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New guidelines for privacy concerns in your workplace

As new technology redefines the work place, the law of employee privacy is developing quickly.

In this environment, employers must know how to protect their business interests, create reasonable expectations of privacy in your work force, and continue to respect certain fundamental privacy interests.



INSIDER VIEW

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A starting point is the Massachusetts privacy statute, M.G.L. c. 214, sec. 1B. The statute does not explicitly identify what an employer can and can not do, but judicial interpretations of the statute require balance on any intrusion on employees' privacy against your business interest that would be served, and to arrive at a reasonable accommodation of the two.

Employers may want to ask questions during the hiring process that an applicant views as intrusive. An applicant for a high level position should expect to disclose more information than someone seeking a lower status.

Likewise, an employee with access to confidential information or in a high risk position, such as a medical employee whose work entails traveling alone to patients' homes and administering medication, should expect to give more information.

Know the rules

Even when asking for personal information is justified, the employer should know the rules on what to ask for and how to use it.

An employer should obtain written consent before requesting a credit history on an applicant. If a credit report becomes the basis for an adverse employment decision, the employer must tell the applicant of that fact.

Similarly, an employer should ask for authorization before checking an applicant's criminal record. In addition, an employer cannot ask about certain misdemeanors or records from which no conviction resulted, and should tell the applicant that he can answer "no record" if criminal records have been sealed.

Before undertaking surveillance of the workplace, either through a camera or actual inspection, an employer should ensure that the surveillance is necessary for the business and tailor the scope of surveillance to meet the business need.

In a case now pending in court in Massa-

chusetts, an employee locker room was taped because the employer suspected that employees were using the locker room to sell drugs. The court recently found that the employees could sue for emotional distress under the Massachusetts privacy statute.

In another case, the videotaping of employees in an open work area was found not to be an invasion of privacy, particularly since the employer had announced the surveillance in advance, thereby deflating any expectation of privacy in the open area.

Tale of the tape

The taping of oral and wire communications is prohibited by state and federal law.

There are exceptions to the prohibition, and the exception of greatest interest to employers allows the monitoring of office intercommunications systems used in the ordinary course of business. Under this, an employer can monitor voice-mail messages, as long as the message system is part of the office intercommunications system.

In order to shape employee expectations, though, the employer should distribute a written policy telling employees that voice mail is intended for business purposes, and that messages may be monitored. The policy should also remind employees that having a password is not a guarantee of privacy.

For telephone calls, an employer can keep track of the numbers dialed by employees and the length of the calls. This sort of tracking allows an employer to ascertain whether its phone system is being used primarily for business, or whether employees are spending too much time on personal calls.

Things become more troublesome when an employer listens in or records actual phone conversations.

Where the employer must record calls for training or security purposes, the safest course is to inform employees in writing that their calls may be recorded, and to add a message on the phone system telling the employee and the other party that their conversations may be recorded.

If the employer ascertains that a call is a personal one, he should stop listening immediately so as to avoid any unauthorized interception of calls, and any unreasonable intrusion on the employee's privacy.

Electronic mail in the office presents a new situation, and current laws do not adequately cover it.

Employers can help shape expectations by

distributing policies on e-mail use, reminding employees that the computer automatically records and stores their messages, and that the system should be used for business, not personal, purposes.

In addition, the policy should caution employees against sending lewd, derogatory or other inappropriate material on the office e-mail system.

Personnel records are an obvious example of something that most employees view as confidential, even though there is no particular statute requiring them to be treated that way. For job references, many employers today ask employees for written authorization before giving detailed job references, and without it simply confirm dates of employment and title to a prospective new employer.

Confidentiality

To creditors, landlords and charities, it is best to give just that skeletal information there is probably no business need to share other details about an employee.

A terminated employee most likely will want the reasons for his termination to be kept confidential, and an employer probably should not discuss the termination, unless specifically authorized to share the information or unless there is a compelling reason to do so.

Medical information about employees should also be treated carefully. If an employee treats such information about himself as private, he probably expects his employer to treat it that way, too. Unless the employer has a strong business reason to disclose medical information, he should treat it as private.

There are some core privacy interests that should be respected, either because a statute requires it, or the employee's expectations of privacy are reasonable. Where the law does not clearly cover a situation or where you, the employer, have a business interest at odds with what your workers expect, the most important steps you can take are to notify employees in writing whenever you are monitoring or surveying their activities or communications, and to narrow the scope of your actions to meet your business needs, but no more.

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