

NONPROFIT RISK MANAGEMENT CENTER
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**Conduct Outside Work Hours:
Practical Strategies
For Nonprofit Employers**

A Risk Management Webinar

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Presented by:

Melanie Herman, Esq. Executive Director
Jennifer Chandler Hauge, Esq., Volunteer

Nonprofit Risk Management Center
1130 17th Street, NW - Suite 210
Washington, DC 20036
(202) 785-3891 - FAX: (202) 833-5747
Web site: www.nonprofitrisk.org

Handout developed by:

Jennifer Chandler Hauge, Esq.
jchandlerhauge@gmail.com

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Conduct Outside Work Hours – Can the Employer Control it?

This Webinar could also be called: “Respecting Employee Privacy Rights,” because the challenge of addressing employees’ conduct outside work is really a legal question of privacy. An employee has the right to his or her private life outside of the workplace, but what if that life spills over and impacts the nonprofit in some way? Can the employee be discharged because of conduct that is potentially damaging to the nonprofit, other employees, clients or volunteers?

The issue of privacy in the workplace presents challenges for nonprofit employers. Fear of invading an employee’s privacy and therefore taking the attitude that ‘nothing can be done’ could have troubling results for a nonprofit— but there are steps a nonprofit can take to reduce both the risk of violating an employee’s privacy rights, and suffering injury as a result of an employee’s conduct.

In this Webinar we will explore (1) the right to privacy at the workplace; (2) an employer’s right to limit employees’ conduct; and (3) policies and practices that can protect a nonprofit from the potentially damaging actions of employees, even when the conduct is outside of working hours.

What laws address an employee’s right to privacy?

1. The United States Constitution (The First and Fourth Amendments apply to all persons, granting the right to free speech and protection from unreasonable searches and seizures. Together, they have been interpreted as granting a constitutional Right to Privacy.) The Right to Privacy, while not explicitly articulated in the Constitution, has been inferred and judicially created through case law, most notably, Roe v Wade (granting a woman the right to make choices about terminating her own pregnancy), and Griswold v. Connecticut (holding that a state law banning the use of contraceptives is unconstitutional as an invasion of a married couple’s right to privacy).

❖ Court cases have consistently held that in the right conditions, a private employee does **not** have a right to privacy at the workplace. BUT, legislation has carved out areas where employees’ privacy rights must be respected by the employer.

⇒ The Right to Privacy broadly impacts the following:

- Background checking – criminal background history checks
- Consumer credit checks
- Drug testing at the workplace
- Video surveillance at the workplace
- Use of computers, email, blogging, voice mail and other technology
- Outside work: employees working two jobs

2. Individual States’ Constitutions create a constitutional right to action in any individual state which gives an employee the right to claim that his or her state constitutional rights were violated.

3. Federal Laws that Govern Consumer Credit Reports:

The Federal Consumer Credit Reporting Act (FCCRA): The Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (“FCRA”) [<http://www.ftc.gov/os/statutes/fcra.htm>] and the fair consumer credit reporting laws of some states, require employers to obtain written authorization for background checks and to provide written notice when an employer uses outside sources, such as credit bureaus, to collect background information on applicants or employees.

- ❑ The FCRA requires employers to put applicants on notice that a consumer report will be sought and used to evaluate qualifications for employment. If an employer uses the report on an applicant or employee’s background (whether educational history, driving records, employment, credit history, or criminal history) to make a decision resulting in an adverse employment action (such as disqualifying an applicant or terminating an employee) the employer must inform the applicant of this fact in writing, and provide the applicant or employee with a copy of the report.
- ❑ The website of the Federal Trade Commission (FTC) [<http://www.ftc.gov/bcp/online/pubs/buspubs/credempl.htm>] provides an outline of the requirements for employers to follow when using outside consumer credit agency reports.

4. Federal and State Laws Governing Criminal History Background Checks:

Can an employer have access to conviction records? (usually—sometimes it’s mandated)
Arrest records? (usually not).

