

Employment Law: Privacy

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Learning Objectives

- Explain the basis for the statement: there is little legal support for an employee's right to privacy in the private sector
- Explain what the Privacy Protection Act of 1974 recommends regarding record review for private employers
- Explain what procedures to follow regarding references and criminal records
- Explain when polygraph tests are permissible by law
- Explain how the right to privacy would relate to searches of company facilities and company property

Learning Objectives

- Explain the legality of surveillance, on and off the job
- List recommendations for managing AIDS in the workplace, including testing, confidentiality and the ADA
- List recommendations for drug testing in the workplace including retesting and confidentiality
- Explain guidelines for dealing with substance abuse in the workplace
- Describe employer defense strategies to claims of invasion of privacy

Rationale

- Employers gather sensitive information about applicants and employees
- Employers search the work area, surveil the work, test for drugs

Legislation Protecting Employee Privacy

- U.S. Constitution – 4th Amendment
- Privacy Protection Act of 1974

U.S. Constitution – 4th Amendment (Many State Constitutions)

- Guarantees privacy and prohibits unreasonable searches and seizures by the government
- Written to protect the individual
- Protects employees of the government, i.e., public sector

What About an Employee's Privacy in the Private Sector?

- Not mentioned in the U.S. Constitution
- Not mentioned in most state constitutions

Reality

- There is little legal support in the private sector for an employee's right to privacy

Privacy Protection Act of 1974

- Established the Privacy Protection Study Commission, which made recommendations (but no laws) for private employers in three areas:

Commission Recommendations

- Record review
 - Review regularly
 - Discard inaccurate information
 - Examine disclosure process

Commission Recommendations

- Employee access
 - To his/her performance evaluations
 - To documents s/he signed
 - To his/her medical records
 - Not to confidential references

Commission Recommendations

- Outside requests
 - Do not provide payroll information
 - Do not provide drug test results
 - Do not provide consumer reporting information

Legislation Protecting Individual Privacy

Not necessarily referring to the work setting

- Many state constitutions under “offenses against public order and safety” define:
 - Criminal defamation
 - Invasion of privacy

Criminal Defamation

- Ruining a person's good name
- Communicating false information without a privilege to do so
- Employer's defense: Information revealed on a "need to know" basis

Invasion of Privacy

- A private place is a place where one can expect to be safe from intrusion
- In a private place, it is unlawful to eavesdrop, observe, intercept a private conversation, activities out of the public view, private messages

Invasion of Privacy

- Employer's defense:
 - Workplace is property of employer
 - Employee can expect privacy only in:
 - Personal belongings
 - Locked items

Examples of Defamation and Invasion of Privacy at Work

- Statements implying illegal or immoral conduct of an employee
- Disclosure of an employee's medical condition to co-workers
- Disclosure of information contained in employee's personnel file

Examples of Defamation and Invasion of Privacy at Work

- Searches of an employee's purse or mail
- Asking personal and non-work related questions during polygraph exam

Screening Activities

- Background investigations
- Polygraph tests

Background Investigations

- Accuracy is critical
- Problems with references
 - Potential employer wants information
 - Former employer fears defamation suit
 - Use waivers

Background Investigations

- Applicant's criminal record
 - Ask about job related convictions, not arrests
 - Any question should be job related
- Guideline: Restrict access to a “need to know” basis

Polygraph Tests

- Employee Polygraph Protection Act of 1988
 - Prohibits private employers from using polygraphs
- Businesses exempted from EPPA
 - Firms with on-going investigations of theft
 - Security firms
 - Firms that handle controlled substances

Searches

- Desks/lockers/storage areas are company property
- Employees have a reasonable expectation of privacy if the area/item is locked and the employer did not gain prior consent

Searches

- Advice for employers: Establish a right to search policy and obtain written consent

Electronic Surveillance Devices

- Computer, telephone monitoring, cameras, etc.
- Little employee protection in the private sector
- Advice for employers: establish policies
- Surveillance off-the-job is rarely permissible

AIDS Testing

- Difficult to justify for employment purposes
 - HIV+ protected under ADA
 - Not spread through routine work
- CDC/OSHA and Healthcare Workers
- Maintain confidentiality

Drug Testing

- Recommendations for employers:
 - Test only applicants whose jobs are safety specific
 - Obtain valid consent, provide examinee with results
 - Maintain confidentiality, retest “+ results”

Drug Testing

- Recommendations for employers:
 - Random testing of current employees is difficult to justify
 - Justified: current employee, under reasonable suspicion, for a work-related incident

Drug Testing

- Reality:
 - Current employee tests “+” for drugs
 - Employee joins rehabilitation program
 - Employee claims no longer using
 - Employee attempts protection under ADA

Substance Abusers in the Workplace

- Danger to the public, employer liable for wrongs/negligence
- Pharmacists who are substance abusers

Substance Abusers in the Workplace

- General guidelines:
 - Develop a policy
 - Document substandard performance
 - Deal in private
 - Explore rehabilitation as an option
 - Employees “under the influence” should not drive

Employer Defense Strategies

- Need to know
- Lack of publicity
- Employee consent in writing