

Businesses monitor risks outside of 9 to 5

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Against the backdrop of large gatherings ranging from protests to political rallies to picnics at the beach, employers trying to enhance workplace safety in a time of COVID-19 are increasingly asking what they can do when their employees take risks outside of work.

“(Off-duty conduct) is a question that has frequently come up,” said Katie Fechte, a St. Louis-based attorney in the labor and employment practice group for Greensfelder, Hemker & Gale, P.C. “It’s so tricky.”



The question poses no simple answer, experts warn, and employers that attempt to govern what a worker does off the clock may face legal challenges based on state or local discrimination laws, but they are also required by federal Occupational Safety and Health Administration standards to provide employees with a safe place to work.

On one hand employers are following sometimes-costly Centers for Disease Control and OSHA guidelines, such as taking temperatures, sanitizing workplaces, and reconfiguring worksites to provide social distancing; on the other they are worried workers are not following safety protocols on their time off, experts say.

For example, an increasing point of contention is the issue of mask-wearing; workplaces can mandate masks but what happens when a worker won’t wear one when they are not at work? Can they face repercussions at work for risky activities?

“There is a real tension” between maintaining a safe work site and ensuring compliance with regulations that protect off-duty conduct, said Hilary Weddell, San Jose, California-based partner with McManis Faulkner P.C. “The employer does have the right to testing, to the temperature-taking, to engaging in measures that protect their employees from having an employee who has been infected from coming to work.” Regarding off-duty conduct that is legal yet risky in a pandemic, “it would be interesting to see what a court would do with this,” she said.

“The reality is you can’t discipline an employee for off-duty behavior,” said Melissa K. Peters, Bozeman, Montana-based special counsel for Littler Mendelson P.C. “If employee B is partying up and doing body shots at the bar there is nothing you can do to punish them.”

A handful of states — California, Colorado, and New York, for example — have laws that strictly bar employers from discrimination against employees based on their lawful off-duty conduct. Federal regulations also bar penalizing workers who engage in protected civil protest — which adds another legal hurdle for employers if their employee attended a recent protest.

Employers should balance the medical safety risk for workers who could catch the virus from a less-than-careful coworker and the legal risks associated with trying to control a worker’s life outside of work, said

Hugh Murray, Hartford, Connecticut-based partner with McCarter & English LLP's employment law practice.

"A lot of protected activities can take place off duty," he said.

When it comes to disciplining a worker for off-duty activities, most laws say the worker must have been engaged in illegal activity. That raises the question of whether a worker who violates a strict shelter-in-place order due to the pandemic can face work consequences, such as a forced 14-day quarantine, said Ms. Peters, who argues against using pandemic response rules as a basis for illegal activity.

"You could technically say they were not complying with orders; but even that could be a stretch in some cases" since the orders are not "laws," Ms. Peters said.

Another question is whether an employer can inquire whether a worker went on a trip or engaged in any group activity, such as a dinner party, and ask them to voluntarily quarantine, said Ms. Peters.

The questions surrounding airplane travel are "justifiable," but others are not so, she said, adding that "an employer can't have every employee out because they had dinner at a cousin's house."

"We are dealing with the legal questions in situations that no one has ever talked about," she said. "Nothing is perfect (in protecting other workers) because it requires cooperation among all employees."

One area where inquiries into off-duty conduct can benefit employers is in the event an employee who tests positive for the virus attempts to file a presumptive workers compensation claim in a state that now permits them, said Jeff Adelson, Newport Beach, California-based partner with the workers comp defense firm Adelson McLean P.C.

As of the end of June, several states had either laws or executive orders in place, including California, whose presumption for COVID-19 is rebuttable, meaning if the employer can prove that the worker could have caught the virus engaging in an off-duty activity the presumption would fail, according to Mr. Adelson.

"You dig in the social media and then you have to start asking questions about the people they live with, who they visited, and on and on," he said. "You can say, you are supposed to observe social distance and I want to know what you are doing as an employee because there's ample opportunity for people to catch (COVID-19), unfortunately."