In April 2006 the EEOC issued guidelines about race and sex discrimination that specifically address whether it is permissible for employers to ask about and consider past criminal activity during recruitment. [See EEOC Compliance Manual No. 915.003, issued 4/19/06, found at URL: <http://www.eeoc.gov/types/race.html>.] The position of the federal government is that an employer may not exclude applicants based on arrests that do not lead to conviction unless there is a business justification (defined as both job-related and fairly recent.) A business justification can rarely be demonstrated for across-the-board exclusions on the basis of *arrest* records.

State Laws: Before deciding whether to conduct criminal record checks on applicants or employees, know your state law! Many states have laws that *mandate* pre-hire criminal record checks for certain categories of employees, e.g., home health care workers and child care workers, which results in the fact that applicants or employees with a prior conviction will not be eligible for employment.

⇒ In most other situations it is possible to gain information about prior criminal convictions, but it is safest to always get written authorization from the employee to conduct the criminal history record check.

State specific information on the laws that govern access to conviction and arrest records is beyond the scope of this Webinar, however, some examples of state law limitations are summarized below.

- ❑ Thirty-six states allow employers to inquire about and make hiring decisions based on **arrests** that did not lead to a conviction, but

- ❑ Ten states – California, Hawaii, Illinois, Massachusetts, Michigan, New York, Ohio, Rhode Island, Utah, and Wisconsin – prohibit employers from using arrests that never led to conviction as the basis for rejecting an applicant for employment.
 - In Illinois, employers with 15+ employees are prohibited from making arrest-related inquiries, as well as using an arrest as a basis for making any employment decision, whether hiring, discipline or termination.
 - In contrast, Pennsylvania allows employers to ask about arrests that never led to conviction but prohibits them from utilizing that information when making a hiring decision; and in Arkansas, New Mexico and New Hampshire private employers are permitted to inquire about or make decisions based on arrests that did not lead to conviction.

For more information about the laws that govern background record checking in your state, please contact the Nonprofit Risk Management Center.

5. Federal Laws Governing Drug and Alcohol Use at the Workplace.

The Drug-Free Workplace Act of 1988 (U.S. Code Title 41, Section 701 et seq.)

[http://www.law.cornell.edu/uscode/html/uscode41/usc_sec_41_00000701----000-.html]

The Drug-Free Workplace Act of 1988 requires *some* Federal contractors and grantees (those receiving 25K+ in federal funding) to agree that they will provide drug-free workplaces as a condition of receiving a contract or grant from a Federal agency. Failure to adhere to the requirements of the Act may cause the nonprofit to lose the Federal contract or grant and/or be unable to qualify for Federal funding in the future.

⇒ **Is your nonprofit covered by the Drug Free Workplace Act?**

Do you have a Federal grant?

Do you have a Federal contract valued at \$25,000 or more?

Do you have any subcontracts that include a drug-free workplace requirement?

Are you subject to any Federal agency regulations, such as those of the Department of Education, HUD, or the Department of Health and Human Services?

If you answered "yes" to any of these questions, you are probably required to have a program. Even if you are not required to comply with the Drug-Free Workplace Act, the Act provides guidelines that you can use to develop a drug-free workplace policy.

The Drug Free Workplace Act requires a covered nonprofit to:

Publish a statement (written policy) notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace. The statement should also notify employees of any punitive actions that will be taken. There is also a posting requirement.

Establish a Drug-Free awareness program to inform employees about

- (i) the dangers of drug abuse in the workplace;
- (ii) the policy of maintaining a drug-free workplace;
- (iii) any available drug counseling, rehabilitation, and employee assistance programs;

and

- (iv) and the penalties that may be imposed upon employees for drug abuse violations.

Make it a requirement that each employee be given a copy of the workplace substance abuse policy.

- 6. State Laws that Limit Drug/Alcohol Testing:** Only five individual state's laws restrict or limit an employer's right to test an employee for alcohol or drug use. Example: Minnesota provides that employers may request or require employees to undergo drug/alcohol testing as part of a routine physical examination provided the test is requested or required no more than once a year and employees are given two weeks notice. Employers can also require employees to undergo testing if they have reasonable suspicion that an employee is under the influence of drugs or alcohol; Random testing is only permitted if the employee is in a safety-sensitive job. Minn. Stat. Ann. 181.950 et seq.

