
Hiring to Firing Podcast — Managing "Moonlighting" in the Workplace: Julie and Julia**Hosts: Tracey Diamond and Evan Gibbs****Guest: Amy Bashore****Tracey Diamond:**

Welcome to *Hiring to Firing*, the podcast. I'm Tracey Diamond, labor and employment attorney at Troutman Pepper, and I'm here with my co-host Evan Gibbs, also a labor and employment attorney at Troutman Pepper, and together we tackle all employment issues from hiring to firing. Today we're very excited to have Amy Bashore, assistant General Counsel at Exelon Business Services Company. Amy, why don't you tell us a bit about Exelon and your role there?

Amy Bashore:

Absolutely. First of all, thank you so much for having me. Before I do that, I'm very excited to be here. Always great to work with you guys, so it's fun to do something outside of the work context. Also, very excited that you picked Julie and Julia. I love the movie when it came out and I ran right out and bought *Mastering the Art of French Cooking* by Julia Child. Unlike Julia Powell. I cooked exactly zero recipes out of it after I opened it up.

Tracey Diamond:

No boeuf bourguignon or deboning a duck for you, huh?

Amy Bashore:

No boeuf bourguignon. Not even oof. I just fry in a pan like every American, I suppose. But it was great to revisit that as well, and maybe I'll crack the book open, but if you are going to cook, Exelon is a great company for you. Exelon is an umbrella of six different utilities, electric and gas utilities and so we will keep the electric running to your stove, the gas running to your stove, or keep the lights on and the electricity running for a podcast like this. We have ComEd utility in Illinois. We've got PECO here in Philadelphia where Tracey and I are. We have BGE down in the Maryland area. We have Pepco in DC, ACE in New Jersey, and Delmarva in that Delmarva region. I am, as you said, an assistant general counsel. I focus primarily on employment issues, although I dabble a little bit in the labor space as well.

Tracey Diamond:

Terrific. We're thrilled to have you here, Amy, and we're really excited about today's topic. Evan, you want to kick us off?

Evan Gibbs:

For sure, yeah, and speaking of gas stoves and all of that, we have a gas stove at my house and I actually cook a lot, and so I can appreciate the energy that we get for that gas stove. It's so much better to cook on than the electric stove. But anyway, as an aside.

Tracey Diamond:

I have an electric stove and it's not as good for sure.

Evan Gibbs:

It takes so long to heat stuff up it seems like.

Tracey Diamond:

It's so true.

Evan Gibbs:

But the gas stove is really, I've found, superior for cooking, and that's what I heard before we got it, and I can confirm that it is true, which is certainly, I think, apropos for our topic. Today, really the substantive topic we're talking about are the benefits and problems with allowing employees to moonlight from their primary careers. As always, as Amy mentioned, we use a popular movie or TV show to illustrate the issues, and so today we've picked the film from back in 2009, *Julie and Julia* starring Meryl Streep, Amy Adams, Stanley Tucci, and some other folks as well. If you haven't seen it, it follows the trials and tribulations, we'll say, of Julie Powell, who is a young New York City government employee as she struggled with her day job and she was struggling with a challenge that she gave herself to cook all 524 recipes of Julia Child's cookbook titled *Mastering the Art of French Cooking*, and then to blog about every recipe that she cooks. So a bit of a daunting challenge to say the least. I think that is a good spot to listen to our first clip.

Movie Clip:

The challenge, 365 days, 524 recipes, the contender, Julie Powell. Government employee by day renegade, foodie by night risking her marriage, her job, and her cat's wellbeing, she has signed on for a deranged assignment. How far it will go, no one can say.

Tracey Diamond:

The movie parallels Julia Child and how she came to be Julia Child with Julie Powell's more modern day struggles with the day job and the blogging. As a fellow blogger, I never tried to actually do the cooking part because nobody really wants that to happen in my family, but the blogging part I can relate to. But I think in general, this idea of moonlighting, it doesn't necessarily have to be moonlighting at a job, but just moonlighting meaning any other gig or side gig that an employee has. What are some reasons, do you think, why employees may want to moonlight?

