

# Private Use of Law Enforcement 2018

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# Off – Duty Employment

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The current state of the law regarding off-duty employment by law enforcement officers indicates that law enforcement agencies may constitutionally restrict or prohibit their law enforcement officers from engaging in secondary employment during off-duty time.

# Off – Duty Employment

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The sheriff must have a clear policy restricting or prohibiting such employment and must be able to articulate how the policy is rationally related to a legitimate government interest (the "rational basis" test).

Op. Tenn. Atty. Gen. No. 01-075 (May 8, 2001).

# Cases

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Allen v. Miami-Dade County, 2002 WL 732108, \*3 (S.D. Fla. 2002).

Ft. Wayne Patrolmen's Ben. Assoc. v. City of Ft. Wayne, 625 F.Supp. 722, 730 (N.D. Ind. 1986).

Shelby County Deputy Sheriffs' Ass'n v. Gilles, 2003 WL 21206067 (6th Cir. 2003) (Sheriff's regulation prohibiting full-time deputy sheriffs from wearing uniform while performing off-duty work was not unconstitutional.).

# Misuse of County Time and Property

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There is a prohibition against the use of public property for private purposes, which would be a form of official misconduct. T.C.A. § 39-16-402.

Op. Tenn. Atty. Gen. 81-587 (the offices in a county courthouse may be used only for a public purpose).

Op. Tenn. Atty. Gen. 82-391 (a county official can not use county property to conduct an insurance business or any other business in his private capacity).

# Public Funds

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In *Azbill v. Lexington Mfg. Co.*, 188 Tenn. 477, 483, 221 S.W.2d 522 (1949), the Tennessee Supreme Court noted that public funds provided by taxation may be used only for public, not private, purposes.

# Public Funds

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The Attorney General has opined that, consistent with the foregoing principle, public equipment and other property paid for, and public officers and employees compensated, by public funds appropriated for public purposes from revenues derived by counties from taxes authorized by law cannot properly be donated or applied by a county officer to a private use.

Op. Tenn. Atty. Gen. 84-166 (May 17, 1984); Op. Tenn. Atty. Gen. 03-088 (July 15, 2003) (same).

# Public Funds

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It is improper for a county official to use publicly owned equipment for private gain.

Op. Tenn. Atty. Gen. No. U93-48 (April 6, 1993).



# Public Funds

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A law enforcement officer should not perform services that are not part of his or her official responsibilities while wearing his/her uniform or driving a patrol car in a way that might convey that any services performed for a private individual are, in fact, being carried out as part of the officer's official duties.

Op. Tenn. Atty. Gen. 97-043 (April 7, 1997).

# LIABILITY CONCERNS

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The leading case in Tennessee dealing with liability for off duty law enforcement officers employed as private security guards is *White v. Revco Discount Drug Centers, Inc.*, 33 S.W.3d 713 (Tenn. 2000).

# LIABILITY CONCERNS

## White v. Revco Discount Drug Centers

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In that case the Tennessee Supreme Court stated that issues concerning employer liability for torts committed by off-duty police officers employed as security guards are to be resolved according to traditional Tennessee agency principles. *Id.* at 723.

# LIABILITY CONCERNS

## White v. Revco Discount Drug Centers

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Private employers may be held vicariously liable for the acts of an off-duty police officer employed as a private security guard under any of the following circumstances:

(1) the action taken by the off-duty officer occurred within the scope of private employment;

# LIABILITY CONCERNS

## White v. Revco Discount Drug Centers

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(2) the action taken by the off-duty officer occurred outside of the regular scope of employment, if the action giving rise to the tort was taken in obedience to orders or directions of the employer and the harm proximately resulted from the order or direction; or

(3) the action was taken by the officer with the consent or ratification of the private employer and with an intent to benefit the private employer.

# LIABILITY CONCERNS

## White v. Revco Discount Drug Centers

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The private employer of an off-duty officer cannot generally be held vicariously liable for actions taken by the off-duty officer outside of the officer's regular scope of employment as a security guard.

As such, when the officer is summoned to official duty by the municipality, **or otherwise performs traditional police actions** outside of the scope of his or her private employment, the private employer will not be generally liable.