Meanwhile, 14 states have laws permitting drug-testing with some limitations: Florida, Georgia, South Carolina, Alabama Mississippi, Louisiana, Tennessee and Arkansas, Ohio, Arizona, Utah, Idaho and Iowa.

- 7. Federal Electronic Communications Privacy Act of 1986 (ECPA)** 18 U.S.C. 2510 et seq.: [http://www4.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00002510----000-.html]
- The ECPA extended traditional privacy principals to a new set of technologies: email, cellular phone calls, and paging devices. The ECPA prohibits the interception of electronic communications, without the consent of one party to the communication. However, once the communication has been received and is stored (e.g., email that has been read and is still present in a computer) the communication can no longer be "intercepted," so accessing and reading that email is not a violation of the law.
 - A Virginia case is instructive: The court found that searching the hard drive of an employee's computer for an email message is not an interception of an electronic communication within the meaning of the ECPA. United States v. Simmons, 92 F. Supp. 324 (E.D. Va 1998). On the other hand, it was clearly a violation of the ECPA when an employer installed a "voice logger" that monitored telephone conversations of employees 24/7. Sanders v Robert Bausch Corp. 38 F. 3rd 736 (4th Cir 1994).

8. State Privacy Laws re: Monitoring or Recording of Conversations /Phone Calls

- The general rule is that if one party to the communication is aware of or has consented to the interception, then there is no invasion of privacy. However, several states have laws that completely prohibit an employer from "eavesdropping" on employee conversations or that require all parties to a conversation to provide consent.
⇒ *Examples:* California: No person other than an authorized law enforcement officer may wiretap or eavesdrop on confidential communications. Georgia: It is unlawful for any person, through use of any device, without the consent of all persons observed, to observe, photograph, or record another in a private place. Illinois: It is a violation of the Illinois Eavesdropping Act to knowingly intercept in person, by telephone or electronically,

another person's conversations, regardless of whether one or more of the parties is aware of the eavesdropping. Pennsylvania: Intentionally intercepting a wire, electronic transmission or telephone call is prohibited. New Hampshire: It is a felony to intercept communications without the consent of *all* parties.

⇒ In contrast, in New Jersey, the state law contains an exception for employers to use telephone recording devices in the course of business to protect the "employer's rights or property"

⇒ Most state privacy laws do not specifically address electronic surveillance, (only interceptions of calls/wiretapping) but employees could state a claim of violation of privacy rights by showing that they had a reasonable expectation of privacy that the employer's surveillance violated.

9. Tort Law: Invasion of Privacy and "intrusion upon the seclusion of another." To determine whether there has been an "intrusion upon the seclusion of another" the courts look to whether the injured person had an "*expectation of privacy*" that was violated. Example: An employee has a legitimate expectation that s/he will not be videotaped in a restroom; but a child care worker who is aware that the day care center regularly uses video surveillance for security purposes, has no expectation of privacy in areas of the building where the cameras are visibly placed.

Case Study #1: Beanies For Sale

Sally has noticed that her administrative assistant is always at her computer, even during lunch breaks. The work Sally gives her assistant is getting done, but it's not always timely or accurate. Sally decides to hold a performance counseling session with her assistant to put her assistant on notice that she is not meeting Sally's expectations of timeliness and accuracy. In a rare moment when Sally's assistant is not at her computer, Sally checks her assistant's calendar to set up a time to hold the discussion. The assistant's computer screen opens to an eBay auction, listing her assistant as the seller. Sally can tell from the screen that her assistant has been holding multiple auctions selling Beanie Babies on eBay –all during work hours.

Is it appropriate for Sally to be snooping on her assistant's computer?

If it is not appropriate for Sally's assistant to be engaged in eBay auctions during work hours, can Sally discipline her assistant?

What if the reason why Sally is spending so much time at the computer is because she is doing some fundraising consulting on the side and is drafting proposals for another nonprofit?

What if the reason why Sally is spending so much time at the computer is because she is constantly updating her Facebook.com profile? What if she is blogging about her experience at work?

What if an employee has brought her OWN computer to work? Does that change the nonprofit's right to investigate computer use and limit employees' activities at the workplace?