Amy Bashore:

Well, I think the movie itself illustrates several. I mean, at a very basic level, she just really loved cooking. People have some passions and they're getting more into them and things like the internet and Etsy makes it easier to do all that. Everyone on my block, I think, has a "side hustle" going in addition to their job, and it's all things they like to do. I think that might be one of the reasons people moonlight is that they just have something they're really passionate about outside of work that you can do a little bit more than just a hobby now these days.

Tracey Diamond:

One of my friends is from Denver, and he says that in Colorado when asked, "What do you do?," people will say, "Skiing, snowboarding, skateboarding", what have you. And in the northeast when you ask, "What do you do?," people say, "Accounting, attorney, doctor," whatever their career is. It's that sort of different mentality of living to work versus working to live. I also think there's some generational differences there where I'm seeing kids that are starting out in the workforce or even if they're coming into jobs that they really love and are interested in, they're really doing the job to fund their personalized versus the older generation. Not so old, but just older generation where I think the mentality is more that you're living to work, that the work is such a big part of your persona. I think that's really interesting when it comes to moonlighting.

Evan Gibbs:

I've heard, too, of the reverse situation sometimes. You have folks who may be doing a job that they love by day. I mean, it could be something that's a really low paying job. I've heard of part-time librarians and people work at a library or maybe work at a nonprofit and they're doing what they love during the day, but it doesn't quite pay the bills. So maybe they start moonlighting, whether it's doing something in the gig space on one of the apps or like Amy mentioned, making something on Etsy or something like that. But I think that's another situation I think where we see that. Then I'll tell you too candidly, I've had a situation come up where a client had an employee, and this is I guess a COVID era sort of problem, but during the pandemic, they had an employee who was ... I won't get into the details of the role, but it was a really important role with the company.

This individual, they found out after several months this person working for them, they came to have strong suspicions that the person was moonlighting with a direct competitor at the same time, and it turns out it was true. They confronted this person about it and they admitted it and they said, "Look, I'm doing this job for you, and an opening came up at your competitor to do the same thing, and so I applied for and got the other job and so I've been moonlighting doing the same job for two companies at once." He explained, "Well, yeah, I got two company laptops side by side and I'm doing the same job." I think folks working from home, there's a real temptation to maybe have if not a second full-time job, some other hustle that they can do simultaneous or during their breaks or something like that to earn extra money.

Tracey Diamond:

That's a pretty egregious example where there's clearly a conflict of interest if you're working for two competitors at the same time.

Evan Gibbs:

Yeah, a little bit.

Tracey Diamond:

Working from home I think does create different issues for employers to deal with. Amy, have you had any thoughts on that in terms of how can companies combat this type of issue, particularly in a remote environment?

Amy Bashore:

The remote environment is tough. We haven't come across it, I will say, but I think a lot of it might come down to supervision and checking in and making sure your supervisors are engaged with their subordinates. I mean, you might get some inklings if projects aren't getting done on time or people aren't where they're supposed to be or they're taking a lot of time off, but just generally being engaged with people and scheduling meetings and checking in and keeping more close tabs I think on the work is probably good. And making people turn on their cameras, you could see where they are. Are they at their house during work? Are they somewhere else? No one wants to turn on their cameras.

Tracey Diamond:

The no camera thing makes it really hard. It makes it hard to get anything done anyway. I think that some companies are turning to AI and turning to other forms of electronic monitoring in general for remote environments to make sure employees are working. I'm not sure that I'm a big proponent of that. I guess it depends on the job, but to me, making sure your employees are meeting your deadlines and managing them properly gets at the heart of the issue more than monitoring how many times they're hitting a certain key on a keyboard. But lots of challenges faced by not having adequate supervision of your employees in a remote environment. If someone's working in the office and they're using office supplies and office tools and they leave something for their other job on the fax machine or on the printer, it's going to be much more obvious.

