

Avoiding Legal Pitfalls in Protecting Your Organization from Privacy and Confidentiality Claims

First Thursday CLE Program

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Introduction

- Every entity, organization, and employer collects a myriad of information on employees and customers that is protected by state and federal laws.
- This is especially true with the rapid advancement of technology that introduces artificial intelligence to our daily operations.
- The challenge of conducting business while safeguarding privacy and confidentiality highlights the key responsibility corporate and in-house attorneys have in overseeing the policies and practices regarding sensitive personal information, whether it is financial, health-related, or personal.

Introduction

Despite their acknowledgement of employer monitoring and surveillance policies, employees often question whether employers have a legal right to invade what they regard as their right to privacy.

To address employees' concerns and their often erroneous beliefs in workplace privacy rights, supervisors need to be knowledgeable about workplace privacy issues.

This presentation provides you with that knowledge.

Agenda

1. What is “right of privacy” in the workplace
2. Sources of privacy protections
3. Key workplace privacy issues
4. Types of employer electronic monitoring
5. Our policy on electronic monitoring

What Is “Right of Privacy” in the Workplace?

In the broad context, the “right of privacy” is an individual’s right to be free from intrusion into his or her private and personal matters.

In the employment context, privacy refers to an employee’s information that he or she regards as personal or private (e.g., medical information, work activities, off-duty behavior) and the right of that individual not to have such information shared with others.

Sources of Privacy Protections

There are four primary sources of privacy rights:

- The U.S. Constitution's Bill of Rights, subsequent amendments and state constitutions.
- Federal laws. The following are major federal laws that address specific aspects of privacy pertaining to employment:
 - Americans with Disabilities Act (ADA). Regulates use of medical information, maintenance of medical documents and access.
 - Fair Credit Reporting Act (FCRA). Restricts the use and requires disclosure of the contents of investigative consumer reports by employers.

Sources of Privacy Protections (cont.)

- Federal Wiretapping Act/Electronic Communications Privacy Act. Prohibits the intentional interception or disclosure of any wire, oral or electronic communication in which there is a reasonable expectation of privacy.
- There are two exceptions, however: a) one party may consent to the monitoring; and b) businesses are permitted to use telephone equipment to monitor communications within the ordinary course of business.
- Health Insurance Portability and Accountability Act (HIPAA). Regulates the use and disclosure of protected health information by employers with health plans.

Sources of Privacy Protections (cont.)

- State laws. Some state laws restrict employer access to information and regulate conduct under one or more of the following:
 - Nondiscrimination acts regarding employee marital status and sexual orientation, AIDS and genetic testing, and lawful products and activities.
 - Criminal, civil or other court records.
 - Medical information.
 - Disclosure to third parties.
 - Workplace monitoring.

Sources of Privacy Protections (cont.)

- Common law (case law). The following are types of invasion of privacy recognized by courts:
 - Unreasonable intrusion into the seclusion of the employee—situations in which the employee had a reasonable expectation of privacy and the employer’s intrusion was offensive and not justified by business necessity (e.g., personal history questionnaires, unjustified drug testing).

Sources of Privacy Protections (cont.)

- Unauthorized use of the employee's name or likeness for the benefit of the employer (e.g., using the employee's photograph on the company website without obtaining the employee's authorization).
- Public disclosure of private and personal information (e.g., disclosing a same-sex partnership, results of employment tests).

Key Workplace Privacy Issues

Workplace privacy issues occur in the following areas:

- Hiring, particularly in the background checking process.
- Disclosure of medical information.
- Searches.
- Surveillance.
- Off-duty, off-premises conduct.
- Electronic monitoring.

Key Workplace Privacy Issues (cont.)

The federal law that pertains to the background checking process is the FCRA. As previously explained, the FCRA restricts the use and requires disclosure of the contents of investigative consumer reports by employers.

Disclosure of medical information by employers is governed by HIPAA Medical Privacy Rules. Limitation on the employer's use of medical information is regulated by the ADA.

Key Workplace Privacy Issues (cont.)

Workplace searches and surveillance are permitted under federal and state laws. Employers may face litigation, however, in situations in which employees had a reasonable expectation of privacy, the intrusion was offensive or the employer's actions were not justified by business necessity.

Off-duty, off-premises conduct pertains to lifestyle discrimination. At the federal level, civil rights laws barring discrimination on the basis of race, gender or disability may apply to lifestyle discrimination.

Workplace Privacy Issues (cont.)

Many state laws are modeled after the Federal Wiretapping Act and prohibit electronic eavesdropping.

Some allow the same exceptions as the federal law, while other states may be more restrictive. Monitoring of stored e-mails and voice mails is much less regulated and is generally permitted under federal and state law.

Types of Employer Electronic Monitoring

Many employers are monitoring the following electronically:

- Telephones.
- Computer use.
- E-mail.

The next slides review these types of electronic monitoring and the right of the employer to monitor these.

Types of Employer Electronic Monitoring (cont.)

Telephone monitoring:

- Employers monitor calls with customers for quality-control purposes. Some states have laws requiring that one or all parties to a phone conversation be informed that the call is being monitored or recorded.
- In those states, employers must have a recorded message when the call begins that the call is being monitored or recorded.

Types of Employer Electronic Monitoring (cont.)

Telephone monitoring (cont.):

- Under federal law, an employer may conduct unannounced monitoring of business-related calls but must immediately stop monitoring when it realizes the call is personal.
- However, when employees are told not to make personal calls using company equipment, the employee loses that protection, and the call may be monitored or recorded.

Types of Employer Electronic Monitoring (cont.)

Computer use:

- Employers may use computer software programs to allow them to see what is on the screen or stored in each employee's computer and file folders.
- They may also monitor Internet use, such as the various websites the employee may access. Employees who perform word processing or data entry may have their keystroke speed and volume monitored.

Types of Employer Electronic Monitoring (cont.)

Computer use:

- Employers may also keep track of the amount of time an employee spends away from the computer. Because the employer owns the computers and provides the Internet access, it may legally conduct this type of monitoring.
- Good practice dictates that employers have a written policy stating their right to monitor computer equipment and use and that employees should have no expectation of privacy when using it.

Types of Employer Electronic Monitoring (cont.)

E-mail:

- E-mail systems used in organizations have no privacy protections because the employers own the systems and are allowed to review their contents. Messages sent within organizations and those sent from an employee's computer externally are subject to monitoring.
- Web-based systems such as Hotmail and Gmail as well as instant messaging may also be monitored.

Summary

In the employment context, privacy refers to information about an employee that he or she regards as personal or private (e.g., medical information, financial data) and the right of that individual not to have such information shared with others.

There are four primary sources of privacy rights: the U.S. Constitution's Bill of Rights and subsequent amendments, federal laws, state laws and common (case) law.

Summary (cont.)

Workplace privacy issues occur in many areas, such as hiring, testing, investigations and monitoring.

Many employers electronically monitor telephones, computer use and e-mail.

Thank you!

Next Meeting: November 2, 2023

Recommendations for Enhanced and More Professional
Communications Within an Organization

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