it is so frequent or severe that a reasonable person would consider it intimidating, hostile, or abusive.



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Retaliation

- Title VII prohibits retaliation by an employer because an individual has engaged in protected activity under the statute, such as objecting to or opposing employment discrimination related to DEI, participating in employer or EEOC investigations, or filing an EEOC charge.



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Understanding DEI and Reverse Discrimination and How It May Impact Employers

- Reverse discrimination is defined as the unfair treatment of members of a majority group based on their race, age, sex or other protected class.
- The *Ames* decision did not introduce any new obligations on employers to ensure compliance with Title VII.
- The *Ames* decision is a reminder that Title VII's protections are universal for all employees regardless if they are not considered a minority from employment-based decisions.
- Employers may see an uptick in reverse discrimination cases particularly in cases involving DEI initiatives or allegations stemming from promotions and terminations, now that *Ames* has confirmed that such claims are not subject to a higher or more difficult burden of proof.



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Understanding DEI and Reverse Discrimination and How It May Impact Employers Cont.

- Employers should make sure they are applying anti-discrimination and harassment policies equally.
- Employers should refrain from considering or referencing an employment decision based on a protected class such as race, color, religion, sex, national origin or other protected classifications.
- Employers should ensure they are investigating all employee complaints regardless if the employee belong to a majority group.
- Employers should provide training on all kinds of bias, including but not limited to unconscious bias towards majority groups.



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What to Know About Separation and Severance Agreements

By: Christopher Kentra and Blake Roter



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Separation & Severance Agreements



- Contract between Employer and Departing Employee
- Not Required By Law or Custom
- Formalizes the end of employment relationship
- Protects Employer from lawsuits
- Provide benefits to Employee
- Requires Consideration
 - Both Employee and Employer must receive something of value



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Common Legal Provisions

- Release of Employee's Claims
- Confidentiality
- Non-Disparagement
- Cooperation
- Return of Company Property
- A.D.E.A. and O.W.B.P.A. Waiver
 - Waiver of certain rights under the Age Discrimination in Employment Act, as amended by the Older Workers Benefit Protection Act
- Payment/Benefit Terms

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Reasons For Separation and Severance Agreements

- Establishes parameters of Employee's departure
 - Last day of employment
 - Neutral references
 - Severance pay/benefits
 - Lump sum/periodic payments
 - Payment of accrued PTO
 - Continued insurance coverage/COBRA
 - Outplacement Assistance
 - Bonuses/Stock Grants/Loans
 - Vested and non-vested stock options and other equity, claw back/repayment obligations, incentive compensation or bonus payments
- Reinforces previously agreed upon restrictive covenants
 - Non-compete, non-solicit and/or confidentiality agreements



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More Reasons For Separation and Severance Agreements

- Risk Mitigation
 - Release of termination-related claims
 - Pay
 - Harassment
 - Discrimination
 - Retaliation
 - Guard against loss of clients/staff
 - Protect good-will and reputation among former employee and current employees



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Important Considerations



- The employee's age
- Whether the termination is isolated or part of a group
- The state where the employee worked
 - State law requirements differ so state of employee's employment is important



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Advance Planning Required

- Employee has right to:
 - 21 days to consider agreement before execution if 40 or older (ADEA) (45 days if part of group layoff);
 - Same time generally provided to younger employees too
 - 7 days to revoke agreement after execution
 - Encouraged attorney review



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Additional Legal Compliance

- Rescission of NLRB restrictions on non-disparagement and confidentiality agreements
- Illinois Workplace Transparency Act Amendment (HB 3638) (1/1/26)
 - Agreements may not restrict employees from reporting or disclosing allegations of unlawful conduct in the workplace to Dep't of Labor, OSHA or NLRB
 - Cannot restrict "concerted activity" which includes discussion of work-related issues such as conditions, benefits and wages
 - Confidentiality provision requires distinct, bargained-for consideration separate from consideration for release of claims
 - Cannot shorten statute of limitations, apply non-Illinois law to Illinois-based claims or require filing of a suit outside Illinois
 - Consequential Damages



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Planning for Termination at Beginning of Employment



- Highly Compensated Executives
 - Complicated incentive/bonus structures
 - Up-front bonuses with claw back/repayment obligations if separated within specific number of years
 - Voluntary/Involuntary Separation
- Non-Competes and Non-Solicits
 - Negotiate and provide compensation for restrictive covenants at outset, rather than in confrontational position at termination



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Icy Conditions Ahead: Employer and Employee Rights During ICE Enforcement Actions

By: Christine Eduardo



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Types of Warrants

- Judicial Warrants
 - Search Warrant
 - Arrest Warrant
- ICE Administrative Arrest Warrant



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Judicial Warrants

• Search Warrant

- Must be signed by a judge; may expire (typically 14 days)
- Law enforcement cannot access any other private area within the facility if it is not identified in the warrant
- If they are searching for a person, they cannot search computers or paper files
- A management-level employee should always accompany officers during their activities

• Arrest Warrant

- Law enforcement has the right to enter the facility and look to arrest the specific individual(s) identified in the warrant
- The arrest warrant must describe the specific individual(s) and the locations that they can enter to find the individual(s)
- They cannot access any other private area within the facility



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AD-93 (Rev. 12/09) Search and Seizure Warrant

This is a judicial search warrant. It DOES authorize agents to enter your home.

