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

- 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