Amy Bashore:

I mean, I guess people may not be as honest, but you could ask them to tell you and have an obligation to report it. You may not know if they're being honest in a remote workspace, but if you ask them to affirmatively tell you and have some kind of process around that, that might help with remote workers to have an idea. If their shift ends at five and they're leaving at three, you might have some questions. You may not know that if they're remote, but if you have a policy that asks them to report second employment, that might help too.

Evan Gibbs:

I'm not sure why I have so many stories around this, but a family member of mine is a manager at a really big company and she manages a team of, gosh, I don't know, 40 or 50 people, and she found out that one of her employees during the pandemic, I think this was 2021, I think, one of her employees had a catering gig, had a full-time sort of catering gig for lunch. So she was apparently not saying that she was taking time off from the job that she was supposed to be doing that my relative was managing, but they found out through Facebook because she created a Facebook page and her name was associated with it. She would take people's lunch orders on Facebook and would post pictures of delivering food to people. I mean, it was like a business she operated out of her house and would make ... I'm not sure what kind of food it was, but she would make food and deliver it to people and was promoting it on Facebook.

Of course, she made the mistake of friending people that she worked with and eventually of course it got reported. I think it's a very real issue out there. I've dealt with other ones as well, but those are the two that I think are the funniest that I've seen. But it is difficult in remote environment a lot of times, especially if it's a position where they've got deliverables but they're not, for example, scheduled to be in meetings or stuff like that where they really have autonomy around their schedule, but they're meeting whatever deadlines they have, producing the quality

and quantity that they're supposed to do. It can be really challenging to know whether they're doing some other gig when they're allegedly supposed to be on the clock for us.

Tracey Diamond:

Evan, you hit on a point that's very similar to what actually happened in the movie where Julie's cooking and blogging project starts to interfere with her day job and kind of comes to a head where she's making a recipe. I think it's the boeuf bourguignon, actually, which I'm sure I'm massacring the French, and it doesn't go well, and she has to make it again because someone's coming for dinner and so she calls in sick. Let's listen to the clip.

Julie:

So with the smell of burned stew still in the air, I woke up dying of stomach cramps. I called in sick.

Paul:

And went back to bed for several hours. Put it in the blog in case someone in your office reads it.

Julie:

Went back to bed for several hours. By noon, I was somehow able to straighten myself up to a standing position, bought the ingredients for boeuf bourguignon over again, dragged myself home and made another boeuf bourguignon. For dessert, a raspberry Bavarian cream. By the end of the day, I felt fine. I was cooking dinner for a legend, even though I'd never really heard of her until a few months ago.

Paul:

Maybe she'll offer you a book contract.

Julie:

What if she does?

Tracey Diamond:

Well, I guess I have one question initially, which is there any benefits to allowing employees to moonlight? Should there just be an anti-moonlighting policy right off the bat, or are there circumstances where a company might want to allow employees under certain circumstances?

Amy Bashore:

I think it's an interesting question. I think it brings up maybe one of the other reasons that Julie in the movie decides to moonlight, which is that she's really kind of depressed or sad or upset about her life and looking for a new direction and there's so much, particularly in the COVID and post COVID area, about the need for mental health and employee wellbeing, that if you have another outlet that's something that you like doing and it makes you feel better, I mean, it might be a reason to allow people to moonlight as long as it's not like a situation that Evan described

where you're working for a direct competitor, but if it's something that promotes your mental health, your wellbeing, your love of life, hopefully it makes you a more productive employee for the employer and just respects the people or people outside of work too.

Tracey Diamond:

I think the other side of that is if you have a really good employee and they're doing a great job, but they have a passion outside of work that they want to pursue, you don't necessarily want to lose that employee so that they can pursue their passion. Maybe it's a win-win for both the company and for the employee to allow them to pursue that passion while also continuing to work for you. Then to Evan's point earlier about finances, that sometimes employees may just have to have a second job because you can't pay them enough to keep them going on the one job.

