

## **HOW TO MAKE POKÉMON GO ... AWAY FROM YOUR WORKPLACE**

Mr. Richard Fader of Ft. Lee, New Jersey asks: “In the past several weeks, Pokémon Go has created a widespread distraction in my workplace. How may I legally reduce the negative impact that this game may be having with my employees’ productivity and, more importantly, their safety?” Your concerns are well placed Mr. Fader. With this game’s rising popularity are valid concerns of employee productivity and, yes, their safety. We all can agree that this is not the first distraction thanks to smartphone and related technology and, of course, it will not be the last. Reasonably written and fairly enforced policies will convey to your employees what types of behavior are permissible and when. However, strict prohibition may result in unintended consequences for you as the employer.

This popular free game uses the GPS feature and camera of the player’s smartphone or tablet to capture creatures called “Pokémon” who appear on the user’s screen as if the creature was actually in the same location as the user. Players must travel with their smartphones or tablets, looking at its screen display to locate the different Pokémon creatures who may be residing in different areas based on the player’s GPS location. To “catch” the Pokémon, players unleash a “Poke Ball” at the creature on their screen by using their finger to flick the ball toward the Pokémon. In the work environment, this means the player - your employee - is walking (or even running) around all the while looking at their phone or tablet screen and not their actual environment.

You may wish to consider communicating to your employees the following limitations:

- Review your employee handbook or policies regarding the use of email, internet, and electronic devices to ensure that they are up to date. The policies should clearly explain the limitations regarding the use of these systems for personal matters. It is prudent that the policy identifies the types of sites (such as Facebook and Instagram), applications (such as Pokémon Go), games and other programs that employees should not access at work and then note that those sites, applications, games and other programs are a non-exhaustive list.
- If your business allows for reasonable use of the internet, smartphones, tablets and personal email, the policy should state that an employee’s personal activity should not interfere with the performance at any time with their job responsibilities. The policy should provide specific guidelines as to when it is appropriate, if at all, for employees to use their smartphones, tablets, or the applications during work hours. For example, you may allow employees to play the game during their lunch break or other approved work day breaks, but not while on the clock and not in any way which could interfere with anybody else.
- Your policy may restrict access to applications by prohibiting employees from downloading them through your networks, downloading them onto company-issued devices, or registering for them with company email addresses.
- As is the case with any third-party applications, you should take into consideration that employees who download and use Pokémon Go on their company-issued smartphones or tablets may open the door to potential malware and virus risks. Similarly, there is the risk that players could be posting photos from the application onto social media, unintentionally revealing

confidential company information. Under these circumstances, employers ban the use of these types of applications altogether, either identifying Pokémon Go to their software blacklist or disabling the application from all company devices. Recently the Pentagon banned the playing of Pokémon Go within Defense Department facilities because of concerns of potential foreign espionage and security risks from the application's GPS monitoring.

- A variety of health and safety concerns are also at issue with the use of applications like Pokémon Go. We are increasing hearing stories that applications such as Pokémon Go have resulted in injuries to players who are distracted while searching for the Pokémon creatures the player can only see on their screen. Because of the player's focus on their screen and not their surroundings, an employee may very well injure themselves or others when attempting to "catch" Pokémon creatures while walking around the office or even while driving or operating equipment. In such instances, employers may be looking at potential liability in terms of workers' compensation claims and claims from third parties. Your employee handbook or policy should provide that safety in and out of the workplace and when driving or operating equipment is paramount.

- In drafting or revising any policies, it is important to balance the recent decisions of the National Labor Relations Board, which have found unenforceable common personnel policies on the grounds that they could lead reasonable employees to believe they may face discipline for engaging in protected activity with, or on behalf of, one or more co-workers relating to employees' wages, hours, or other terms or conditions of employment.

Having any or all of the above policies in place are, in and of themselves, insufficient. You must effectively alert you employees to these policies and engage a uniform disciplinary procedure.

- All employees should receive or be able to easily access your company's policies so that they understand your company's expectations. If necessary, you may want to consider distributing the revised policy(ies) including a specific notice informing employees that playing Pokémon Go is prohibited during working hours both on and off the work premises.

- If an employee violates any of your company's policies, you must always, always follow the established procedures in a uniform manner. Whether it is a warning or termination, the important part is to be consistent.

Now, having evaluated all of the measures you may seek to implement to forbid the use of Pokémon Go during working hour, you may be surprised to learn that such policies may be counterintuitive. While it may seem that Pokémon Go is only creating problems for you as an employer, there may be benefits in allowing limited use of Pokémon Go. The game encourages its players to get up from their desks and walk around as they search for Pokémon creatures. You may wish to allow your employees breaks for limited exercise. You may even supplement the game by issuing pedometers or other fitness trackers to your employees and, within certain parameters, create a competition among employees to obtain the most steps after a certain amount of time. Interestingly, a recent poll by Forbes argued that many employees felt the smartphone game has improved office camaraderie, as many have used the application to bond with their co-workers or bosses and have played it with co-workers during lunch and their break time.

Whether to deter or prohibit the use of Pokémon Go during working hours depends on the employer and the specific working environment. Employers should carefully consider the potential liability and security risks involved in allowing employees to search for the use of Pokémon creatures during working. Prohibiting the use of the application altogether may be most beneficial to employers whose employees work with confidential material or who work in physically demanding jobs with the high potential for injury. While each workplace may be different, in the end employers must carefully weigh the risks and benefits before allowing the use of Pokémon Go during working hours in their workplace.

The contents of this column are not intended to be a complete summary of the legal issues discussed in this column. Rather, this column is intended to alert you to the broad impact of changes in the law. Because of the complexity of the law, it is recommended that all employers consult with experienced labor and employment counsel to ensure that all policies and practices are in compliance with the applicable California and federal law. Please feel free to reach out to the author at [jroth@TheRothLawFirm.com](mailto:jroth@TheRothLawFirm.com) with any questions or comments.