

Chapter 13

The Employee's Right to Privacy and Management of Personal Information

Are There Guarantees in Life?

- The right “to be let alone”
- Privacy as a fundamental right
- Employer need for private information
- Global marketplace

13-2

Myths about Employee Privacy Rights

- Employees have an absolute right to privacy in their workplace
- It is a breach of an employee's right to privacy for an employer to ask with whom the employee lives
- In the private sector, the Constitution protects employees' right to be free from unreasonable searches and seizures
- Without constitutional protection, employees in the private sector are left with no protection against invasions of privacy
- Once an employee gives information to an employer, the employer may use it for whatever purpose it desires

13-3

Background

- Fundamental rights guaranteed by the Constitution
 - The right to be free from unreasonable searches and seizures
- Argument: The employee is trying to hide something
- Access to employee information

13-4

Public Sector Employee Privacy	
	<ul style="list-style-type: none"> • The Fourth Amendment <ul style="list-style-type: none"> – Protection against unreasonable search and seizure – Violation if the search is: <ul style="list-style-type: none"> • Unreasonable • Unjustified at its inception • Impermissible in scope – Search warrant – Drug testing – Search of employer-owned property – False imprisonment
	<small>13-5</small>

Public Sector Employee Privacy (continued)	
	<ul style="list-style-type: none"> • The 5th and 14th amendments <ul style="list-style-type: none"> – Strict scrutiny – Compelling state interest – Rationally related to a valid state interest – Is the right fundamental? <ul style="list-style-type: none"> • Implicit in the concept of ordered liberty • Deeply rooted in this Nation’s history and tradition – No general right of the individual to be left alone
	<small>13-6</small>

The Privacy Act	
	<ul style="list-style-type: none"> • Regulates the release of personal information about federal employees by federal agencies • Basic principles: <ul style="list-style-type: none"> – Employee access to their files – Mechanism to correct or amend information – Employer protection of information – Maintenance of information • The right to privacy is not absolute • Guiding factors • Employee relief
	<small>13-7</small>

Privacy Protection Study Commission	
	<ul style="list-style-type: none"> • Privacy Act not extended to private sector • Commission recommendations • Commission policy goals • Five basic employee procedural rights: <ul style="list-style-type: none"> – Notice – Authorization – Access – Correction – Confidentiality
	<small>13-8</small>

	Federal Wiretapping—Title III and Electronic Communications Privacy Act (ECPA)
	<ul style="list-style-type: none"> • Federal Wiretapping – Title III <ul style="list-style-type: none"> – Governs the interception of oral, wire, and electronic communications – Interception by state and local law enforcement • ECPA <ul style="list-style-type: none"> – Covers all forms of digital communication – Prohibits unauthorized eavesdropping – Prohibits unauthorized access to messages
<small>McGraw-Hill/Orinda</small>	<small>13-9 © 2007 The McGraw-Hill Companies, Inc. All rights reserved.</small>

	Private Sector Employee Privacy
	<ul style="list-style-type: none"> • Bases for right to privacy in the private sector <ul style="list-style-type: none"> – Common law tort claims • Statutory claims • Tort law protections/common law • Intrusion into seclusion <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p>Tort A legal wrong, for which the law offers a remedy.</p> </div>
<small>McGraw-Hill/Orinda</small>	<small>13-10 © 2007 The McGraw-Hill Companies, Inc. All rights reserved.</small>

	Private Sector Employee Privacy (continued)
	<ul style="list-style-type: none"> • Public disclosure of private facts <ul style="list-style-type: none"> – What – Who • Publication in a false light <ul style="list-style-type: none"> – Public disclosure of facts that place the employee in a false light • Breach of contract • Defamation <ul style="list-style-type: none"> – Libel vs. slander – Compelled self-disclosure
<small>McGraw-Hill/Orinda</small>	<small>13-11 © 2007 The McGraw-Hill Companies, Inc. All rights reserved.</small>

	Regulation of Employee’s Off-Work Activities
	<ul style="list-style-type: none"> • Employers may regulate off-work or otherwise private activities of their employees where they believe that the off-work conduct affects the employee’s performance at the workplace • Smoking • Weight • Marital status • Romantic involvement • Political status • Lifestyle discrimination • Enforcement
<small>McGraw-Hill/Orinda</small>	<small>13-12 © 2007 The McGraw-Hill Companies, Inc. All rights reserved.</small>

Employer's Information-Gathering Process/Justified Use/Disclosure of Information	
	<ul style="list-style-type: none"> • Process of information gathering <ul style="list-style-type: none"> – Harassment – Improper filing – Dissemination of the information • Limitation of questions to potential employee • Proper storage of information • References
<small>McGraw-Hill/Quanta</small>	<small>13-13 © 2007 The McGraw-Hill Companies, Inc. All rights reserved.</small>