# LIABILITY CONCERNS

## White v. Revco Discount Drug Centers

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The private employer would be liable, however, for acts taken outside of the regular scope of private employment under the following two scenarios:

- (1) the employer ordered or directed the action; or
- (2) the employer gave consent to the action, which was taken by the officer with a primary intent to benefit the employer.

# LIABILITY CONCERNS

## White v. Revco Discount Drug Centers

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Under the dual master doctrine, the municipality may also be vicariously liable—along with the private employer—for the actions taken by one of its off-duty police officers.



# LIABILITY CONCERNS

## White v. Revco Discount Drug Centers

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Under Tennessee agency law, liability may also be imputed to the municipality when all of the following four circumstances are present:

- (1) the action taken by the off-duty officer involves **exercise of a traditional police power**, such as the power to arrest, the power to issue citations, or the power to command aid;
- (2) the municipality had knowledge, either actual or constructive, of the action taken by the off-duty officer;

# LIABILITY CONCERNS

## White v. Revco Discount Drug Centers

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(3) the action taken by the off-duty officer simultaneously serves the objectives of the private employer and the municipality; and

(4) the objectives of the private employer and the municipality, which are both served by the officer's action, are not inconsistent with each other.

White v. Revco Discount Drug Centers, Inc., 33 S.W.3d 713, 724 - 725 (Tenn. 2000).

T.C.A. § 62-35-141.

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62-35-141. Notification and uniform requirements for peace officers providing security outside of primary jurisdiction.

# T.C.A. § 62-35-141 (a)(1)

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Notwithstanding any provision of this chapter to the contrary, if a full-time sworn peace officer is working to provide uniformed security, direct traffic, exercise crowd control or perform any other such duty in a jurisdiction other than the officer's primary jurisdiction, then the chief law enforcement officer of the jurisdiction in which the full-time sworn peace officer is working shall be notified of the location of the officer's assignment as well as the length of the assignment.

## T.C.A. § 62-35-141 (a)(1)

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For work performed in unincorporated areas of a county or within the limits of a municipality that does not maintain a police department, the chief law enforcement officer of the jurisdiction is the county sheriff.

For work performed within the limits of a municipality that maintains a police department, the chief law enforcement officer of the jurisdiction is the municipal police chief.

## T.C.A. § 62-35-141 (a)(2)

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Notice shall be provided in writing by the employer of the full-time sworn peace officer within five (5) days prior to the date of first service, unless other arrangements are made with the chief law enforcement officer of the jurisdiction.

## T.C.A. § 62-35-141 (b)(1)

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While a full-time sworn peace officer certified pursuant to § 38-8-107 is employed in a jurisdiction other than the full-time sworn peace officer's primary jurisdiction, the officer's clothing shall bear insignia and markings clearly designating that the peace officer is a private duty law enforcement officer. The Tennessee peace officer standards and training commission, created by title 38, chapter 8, part 1, shall establish design criteria for the insignia and markings.

## T.C.A. § 62-35-141 (b)(2)

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Notwithstanding subdivision (b)(1), a full-time sworn peace officer certified pursuant to § 38-8-107, while employed in a jurisdiction other than the officer's primary jurisdiction, may wear the primary jurisdiction's uniform, if the jurisdiction has authorized its officers to do so. The jurisdiction may establish reasonable regulations for the wearing of its uniforms during the employment.



# T.C.A. § 62-35-141 (c)

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This section shall only apply to sworn peace officers engaged in employment outside their primary jurisdiction and within a county having a:

- (1) Metropolitan form of government and a population greater than one hundred thousand (100,000), according to the 2000 federal census or any subsequent federal census; or
- (2) Population of no less than one hundred eighty-two thousand (182,000) nor greater than one hundred eight-three thousand (183,000), according to the 2000 federal census or any subsequent federal census.

T.C.A. § 62-35-141 (c)

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(c)(1) is Davidson County

(c)(2) is Rutherford County

See AG OP No. 12-77 (July 25, 2012)

# Other Issues

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Workers' Comp

Overtime Pay (performs official function)

Overworked employees

Insurance – (wrecks patrol car)

Testifying in court (on whose time)