UNITED STATES DISTRICT COURT Issued by a Court

for the
Eastern District of California

In the Matter of the Search of)
(Briefly describe the property to be searched)
or identify the person by name and address) Case No.
540 Oak Avenue)
Davis, California 95616)

SEARCH AND SEIZURE WARRANT Judicial Warrant

To: Any authorized law enforcement officer 2: 11 - SW - 0161 EFB

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the EASTERN District of CALIFORNIA
(Identify the person or describe the property to be searched and give its location):
SEE ATTACHMENT A, ATTACHED HERETO AND INCORPORATED BY REFERENCE

Read attachments to make sure they are regarding YOU and YOUR address, not someone else's.
The person or property to be searched, described above, is believed to conceal illegally the person or describe the property to be searched.
SEE ATTACHMENT B, ATTACHED HERETO AND INCORPORATED BY REFERENCE

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property. Date for warrant, not to exceed 14 days
YOU ARE COMMANDED to execute this warrant on or before 5-9-2011 (not to exceed 14 days)

☒ in the daytime 6:00 a.m. to 10 p.m. ☐ at any time in the day or night as I find reasonable cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to United States Magistrate Judge

(Name) _____

☒ I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized (check the appropriate box) ☐ for _____ days (not to exceed 30).
☐ Until the facts justifying the later specific date of _____

Date and time issued: 4-25-2011
9:10:00 AM

City and state: SACRAMENTO CALIFORNIA EDMUND F. BRENNAN, U.S. MAGISTRATE JUDGE Signed by a JUDGE
Printed name and title

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DEPARTMENT OF HOMELAND SECURITY Warrant for Arrest of Alien

NOT issued by a Court File No. _____
Date: _____

Any immigration officer authorized pursuant to sections 236 and 287 of the Immigration and Nationality Act and part 287 of title 8, Code of Federal Regulations, to serve warrants of arrest for immigration violations

I have determined that there is probable cause to believe that _____
removable from the United States. This determination is based upon:

- ☐ the execution of a charging document to initiate removal proceedings against the subject;
- ☐ the pendency of ongoing removal proceedings against the subject;
- ☐ the failure to establish admissibility subsequent to deferred inspection;
- ☐ biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and
- ☐ statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

YOU ARE COMMANDED to arrest and take into custody for removal proceedings under the Immigration and Nationality Act, the above-named alien.

(Signature of Authorized Immigration Officer)

(Printed Name and Title of Authorized Immigration Officer)

NOT signed by a JUDGE

Certificate of Service

I hereby certify that the Warrant for Arrest of Alien was served by me at _____ (Location)
on _____ (Name of Alien) on _____ (Date of Service), and the following
notice were read to him or her in the _____ (Language) language.

(Name and Signature of Officer)

(Name or Number of Interpreter)

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Public vs. Private Areas

**PRIVATE
PROPERTY**

**AUTHORIZED
EMPLOYEES ONLY
DO NOT ENTER**

**PROPIEDAD
PRIVADA**

**SÓLO EMPLEADOS
AUTORIZADOS**

- **Public Areas**
 - Anyone – including ICE agents or law enforcement – may enter public areas of your business without permission. Examples include a lobby or waiting area, dining area in a restaurant, or parking lot.
 - This does not give law enforcement or ICE agents authority to stop, question, or arrest anyone.
- **Private Areas**
 - Employers have a right to deny access to private areas of their facility, and may demand that law enforcement present a judicial warrant before it is granted access to any private areas
 - Without a judicial warrant, law enforcement needs the employer's permission to enter the facility's private areas



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Guidance for Employers During Raid

Step 1: Request to review the warrant

- Judicial Warrant
 - **Search Warrant:** Agents have the legal right to enter the premise and inspect the documents as specified in the warrant.
 - **Arrest Warrant:** Must describe the individual(s) and the locations the agents may enter to find the individual.
 - Employers are NOT required to permit access to private areas that are not specified in the judicial warrant.
- Administrative Warrant
 - Employers are NOT required to comply with an Administrative Warrant and may ask agents to leave their premises



U.S. Immigration
and Customs
Enforcement



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Guidance for Employers During Raid

Step 2: If the agents have a valid and enforceable judicial warrant,

Employers should NOT:

- Answer any questions about any employee or themselves
- Provide information regarding whether an employee is working on that day
- Take agents to the employee named on the warrant
- Help agents sort employees by immigration status or country of origin

Employers should:

- Watch the agents and see if they are complying with what's written in the warrant
- Strictly comply with judicial search or arrest warrants, but are not required to take any action to assist agents beyond what is reasonably required by the judicial warrant



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Takeaways

- Train your employees and establish workplace policies in responding to worksite actions and government officials.
- Employees also have right to remain silent, and employers cannot require employees to answer questions or discriminate against those who remain silent.
- Consider designating private areas of your facility with clear signage.
- For any other questions or assistance, please contact us.



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