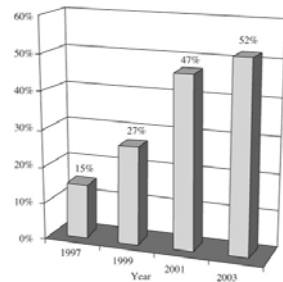
Electronic Monitoring or Surveillance of Employee Activities	
	<ul style="list-style-type: none"> • Written policies concerning e-mail use • Intersection of law and ethics • New technologies <ul style="list-style-type: none"> – Information gathering – Impact on traditional workplace challenges
<small>McGraw-Hill/Quanta</small>	<small>13-14 © 2007 The McGraw-Hill Companies, Inc. All rights reserved.</small>

Forms of Monitoring	
	<ul style="list-style-type: none"> • Surveillance by glitch <ul style="list-style-type: none"> – Information uncovered by mistake • Surveillance by default <ul style="list-style-type: none"> – All information sent through a system is caught and cataloged • Surveillance by design <ul style="list-style-type: none"> – Entire purpose is to collect information and the user is aware of this purpose • Surveillance by possession <ul style="list-style-type: none"> – Employee information contained in a database or some other list
<small>McGraw-Hill/Quanta</small>	<small>13-15 © 2007 The McGraw-Hill Companies, Inc. All rights reserved.</small>

How Does Monitoring Work?	
	<ul style="list-style-type: none"> • Silentranner • Global positioning • Websense/Websense reporter • MIMESweeper • Reasons to monitor: <ul style="list-style-type: none"> – Avoid legal liability – Prevent employee theft • Protection from overt intrusions
<small>McGraw-Hill/Quanta</small>	<small>13-16 © 2007 The McGraw-Hill Companies, Inc. All rights reserved.</small>

Percentage of Large U.S. Companies That Monitor Employee E-mail

Exhibit 13.5 Percentage of Large U.S. Companies That Monitor Employee E-mail



Adapted by authors from data from the American Management Association.

13-17

Why Do Firms Monitor Employee Internet Use?

- Reasons to limit workplace Internet use:
 - Wasted time
 - Overlogged networks
 - Inappropriate material seepage into the workplace
- Areas of employer potential liability:
 - Defamation
 - Copyright infringement
 - Sexual harassment
 - Discrimination
 - Obscenity
- Impression when an employee visits various sites
- Formal policies or programs regulating employee Internet use

13-18

Employee E-Mail Usage

- Employers' needs vs. employees' right to privacy
- "Retaliation" e-mails
- Employers must specifically inform employees of the extent and circumstances under which e-mail communications are monitored
- State imposed notice requirements

13-19

Computer Usage Policies

- Policies should be both written and communicated to the employee, and then adhered to
- Suggested guidelines
- CFEP principles:
 - Openness
 - Disclosure
 - Secondary usage
 - Correction
 - Security

13-20

<h2>Waivers of Privacy Rights</h2>	
	<ul style="list-style-type: none"> • An employer may request that an employee waive her or his privacy rights as a condition of employment <ul style="list-style-type: none"> – Requiring a waiver is a questionable approach • Requirements: <ul style="list-style-type: none"> – The waiver should be accompanied by an offer of employment – The waiver must be knowingly and intelligently given – The waiver must be clear and unmistakable – The waiver must be in writing – The waiver must be voluntary
McGraw-Hill/Thomson	13-21 © 2007 The McGraw-Hill Companies, Inc. All rights reserved.

<h2>Privacy Rights Since September 11, 2001</h2>	
	<ul style="list-style-type: none"> • USA PATRIOT Act • The government is now allowed to monitor anyone on the Internet simply by contending that the information is “relevant” to an ongoing criminal investigation • Antimoney laundering provisions • Sunset provisions • Employee response to governmental request for information
McGraw-Hill/Thomson	13-22 © 2007 The McGraw-Hill Companies, Inc. All rights reserved.

<h2>Summary</h2>	
	<p>Basic rules that may preclude employer liability for invasions of privacy:</p> <ul style="list-style-type: none"> • First, conduct an information audit for the purpose of determining those areas of the company’s practices and procedures that have the potential for invasion. • Second, in connection with sensitive areas where the company maintains no formal policy, develop a policy to ensure appropriate treatment of data. • Third, the information collected should be kept in one of several files maintained on each employee: <ul style="list-style-type: none"> – Personnel file – Medical file – Evaluation file – Confidential file • Fourth, information should be gathered from reliable sources, rather than sources of questionable repute, such as hearsay, lie detector tests, and subjective indicators. • Fifth, publicize privacy policies and procedures, and educate employees regarding their rights as well as their responsibilities.
McGraw-Hill/Thomson	13-23 © 2007 The McGraw-Hill Companies, Inc. All rights reserved.