Evan Gibbs:

I was going to say, I think a lot of the question of whether employers can or should let employees moonlight, I mean, I think it's so individualized. I mean, it's going to depend on the employee's job, what they're doing for you, what the moonlighting gig would be. It's such an individualized assessment. I've seen a lot of companies, they have the sort of no moonlighting policy and they'll have language maybe in an offer letter or in a handbook or something like that that says, "We expect or require you to devote your full working time, nine to five or whatever to the company." So it seems like it's pretty common, but I think exceptions to that policy are certainly possible and they happen, but I think it's hard to not have that policy.

For example, if it's a call center where you've got people calling in, it's hard for people to do something different at least during working hours. So I think it depends. Then it could be an industry where they're working with something that's so classified or something like that that they don't want them working for a company, even though it may not be a competitive industry or something like that. I think it's just such an individualized issue.

Tracey Diamond:

There's also the reputational piece. If an employee is pursuing a passion and they're doing it in a public way, they may say something that reflects poorly on the company, because they're an employee of the company, particularly if they're a higher-level employee of the company. So there are guardrails that you may want to put up around that as well. In Julie's case, we don't know anything about a policy, so we'll assume that there was no policy in place, there was no requirement. We'll assume for her to communicate ahead of time that she was doing this and she gets caught. Let's listen to that clip.

Man:

Julie, could you come in here?

Woman:

I didn't tell him, I swear.

Man:

Julie. Feeling better?

Julie:

Much.

Man:

So you burned the stew?

Julie:

But that's not why I didn't come to work. I didn't come to work because I had stomach flu.

Man:

Stomach flu. Listen, it's a free country, but this little thing of yours on the internet, I do not want to show up in it. Okay? And if you don't feel like coming into work, let me know. Somebody will want this job. We're trying to do something here.

Julie:

I'm sorry.

Man:

Anyone else would fire you. A Republican would fire you. I'm not a schmuck.

Tracey Diamond:

So this was a really interesting clip about how her boss handled the situation when he discovered that she had called in sick and was actually doing her side gig, we'll call it, during her sick day. How do you think he handled it and was there an opportunity maybe to do it differently?

Amy Bashore:

That's an interesting question. I sort of like how he handled it, let her know he's reading her blog.

Tracey Diamond:

He was kind of nice about it, right?

Amy Bashore:

I'm typically a fan of giving people a chance to sort of rehabilitate themselves and it's, I think, a little bit different when it's one time a person calling out sick when they're not really sick and habitual lateness or not being available for work. If you're within your sick days and you're taking one off, I mean you expect people to be sick anyway, it's probably fine to warn the person.

Tracey Diamond:

Would you docked the person's vacation days, take it as a vacation day once you found out?

Amy Bashore:

Would I have done that? That's a great question.

Evan Gibbs:

That's a hard one.

Amy Bashore:

It's a hard question. I think you definitely need to be careful about whether she appears to be non-unionized, just a regular sort of employee. I mean, that would be I think, very challenging. Probably in the bargaining unit space, you definitely want to check your CBA before you start disciplining or taking people's pay away. I probably would've been like Julia's boss and just the warning first. But I think assuming it's okay under your CBA and your policies, you certainly could have taken back the time and then made her take it as an unpaid day if she wasn't truly sick. Although be careful too, because some people don't actually have sick days, right? They have PTO, and so I think you should be careful on that too.

Evan Gibbs:

I was going to say, that's another argument in favor of just having a sort of ambiguous PTO policy instead of sick days versus personal days. Just for whatever reason, you can't make it in for whatever reason, and it's just a PTO day.

