

## Off Duty Conduct — Balancing An Employer's Needs With An Employee's Right To Privacy

### Are You Concerned If:

- Your accountant takes a part-time job (moonlighting) with one of your customers?
- Your VP of marketing is going through a mid-life crisis and is basically participating in every new extreme sport that comes along, including something called "Russian roulette skydiving?"
- A sales manager belongs to several highly controversial racist organizations?
- Your production staff seems to be a particularly hard drinking group that smokes enough by themselves to keep the profits at Phillip Morris skyrocketing?
- Your VP of IT, who always seemed so quiet and reserved, has allegedly been observed dancing nude on the weekends at a club downtown?

### Summary Of The Issues

Workplace privacy issues are increasing dramatically and as you might expect related employee complaints and litigation are up as well. As companies struggle with the reasonable business needs of controlling rising health care costs, increasing productivity, maintaining company confidentiality, and keeping bad publicity out of the headlines, they become concerned with how employees spend their time away from work. Meanwhile, employees have a strong desire to maintain their privacy and limit "company invasion" of their personal lives.

Where are these interests likely to collide in the workplace?

### Areas Of Potential Conflict

#### Interviewing

Companies should ensure that their application forms and interview questions don't violate the law. Questions regarding an employee's personal life and activities may raise privacy issues and also be discriminatory. Keep all questions job-related. If they don't directly relate to the job, don't ask.

#### Nepotism

Organizations should be careful in drafting rules that prohibit hiring of an employee's relative. In general, companies may implement nepotism policies but should be careful that they are narrowly drafted and are justified by business needs. Privacy and often sex discrimination claims have been raised. Nepotism issues may be better dealt with through policies controlling supervisor/subordinate relationships and conflicts of interest.

#### Moonlighting

Second jobs should be dealt with through a good "moonlighting policy" which addresses productivity and conflict of interest concerns as well as worries about the employee doing work for the second job on company time, using company resources, information, or name inappropriately, and abuse of sick leave (due to the outside work).

### **Smoking & Other Legal Activities**

Over half of the states have passed “smokers” rights laws. Such laws prohibit employers from refusing to hire smokers or from disciplining or firing them because of their habit. Several states have gone even further and prohibited employers from discriminating against employees who participate in any legal activity.

### **Dating Coworkers**

Some organizations have implemented “no dating” policies. However, such restrictions regarding co-workers have often not been upheld by the courts. The issues may be better dealt with through corrective action as necessary. Businesses have a much greater interest in regulating relationships between supervisors and subordinates.

### **Criminal History & Activities**

Employers considering using arrest or conviction records should do so with caution, even in states that allow their use for employment purposes. An arrest might never result in a criminal guilty plea or conviction and it is always possible that a person has been arrested for something he or she did not do. Moreover, the federal Equal Employment Opportunity Commission (EEOC) has stated that use of conviction records might be discriminatory.

### **Credit History & Background**

As with criminal checks, examination of credit backgrounds must be cautiously undertaken. The Fair Credit Reporting Act (FCRA) imposes significant requirements on employers seeking to use credit reports for employment purposes.

### **Conflicts of Interest and Confidentiality**

Employers have significant business interests in ensuring that confidential information is appropriately maintained and that employees avoid situations that may create conflicts with company interests, or damage the corporate reputation. Well-drafted and communicated policies are critical.

### **Social, Political and Other Community Activities**

Companies may be tempted to restrict employees from participating in controversial social or political activities to avoid conflicts with coworkers, minimize distractions, and potentially poor publicity. However caution should be exercised as such company restrictions could violate “off duty legal activities” laws, EEO requirements, constitutional or other legal provisions.

### **The Bottom Line**

A few keys to avoiding becoming one of the “up and coming” privacy lawsuits on the horizon are to ensure that:

- Employer vs. employee interest is well balanced.
- Inquiries and restrictions are job-related and justified by business requirements.
- Policies and practices regarding employees’ off duty activities are crafted as narrowly as possible and communicated to employees.
- Managers understand the issues and legal requirements.
- Worry about on-the-job performance, not off-duty activities.
- Implement an effective appraisal system to evaluate and manage performance.
- Contact your lawyer before trouble arises.

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