Policy issues raised by this scenario:

1. **What right does an employer have to search a computer used by an employee?**

A private employer has the right to search computers at the workplace, BUT employees generally have an EXPECTATION of privacy in the computers they use, and may be outraged when their computer is searched.

- Manage employees' expectations by having a written policy that computers at work are the property of the nonprofit and stress during orientation that the nonprofit has the right to search the computers, including an employee's email records, voice messages, hard drive etc. at any time.

2. **What right does an employer have to discipline an employee for engaging in outside work?**

A distinction needs to be made between outside work that the employee conducts DURING work hours for the nonprofit, and on his/her own time.

⇒ An employee has the right to pursue other employment, such as a Beanie Baby business, or outside consulting, but the nonprofit has the right to discipline or terminate an employee if the outside work is in conflict with the nonprofit's best interests.

Compensating an employee who is working for another employer during work is clearly not in the best interest of the nonprofit. When an employee is working for another employer outside of work hours, there could also be a conflict:

- The employee could be unproductive at work because s/he is working two jobs
- The other employment could be an organization with values that are inconsistent with those of the nonprofit.

Practical Risk Management Steps: (see sample policies in handout materials)

Written email Policy

Written Policy on Telephone Use, limiting personal calls

Written Policy on Responsible Use of Technology

Written Policy on Conflict of Interest

Written Policy on Outside Work

Case Study #2 – The Summer Vacation

A board member of a youth mentoring organization was approached by a friend, with a concern. She told the board member that she was being stalked by the executive director and that the executive director regularly visited a notorious nudist colony in another state. She showed the board member a photograph of herself with the executive director, from the waist up, both of them scantily clad. The executive director was holding a beer bottle. The board member was alarmed and told the Chair of the board that he believed the information from his friend was credible. The board decided to confront the executive director not about the stalking (because they didn't want to give away their source) but about the nudist colony. "Sure," responded the executive director. "I've been going there with my family on summer vacations for years." The board's collective jaws drop. What can the board do about this situation?

Is the executive director's personal life (specifically his preferences for summer vacation destinations and the fact that he was shown in the photo with a beer in his hand) factors the board can consider when determining his suitability for the position? Would it be appropriate for the board to terminate the executive director if he refuses to change his family's vacation plans in the future? Would a written personnel policy be useful here? Would a more thorough background check have brought this issue to light? Can the conduct of the executive director, if indeed he is stalking the board member's friend, create a liability for the nonprofit?

Policy Issues Raised by this Scenario:

1. **Can employers conduct a background check on an existing employee? On an applicant for employment?** Usually – to what extent may be controlled by state law. Always obtain consent in the form of written authorization from the employee prior to conducting a background check. Know whether FCRA applies.
 2. **Can an employer discipline or terminate an employee whose conduct outside of work could damage the good will of the nonprofit in the community?** Yes, as long as the employer is not discriminating against the employee unlawfully or violating any specific law governing off-duty conduct.
 - ⇒ General rule: the employer should not discipline or discriminate against employees for participating in lawful activity, off premises, during nonworking hours, unless the conduct is in direct conflict with the essential business related interests of the employer.
 - Most of the state laws addressing this issue pertain to off-duty tobacco use or political activities.
 - There are also public policy considerations: It could be considered a violation of the public policy of a state to discharge an employee for exercising his legal rights.
- ⇒ See Summary of State Laws Addressing Off-Duty Conduct at the end of these materials.

Practical Risk Management Steps:

Conduct a thorough background check prior to hiring
Check criminal history records, if possible, and if relevant to the position
Conduct a consumer credit check, but only if the nonprofit is prepared to follow the federal law requirements pertaining to authorization, notice, and destruction of records
Include a policy that all employees' conduct outside of work should never injure the nonprofit's goodwill, and should reflect positively on the nonprofit – remind staff (and trustees) that they are always ambassadors of the nonprofit in the community and reserve the right, at the nonprofit's discretion, to terminate an employee/trustee when their conduct is not in the nonprofit's best interest.