Tracey Diamond:

I'm a big proponent of PTO versus sick also because I don't really want to get into the weeds of whether someone's truly sick. I think that's a decision that that person should be making with their doctor, or is it the person sick versus they're taking their sick kid to the doctor? I don't really want to know. I think it's better that employees just have the ability to make those decisions for themselves, but it does kind of make me think about the concept of unlimited PTO and how that could be potentially more rife for abuse with a moonlighting situation because the person may take advantage of those unlimited days off to work their side gig. Kind of interesting.

Evan Gibbs:

That's right. That's a really good point. It seemed like for a little while that was getting a lot of talk. There was a lot of talk about the unlimited PTO. I don't know how widely that's been adopted now. I haven't seen a lot of folks or worked with a lot of folks that have that. I mean, I know of a few, but it seems like it's-

Tracey Diamond:

I have two that just recently moved to it, so it is happening out there.

Evan Gibbs:

Interesting. That definitely presents a challenge if you've got unlimited time off. There's definitely going to be some folks who take advantage of that, I think, and really push the envelope and see how far does that go? What limits are there on a truly unlimited PTO policy.

Tracey Diamond:

It definitely brings up that question, and of course, we're not giving legal advice here, but that does seem to come up often with unlimited PTO policies. When and under what circumstances can you start to crack down on employees that are clearly abusing this policy by taking excessive time off? It becomes somewhat complicated.

Evan Gibbs:

It really does. I actually just thought of another person that I know that was moonlighting. This was another interesting one. I don't know why I know so many people that have dealt with these situations, but I was traveling for work somewhere and called a Lyft to take me to the airport, and my Lyft driver, he was a mortgage underwriter. I don't know what company, but he said he was a mortgage underwriter and that he just basically left his app on all day. I guess he lived somewhere around me because he came in a really nice car. I think it was like a Lexus or something like that, and he came and picked me up and we were talking. He said he leaves the app on during the day, and so if somebody flags him for a ride, he'll just kind of pause his work, go do the ride on Lyft, come home and continues on with his mortgage underwriting gig.

So that's another one of those situations where, for example, if his boss knew that, would they say, "Well, no harm, no foul. You're getting your work done, but that was PTO time that you need to designate in the system that you took half a day off if you were spending half the day out doing Lyft rides." That's another one of those situations where there's an individualized assessment, I guess.

Tracey Diamond:

It's really interesting. I think the concept of time in the office or time in the virtual office is really becoming very fluid. I just read an article about how four o'clock has become sort of the new stopping time. It's really hard to schedule meetings now for four or later because employees are just not staying in the office for full days, even when they are going back into the office, often in response to mandated in-office policies that are the new wave. What a lot of times in employees are doing now is they'll go in for sort of a partial day, leave in the mid-afternoon, go do whatever they need to do for their personal lives and then log back in at night. I think all three of us could probably relate to that.

Evan Gibbs:

Oh, yeah.

Tracey Diamond:

So whether it's childcare or it's a side gig or it's a second job or what have you, I wonder, it's something that may be tolerated/expected when you have young kids at home, but would it be so tolerated or understood if it's because you're doing a second job from four to eight and then logging in from eight o'clock till whenever, 10 o'clock, to do the first job? I wonder how employers would feel about that.

Evan Gibbs:

That's a good question.

Amy Bashore:

How do employees feel maybe if you don't have young kids? You know what I mean? Is it any more appropriate for someone to be off for four hours to do whatever it is they're doing versus taking care of their families, and how does that affect employee morale too?

Tracey Diamond:

Right. I've heard that before where employees that don't have kids get really resentful that the employees that do have kids and have children responsibilities that take them out of the office at four or whatever every Wednesday or whatever it is, that doesn't seem very fair to them.

