

Should You Monitor Workers Who Aren't Social Distancing Off Duty?

By Allen Smith, J.D.

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Summer is near, and many stir-crazy employees are eager to get outdoors, hit the beach and visit family, despite the pandemic. Employers who choose to monitor off-duty conduct may be legally permitted to send home workers who aren't social distancing off duty, if the policy is applied consistently.

However, some think this approach isn't practical and recommend alternatives.

If an employer learns that an employee is not following social distancing guidelines away from work, it may ask him or her to stay home for 14 days, said Laura Jacobsen, an attorney with McDonald Carano in Reno, Nev. The U.S. Centers for Disease Control and Prevention (CDC) has issued guidance permitting an employee to return to work sooner than 14 days under some circumstances (www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/new-cdc-guidance-says-essential-employees-can-continue-working-after-coronavirus-exposure.aspx).

A business that provides direct-care services to the elderly or immune-compromised individuals may have a great interest in ensuring that its employees are social distancing, even away from work, noted Michelle Anderson, an attorney with Fisher Phillips in New Orleans.

"Should the employer become aware that an employee is experiencing symptoms, has tested positive or been in close contact with someone who has tested positive or has symptoms awaiting test results, isolation away from the workplace should then be required," she stated.

SHRM RESOURCE SPOTLIGHT

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

Lawful Off-Duty Statutes

Employers nonetheless should follow any applicable state statutes that protect employees from being disciplined for lawful off-duty activity, Jacobsen cautioned.

She noted that employers might ask employees in a daily health survey if workers:

- Have been in close contact with a confirmed or presumptive case of COVID-19.
- Are complying with any state or local stay-at-home orders.

The workplace itself should be complying with such orders, pointed out Katherine Dudley Helms, an attorney with Ogletree Deakins in Columbia, S.C.

Feedback

"The possibility of liability under a lawful-use statute or a possible discrimination claim should be balanced against a duty to keep the workplace safe," Jacobsen said.

[*SHRM Resource Spotlight: Coronavirus and COVID-19* (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)]

Practical Difficulties

From a practical standpoint, it could be difficult to monitor social distancing outside the workplace and send people home for 14 days every time there is an alleged violation. This might impose an undue hardship on the employer, Anderson said.

"There are measures to be taken in the workplace that reduce the potential for transmission of the virus that are much more manageable from a business standpoint than trying to keep up with what employees are doing during their off hours," she said. These measures include following CDC guidelines for cleaning, wearing personal protective equipment, social distancing at work, restricting and limiting access within workspaces, and limiting business travel.

Two potential problems of monitoring social distancing away from work would be poor morale and bad publicity, said Adam Chotiner, an attorney with Shapiro, Blasi, Wasserman & Hermann PA in Boca Raton, Fla.

Social Media Considerations

Some people don't like shelter-in-place orders and social distancing guidelines, however well-intended, Helms noted. As employees return to worksites, employers may learn through social media that workers are visiting the beach or going to family gatherings with others off hours.

Rather than assuming employees in such circumstances were exposed to COVID-19, employers should ask workers to monitor themselves and report any symptoms immediately, not come to work if symptoms appear and take their temperatures each morning, Helms said. She recommended that businesses educate employees about the impact their behavior could have on others and ask them to behave responsibly in addition to exercising strict hygiene and social distancing at work.

Chotiner said there would be difficulties enforcing social distancing away from work consistently. An employer might become aware of some employees not social distancing offsite when those workers have social media accounts but not learn of similar behavior by others who aren't on social media.

Beware of Speculation

An employer also should be cautious about acting based on speculation, said Gary McLaughlin, an attorney with Akin Gump in Los Angeles. An employee who visited a popular beach or park might have been able to maintain social distancing.

"Because there may be an element of subjectivity to what constitutes good social distancing practices, employers must be careful to avoid uneven enforcement that could be perceived as unfair or discriminatory," he added.

"At the same time, employers also have an obligation to protect co-workers from a reckless colleague who jeopardizes the safety of the workplace," McLaughlin said. So, if an employee has participated in a large gathering where social distancing was not practiced, the employer likely would be justified in asking the employee to stay at home for 14 days—or less in certain circumstances—following CDC guidelines, he remarked. The employer also might require the worker to test for coronavirus before returning, he added.

What About Masks?

If social distancing and wearing masks offsite isn't required by a state, federal or local order, the employer should tread carefully when employees aren't wearing them away from work, according to Anderson. "It's likely not appropriate for an employer to take action against an employee for this," she said.

Masks are for the protection of others, not the individual wearing the face covering, McLaughlin noted. "Therefore, failure to wear a mask or face covering away from work likely would not increase the risk of infecting co-workers."

Social Distancing and Masks at Work

Within the workplace, employers have the right to require employees and visitors to conform to social distancing practices.

"If an employer has implemented social distancing and wearing of personal protective equipment (PPE) in the workplace, it can expect employees to abide by these rules," Anderson said.

If masks or other PPE are required, employers should provide them or offer reimbursement, she added.

"Requiring employees to incur the costs of PPE could cut into the minimum wage, tips or overtime, which could expose the employer to wage and hour claims," she said. "Some states also have reimbursement laws when employees purchase items required by their employers."

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