

Employment Law for Business, 6th ed.
Bennett-Alexander

Chapter 13

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

McGraw-Hill/Irwin Copyright © 2007 by The McGraw-Hill Companies, Inc. All rights reserved.

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

- The Fourth Amendment
 - Protection against unreasonable search and seizure
 - Violation if the search is:
 - Unreasonable
 - Unjustified at its inception
 - Impermissible in scope
 - Search warrant
 - Drug testing
 - Search of employer-owned property
 - False imprisonment

13-5

Public Sector Employee Privacy (continued)

- The 5th and 14th amendments
 - Strict scrutiny
 - Compelling state interest
 - Rationally related to a valid state interest
 - Is the right fundamental?
 - 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

13-6

The Privacy Act

- Regulates the release of personal information about federal employees by federal agencies
- Basic principles:
 - 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

13-7

© 2007 The McGraw-Hill Companies, Inc. All Rights Reserved.

Privacy Protection Study Commission

- Privacy Act not extended to private sector
- Commission recommendations
- Commission policy goals
- Five basic employee procedural rights:
 - Notice
 - Authorization
 - Access
 - Correction
 - Confidentiality

13-8

© 2007 The McGraw-Hill Companies, Inc. All Rights Reserved.

Federal Wiretapping—Title III and Electronic Communications Privacy Act (ECPA)

- Federal Wiretapping – Title III
 - Governs the interception of oral, wire, and electronic communications
 - Interception by state and local law enforcement
- ECPA
 - Covers all forms of digital communication
 - Prohibits unauthorized eavesdropping
 - Prohibits unauthorized access to messages

13-9

© 2007 The McGraw-Hill Companies, Inc. All Rights Reserved.

Private Sector Employee Privacy

- Bases for right to privacy in the private sector
 - Common law tort claims
- Statutory claims
- Tort law protections/common law
- Intrusion into seclusion

Tort

A legal wrong, for which the law offers a remedy.

13-10

© 2009 The McGraw-Hill Companies, Inc. All Rights Reserved.

Private Sector Employee Privacy (continued)

- Public disclosure of private facts
 - What
 - Who
- Publication in a false light
 - Public disclosure of facts that place the employee in a false light
- Breach of contract
- Defamation
 - Libel vs. slander
 - Compelled self-disclosure

13-11

© 2009 The McGraw-Hill Companies, Inc. All Rights Reserved.

Regulation of Employee's Off-Work Activities

- 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

13-12

© 2009 The McGraw-Hill Companies, Inc. All Rights Reserved.

Employer's Information-Gathering Process/Justified Use/Disclosure of Information

- **Process** of information gathering
 - Harassment
 - Improper filing
 - Dissemination of the information
- Limitation of questions to potential employee
- Proper storage of information
- References

13-13

Electronic Monitoring or Surveillance of Employee Activities

- Written policies concerning e-mail use
- Intersection of law and ethics
- New technologies
 - Information gathering
 - Impact on traditional workplace challenges

13-14

Forms of Monitoring

- Surveillance by glitch
 - Information uncovered by mistake
- Surveillance by default
 - All information sent through a system is caught and cataloged
- Surveillance by design
 - Entire purpose is to collect information and the user is aware of this purpose
- Surveillance by possession
 - Employee information contained in a database or some other list

13-15

How Does Monitoring Work?

- Silentranner
- Global positioning
- Websense/Websense reporter
- MIMESweeper
- Reasons to monitor:
 - Avoid legal liability
 - Prevent employee theft
- Protection from overt intrusions

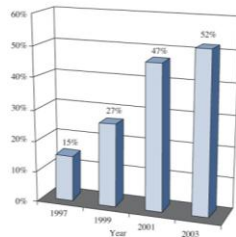
13-16

© 2007 by The McGraw-Hill Companies, Inc. All Rights Reserved.

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

© 2007 by The McGraw-Hill Companies, Inc. All Rights Reserved.

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

© 2007 by The McGraw-Hill Companies, Inc. All Rights Reserved.

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

© 2009 The McGraw-Hill Companies, Inc. All Rights Reserved.

Computer Usage Policies

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

13-20

© 2009 The McGraw-Hill Companies, Inc. All Rights Reserved.

Waivers of Privacy Rights

- An employer may request that an employee waive her or his privacy rights as a condition of employment
 - **Requiring** a waiver is a questionable approach
- Requirements:
 - 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

13-21

© 2009 The McGraw-Hill Companies, Inc. All Rights Reserved.

Privacy Rights Since September 11, 2001

- 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

13-22

© 2008 The McGraw-Hill Companies, Inc. All Rights Reserved.

Summary

Basic rules that may preclude employer liability for invasions of privacy:

- 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:
 - 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.

13-23

© 2008 The McGraw-Hill Companies, Inc. All Rights Reserved.
