Pokemon Go: At (Or Coming To) A Workplace Near You

Wednesday, September 21, 2016

If you haven’t already heard, Pokémon Go, a virtual reality app created by Nintendo and Niantic, is taking the world by storm. According to Forbes, the app is about to surpass Twitter on the Android platform in daily active users, even though it was first released just a couple weeks ago in the United States and Australia and has not yet been made available worldwide. More and more people are getting in on the action, exploring real world landscapes with their smart phones in hopes of capturing virtual Pokémon appearing on their screen based on their phone’s clock and GPS location. It seems that no location is off limits, as Pokémon appear on or near both public and private property – even in bathrooms. As the Pokémon franchise motto commands, users “Gotta Catch ’Em All” at designated “Pokéstops” in their quest to become a renown Pokémon “trainer” who can out battle other users at local, virtual “Gyms.”

Pokémon Go users have been wreaking havoc, day and night, along the way. They have been loitering near, and trespassing on, private property, so much so in Massachusetts that the Boston police are calling for users to be “vigilant” in avoiding private property and the “obvious inherent dangers” presented by playing Pokémon Go. They have disrupted operations at hallowed sites, such as the 9/11 Memorial and the Holocaust Museum. One even interrupted a live weather report. Users have used the app to lure and then rob other, unsuspecting users. One gamer ran his car into a tree while playing the app. Another was hit by a car trying to cross a public highway while playing the app. They have even fallen off a 75 foot-high cliff while playing the app.

Employers are not immune from the Pokémon Go fun. They have been – or soon will be – affected not only as property owners but also as managers of their employees.

Employer as Property Owner

As legal bloggers have noted, Pokémon Go challenges the traditional paradigm for legal property rights. It blurs the lines between reality and augmented reality, raising a number of interesting legal questions in the process. Does placing a Pokémon on private property without permission affect a property owner’s common law right to exclusive ownership of his property? Are Nintendo/Niantic potentially liable for placing characters on private property? Does the presence of virtual Pokémon on a property create an attractive nuisance that could create liability for the owner in the event a child-user injures himself on the property? If so, how would the property owner abate the nuisance? Can the state preclude users from playing Pokémon Go on public property consistent with the First Amendment? The answers to these questions are unclear.

What is clear, however, is a property owner’s right to exclude others from his property under West Virginia law. A property owner generally has the right to exclude other persons from his property, but there are exceptions to this rule. For example, if the property is a place of public accommodation, the property owner may not exclude persons based on their protected status, e.g., race, sex, religion, disability, or national origin. Generally speaking, however, property owners could legally exclude Pokémon Go users from their premises. To wit, in the case of a
trespasser, a property owner could seek monetary damages for any damages caused by a trespass, even if such damages are only nominal.

A property owner’s obligation to keep his property safe is also clear. In the case of an invited person, the property owner must exercise reasonable care to protect the invited person from anticipated/foreseeable hazards. In the case of a trespasser, such as a wandering Pokémon Go user, the property owner need only refrain from willfully or wantonly injuring the trespasser to escape liability.

Pokémon Go isn’t all bad from a property owner’s perspective, however. For the right property/business owner, Pokémon Go could be a very useful marketing tool. Just Google “6 Ways To Use Pokémon Go in Your Local Marketing Campaign” to learn how. One New York Pizzeria spent just ten dollars to have a dozen Pokémon lured to its store and saw a 75% increase in their business. How’s that for return on investment?

**Employer as Manager**

Pokémon Go also raises several concerns for employers as managers. Several of these concerns are obvious. The foremost of these concerns may be workplace safety. In a little more than a week, Pokémon Go users have shown just how dangerous the app can be. Think about what could happen if you added a distracted user to the existing hazards in your workplace. Disaster. In addition, there is the age-old concern of vicarious liability, especially for employers who have employees out on the road. Your mobile device policy should preclude employees from using a mobile device while driving, if it doesn’t already. West Virginia law makes it unlawful to use your phone while operating a motor vehicle on a public road.

Further, Pokémon Go is yet another appealing fad, much like March Madness, that threatens to bring your workforce to a halt while on the clock, particularly if you employ groups of Millennials or Gen Zers. You must set appropriate boundaries and outline clear expectations with your employees, especially where you are relying on broad language in your company handbook. If you need a “catchy” sign to get your employees’ attention, one human resource manager has got you covered:

Otherwise, revisit your personnel policies and update them as needed to mitigate the potential employment carnage that could result from Pokémon Go. At bare minimum, no Pokémon hunts in the bathroom!

There are at least a couple of hidden concerns with Pokémon Go too. For one, users participate on the Pokémon Go program with their phone’s camera and will soon, if they do not already, have the option of recording or even live streaming their Pokémon Go gameplay. That is cause for concern where employees are permitted to play Pokémon Go on breaks in the workplace. In their quest to capture Pokémon “living” around the office, they may record or stream unsuspecting coworkers, or worse, confidential company information. This creates one more avenue for workplace conflict among employees and raises security concerns for private company information.

For another, Pokémon Go may be a cyber-security concern for company’s using Google products, such as Chrome, Gmail, and Google drive. When the app first debuted, it requested “full access” to the user’s Google account, which meant that Nintendo and/or its partner, Niantic, could not only review your email, your Google docs, Google photos, your location history, your search history, but also, modify all that content, and even send emails as the user of your Gmail account! For users who signed up with a company-related Google account, Niantic was functionally a business partner. It appears that recent outcry has led the Pokémon Go creators to modify the permissions required to download the app. It will be interesting to see whether this change is enough to quell the public outcry. Either way, the initial cyber-security scare is a reminder that employers should remain vigilant in maintaining the wall between work and play with employees that have been granted a company-sanctioned mobile device.

**What You Should Do**

Pokémon Go is all the rage and promises to be for your employees soon, if it isn't already. Regardless of whether the app catches on at your workplace, go through the exercise of reviewing your mobile device and social media policies. Are they inclusive of augmented reality apps? If necessary, update them to ensure that they are clear on the use, non-use, or limited use of augmented reality apps like Pokémon Go at your workplace. But don't stop there. Review your policies with your employees, even if you don't make any changes. Make sure that employees
are aware of the boundaries for augmented reality apps at the office.

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