Best Practices and Risk Management Strategies:

Manage Employees' Expectations About Privacy at the Workplace:

The nonprofit should have written policies that explicitly provide that:

computers and other technology used by employees are the property of the nonprofit
the nonprofit has the right to inspect emails, computer hard drives, listen to voicemails and otherwise monitor employees' use of the nonprofit's equipment
personal telephone calls should be limited

Manage Employees' Expectations about The Fact That Their Conduct Must Be Consistent With the Nonprofit's Values:

- ❖ **Consider drafting a Code of Ethics for the Nonprofit**

Summing Up

Basic Risk Management Principles:

1. **Preparation:** Know in advance that the invasion of privacy rights can lead to sticky constitutional challenges to employees' privacy rights. Anticipate that employees will NOT always comport themselves consistently with the employee's values.
2. **Manage Employees' Expectations** about privacy in the workplace.
3. **Documentation:** Consider what written policies will assist the nonprofit if it is ever necessary to discipline or terminate an employee due to conduct outside work, or inappropriate conduct while at work.
The nonprofit should consider the value of written policies addressing:
 - compliance with copyright laws
 - prohibition against viewing and downloading pornographic material from the internet
 - prohibition of the use, sale, distribution or being under the influence of illegal drugs or alcohol while at work
 - the obligation to inform the nonprofit about outside work
 - outside work is permitted as long as it does not conflict with the best interests of the nonprofit, in which case the employee will be asked to either cease the outside work, or resign from employment, or otherwise satisfactorily address the conflict.
4. **Consistency:** Apply the policies consistently, making sure that similar situations result in similar disciplinary actions.
5. **Investigate, don't assume.** Remain receptive to suggestions or shared concerns about the conduct of an employee outside of work, but do not jump to conclusions. Investigate thoroughly, especially allegations of drug or alcohol use, or anything that could be especially damaging to the reputation of the employee.

- ❑ **Follow closely any internal policies and procedures in the organization’s handbook.** Before taking any significant step that will negatively impact an employee’s situation, always consult your organization’s personnel policies or employee handbook to determine whether the situation is covered. If so, *follow your established procedures*. If the procedures really don’t make sense for the situation at hand, consult with legal counsel.
- ❑ **Consult with legal counsel, experienced in employment matters.** In advance of a crisis, identify legal resources in your community where you can receive advice from an employment lawyer; ideally one who has worked with other clients in the nonprofit sector.
- ❑ **Review your organization’s Directors and Officers Liability Insurance** or consult with your insurance broker/agent to confirm that your organization has coverage for Employment Practices Liability (“EPL”) claims. Typical coverage will cover the costs of defending an organization when a violation of law is claimed. If you do not understand the coverage for employment practices claims after reading your policy, contact your agent/broker and request their help. Describe your circumstances and ask their opinion about whether there would be coverage in the event that one of the affected employees brought a future legal claim against the organization. Ask your agent/broker to respond in writing. Armed with that information you can make a business decision about the potential financial costs/risks of the planned action.

The presenters for this Web Seminar welcome your comments and questions about the topics covered in this program or other employment-related concerns affecting your nonprofit. The presenters can be reached by email as follows:

Jennifer Chandler Hauge: jchandlerhaug@gmail.com

Melanie Herman: Melanie@nonprofitrisk.org

Summary of State Laws Concerning Outside Conduct:

Arizona: Employers may not discipline employees for the exercise of their civil rights.

California: Employers may not discipline or discharge employees for any lawful conduct occurring during non-working hours.

Connecticut: Employers may not discharge or discipline employees for smoking or using tobacco products. Employers with 25+ employees may not discriminate against, discharge or discipline any employee who runs for, or takes time off to serve in, state public office.

District of Columbia: Employers may not discipline employees for smoking or using tobacco products.

Illinois: Employers may not discipline employees for the use of lawful products outside work, during non-working hours.

Indiana: Employers may not require that employees refrain from off-duty tobacco use.

Kentucky: Employers may not make employment decisions based on an employee’s status as a smoker and may not restrict employees freedom to smoke during off-duty hours.

Louisiana: Employers are prohibited from discriminating against employees or applicants for using tobacco outside the workplace. Employers may not control or direct the political activities or affiliations of employees.

