

# Labor Arbitration For Virtual Work Issues Can Be Tricky

By **Daniel Johns** (February 1, 2022)

As a result of the pandemic, the last two years have brought forth an unprecedented amount of work from home, telecommuting and virtual workplaces.

In the context of labor arbitrations, arbitrators often have to determine whether employees can and should be disciplined for misconduct that occurs outside of the workplace. As a general rule, the greater the distance in time and space from the employee's workplace, the more difficult it is for an employer to hold an employee accountable for misconduct in the labor arbitration forum.



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But what is the workplace in a virtual world? In a virtual workplace, this question becomes much more cloudy and difficult for arbitrators to answer.[1]

The normal test employed by arbitrators in off-duty misconduct cases is called the nexus test. That is, arbitrators determine whether the misconduct has a sufficient nexus to the workplace and the employee's job such that an employer can hold an employee accountable for it.

If such a nexus exists, then arbitrators often find that the employer had just cause to issue discipline to the employee for off-duty actions.

To make a just cause determination with respect to off-duty employee misconduct, arbitrators have traditionally looked at the following factors:

- Whether the misconduct harms the employer, its employees or potential customers;
- Whether the misconduct damages the employer's public image;
- Whether the misconduct harms the employee's ability to work with co-workers; and
- Whether the conduct involved a public attack on the employers or its products.

But in the virtual workplace, when and under what circumstances should an arbitrator even apply the nexus test? In a normal context, the nexus test only applies if an employee received discipline for misconduct that occurred outside a brick-and-mortar workplace.

But, if an employee works from home and makes his or her own hours, what should be considered off duty? If an employee uses an employer-provided laptop to access porn sites, is that a dischargeable offense? If the porn access occurred at a work location, many

arbitrators would say yes. If it occurred at home and the employee works virtually, is the answer the same?

If the porn access occurs at 11 p.m., is that off the clock? What if the employee often answers work emails just before bed? What if the employee uses a private device to send work emails? What if an employee tweets a political opinion that damages the employer's customer relationships because the employee's online profile identifies him or her as an employee of the company?

For a labor arbitrator considering whether there is just cause to discipline an employee for off-duty misconduct, these questions are difficult to answer. It is easy for arbitrators to weigh the significance of an employee cursing out a co-worker on a factory floor while on the clock.

It is much more difficult to weight such considerations when the cursing out was done at an employee's home through instant messaging. It is even more difficult to determine whether those messages have had a deleterious impact on an employer's business.

So, what factors should arbitrators weigh with respect to employee misconduct in the virtual workplace?

First, does the employer have a timekeeping system that applies even if an employee works from home? Is such a timekeeping policy consistently enforced?

Employers would be wise to have such systems in place and to make certain that employees are clocking in and out when they are performing work-related services. If the misconduct occurs while an employee is at home, but on the clock, then employers are on more solid ground in issuing discipline for it.

And, arbitrators are better positioned to determine whether an employee should be disciplined for what occurred outside of the normal workplace if it can be clearly shown that it occurred at a time while an employee was working and being paid.

Second, in a virtual world, arbitrators need to expand the types of considerations that may show an impact on an employer's business. In the virtual world, nearly any employee's online presence can be traced back to an employer by online sleuths.

Any employee's tweet, Facebook or LinkedIn post can be circulated around the world many times over in a matter of minutes. In a virtual world, an offhand comment might lead to more serious discipline because there is a much greater risk and impact that such comments may hurt an employer's business.

At the least, arbitrators and employers must consider the increased risk to an employer's business of publicized employee misconduct in the virtual world.

Third, arbitrators must weigh not only the different impacts to an employer in off-duty misconduct cases, but they also should consider the impact that a virtual workplace may have on employees. Specifically, the virtual workplace can have a drastic impact on the ability of employees to maintain some modicum of privacy.

If the whole world is the workplace, does an employee have any ability to establish a private life? Arbitrators cannot ignore this blurring of employee's work and personal lives and the concomitant diminution of employee privacy. Employers too should be mindful of employee

privacy as they navigate the new virtual world.

The difficulty of applying labor and employment law to the virtual workplace is not unique to labor arbitration. For example, consider some other virtual workplace scenarios.

When and under what circumstances is an employee entitled to workers' compensation protection if he or she works from home? Can the Occupational Safety and Health Administration's investigators do a site visit to an employee's home to inspect safety issues?

What about Fair Labor Standards Act overtime issues when an employee is seemingly always on the clock at home? There are no easy answers to these questions, but employers would be wise to consider that the law may be applied in ways and in areas that it has never been applied before as the result of the newfound prevalence of virtual workplaces.

The pandemic has changed the workplace, likely permanently, in many significant ways. Employers and employees must recognize those changes and adapt accordingly. So must labor arbitrators change as they attempt to determine when and under what circumstances an employee can be disciplined for misconduct that occurs outside the normal workplace.

In the limitless virtual workplace world, labor arbitrators must figure out how to establish and enforce new limits.

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[1] The themes of this article were addressed previously by the author in *Toward a More Modern Application of the "Nexus to the Workplace Test": Arbitral Considerations in Off-Duty Employee Misconduct Cases*, 23 *Harvard Negotiation L. Rev.* 1 (2017).