Evan Gibbs:

I remember having those very, very early in my career when I was at another firm, another state, and I remember that there were a couple of folks that had young kids. This was back when it was a hundred percent in office, and I didn't even have a laptop at a desktop computer. A hundred percent in office, and a couple of folks would leave early for kids' stuff, and it was always like, "Man, I can't walk out of here at four every day and just say, "Well, I've got to get the kids." I didn't understand at the time that it's a very ... now that I have a three and a half year old and eight month old, I get that it's not optional, but especially your more junior employees, folks earlier in their careers and younger don't have kids, it could definitely build some resentments if only certain folks are allowed to leave.

If they've got a hobby or, like we're talking about, a moonlighting gig, they want to go do whatever side gig they've got, then I can definitely see a very real morale issue coming up with employees around that for sure.

Tracey Diamond:

What's our takeaways for companies? What advice can we give to companies on how best to manage this issue?

Evan Gibbs:

I think from my perspective, it's good to have a policy that has certain rules in it around moonlighting. For example, you cannot moonlight for a competitor. I mean, I think that's a good one to spell out. There's no real downside.

Tracey Diamond:

You think you wouldn't have to say that, but apparently you do.

Amy Bashore:

Feels pretty bright line.

Evan Gibbs:

You would think that you wouldn't need to say that, but as I've learned, you just never know. But maybe something like that. "Look, you can't work for a competitor. You can't do anything that would require, for example, that could even possibly use confidential information that you have access to at our company." Stuff like that where you're really making sure that you're protecting the assets of the company that's writing the policy, that they're looking out for their ...

Tracey Diamond:

You can't use computer equipment or other office supplies of employer number one for the job that you have with employer number two.

Evan Gibbs:

Exactly. Then just either you don't say anything beyond that, or you have something to the effect of "Any other employment that you may have, even if it's outside of working hours, needs to be reported to a supervisor" or something like that. You can have language like that because if you do run into a situation where you've got a problematic employee, you want to discipline them for it, it's interfered with their work, and you want to be able to say something like, "Oh, you violated this policy or this procedure", and maybe the violation is that it requires reporting and they didn't report it, for example. I think that's one approach.

Tracey Diamond:

Amy, do you have anything that you would add to that from a policy perspective or from an administering of the policy perspective?

Amy Bashore:

No. I mean, I think that's right. I think it's always helpful to have a policy and have a policy underpinning it, and then maybe whatever it is can't conflict with your duties to the company. You first and foremost need to fulfill your obligations to us. I think that's all right. Then I think in terms of implementation, it's really what we've said before too, is that it's not a one size fit all approach. It's probably not one size fits all even within the organization, there's going to be different positions. Like we said, call center employees are going to be different than an exempt who's got just some deliverables at the end of the month anyway, and we otherwise allow flexibility for all sorts of things.

I think even if it's not laid out specifically in your policy, having the organization really think about, "Well, do I have competitors? What kind of confidential information? What kind of work would be okay? What are my expectations for employees in any given position?", so that you can evaluate requests for second employment, or if you just find out from Facebook or a blog post about cooking, how you can address it.

Tracey Diamond:

Because now you've violated the policy by not giving notice. Not so much the moonlighting itself, it's the failure to communicate the fact that you're moonlighting. I think that's all exactly right. The only thing I would add to that is when you are administering the policy, even though it is a case by case analysis, and like you said, Amy, every job is different and some jobs may be more conducive, and every moonlighting side gig is different, so some side gigs may be more conducive to the job than others, you do want to keep in mind the idea of trying to be consistent

so that you don't have employees in different protected categories getting upset that you said yes to one employee and then you said no to another employee. You have to have a good legitimate business reason for that no answer.

Amy Bashore:

No, that's really important.

Tracey Diamond:

Well, this has been a great discussion. So much fun. Such a fun movie to talk about. Now I'm a little hungry. I don't know about you guys.

Amy Bashore:

We're all going to cook some stew.

Tracey Diamond:

Well, thanks so much, Amy, for joining us, and thanks always to my co-host, Evan, and thanks to our listeners. Please check out our blog, HiringtoFiring.law, and subscribe to our podcast and drop us a line. Tell us what you think. Thanks so much.

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