- Maine: Employers are prohibited from discriminating against employees or applicants for tobacco use outside the workplace.
- Michigan*: Employers may not keep records of employees' associations, political activities, publications or communications about non-work activities. *NOTE this law could restrict an employer from disciplining an employee who **BLOGS**.
- Minnesota: Employers may not refuse to hire or discharge employees because they engage in or have engaged in the lawful consumption of food, alcoholic or nonalcoholic beverages and tobacco, while off the premises.
- Mississippi: Employers may not make employment decisions based on off-duty, off-premises use of tobacco.
- Missouri: Employers may not discriminate based on the lawful use of alcohol or tobacco.
- Montana: Employers may not make employment decisions based on an employee's use of lawful products away from the job BUT employers may make decisions based on the fact that the employee's lawful use affects the employee's ability to perform job-related responsibilities, the safety of other employees, or conflicts with a bona fide occupational qualification that is "reasonably related" to the employee's job. Nonprofits with a primary purpose of discouraging the use of a lawful product are excepted.
- Nevada: Employers may not have policies that prevent employees from engaging in politics or becoming candidates for public office. Employers may not discipline or discharge or discriminate against employees or refuse to hire those that engage in the lawful use of any product outside the premises during nonworking hours.
- N. Hampshire: Employers may not require employees or applicants to refrain from tobacco use outside the course of employment.
- New Jersey: Employers may not refuse to hire or take adverse action against employees because they do or do not smoke or use tobacco products unless the employer has a rational reason related to employment.
- New Mexico: Employers may not require, as a condition of employment, that employees or applicants abstain from smoking or using tobacco products during nonworking hours.
- New York: Employers may not discriminate against employees for the following off-premises and outside work hours: (i) engaging in political activities, (ii) legal use of consumable products, (iii) legal recreational activities or (4) membership in a union.
- North Carolina: Employers may not discharge or discriminate against employees or refuse to hire them because they engage in the lawful use of lawful products off premises, during nonworking hours and as long as the conduct does not adversely affect job performance or the safety of other employees. Exception: when the employee's off duty, off premises conduct conflicts with the fundamental objectives of the organization.
- North Dakota: Employers may not discriminate against employees for participating in lawful activity off premises during nonworking hours that is not in direct conflict with the essential business related interests of the employer.
- Oklahoma: Employers may not discharge or discriminate against individuals based on their smoking or use/non-use of tobacco products. Employers may not require that employees refrain from smoking during non-working hours.

Rhode Island: Employers may not require employees to refrain from smoking outside the course of employment, however, nonprofits with the primary purpose of discouraging tobacco use are excepted.

South Carolina: Employers are prohibited from taking employment actions based on an employee's use of tobacco products outside work, or because of political activities.

South Dakota: Employers may not discharge employees because of their tobacco use off-premises during nonworking hours unless the restriction relates to a bona fide occupational requirement and is rationally related to the employment or required to avoid conflict of interest.

Tennessee: Employers may not discharge employees for off-duty tobacco use or any other lawful agricultural product.

Utah: Employers MAY make employment decisions based on off-duty conduct concerning alcohol or illegal drug use because there is a state law that provides guidelines for employers to make decisions and take action based on employees' private activity.

Washington: Employers may not discipline or discharge employees for the exercise of their rights to be politically active or support candidates.

West Va.: Employers may not discriminate against employees for off premises use of tobacco during nonworking hours.

Wisconsin: Employers may not take adverse job actions against employees based on their use or nonuse of lawful products off premises during nonworking hours. Exception: nonprofits that discourage the use of certain lawful products may refuse to hire employees who use those products.

Wyoming: Employers may not refrain from tobacco product use outside of employment.

RECOMMENDED RESOURCES

Right to Privacy and Technology Issues at the Workplace:

Right to Privacy in the Workplace in the Information Age (website article: <http://www.publaw.com/privacy.html>) © Copyright 1995 Lloyd L. Rich

The Drug Free Workplace Act of 1988:

The Department of Health and Human Service's website provides an abstract of the law at: <http://workplace.samhsa.gov/FedPrograms/FedCntsGrantee/DTWAct1988.htm>.

Frequently asked questions about the Drug Free Workplace Act are addressed at: <http://www.dol.gov/elaws/asp/drugfree/screenfq.htm>