

Monitoring Employees: Privacy Issues and Employer Risks

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Agenda

- Using social media in hiring process.
- Employer searches of workplace.
- Monitoring employee communications.
- Dress and personal appearance.
- Drug and alcohol testing.
- Preventing and protecting against workplace violence.
- Off-duty behavior and activities.

Social media

- 21 states have passed laws limiting or prohibiting employers from requiring an employee to disclose a user name or password to employee's social media account.
- Reviewing social media to check out a potential employee can be a good idea, but potentially lets you find out information that could be basis for discrimination claim.

Unintended knowledge from social media

- Age.
- Religion.
- Race.
- Pregnancy.
- Disability.
- Sex—or previous sex.

Best practices

- Don't perform searches on an ad hoc basis.
- Only search public content. (Don't friend potential hire under pseudonym.)
- Limit access to information on a need-to-know basis.
- Establish social-media research policy and train employees.
- Make hiring decisions on nondiscriminatory basis.

Employer searches

- No **constitutional** right to privacy.
 - Constitution only protects against unreasonable searches by **government**.
- **But** there's a risk of violating common-law right of privacy. Risk increases when—
 - Searches not conducted in discreet manner.
 - Information not related to workplace revealed to others at workplace.

Expectation of privacy

- Generally, primary issue will be whether employee expects information to be private.
- If employee has reasonable expectation of privacy, then common-law claim will probably succeed.
- Giving notice of lack of privacy is best way to eliminate risk.

Best practices

- Conduct physical searches in private and sensitive manner that doesn't purposefully embarrass employee.
- Notify employees that workplaces, computers, emails, and other employer property are subject to search and monitoring.
- Post similar disclaimer on log-in pages.
- Don't access employee's personal (non-work) email account.

Monitoring employee communications

- Telephone calls.
- Email.
- Internet use.

Telephone calls

- Employers may monitor or even record its own phone system to ensure that employees are using system for business purposes.
- This comes from business extension exception to federal wiretapping laws.
- **But** employees must be warned about monitoring.
- Employer should not listen longer than to establish that call not business related.

Email, Internet use

- Prohibited workplace harassment can occur through use of email.
- Thus employer may be justified in investigating use of email for harassment.
- Work-related email accounts have no constitutional protection from searches.
- But there may be a common-law right of privacy.

Email, Internet use (continued)

- Illegal to access employee's **private** e-mail accounts.

Best practices

- Implement a broad electronic communications policy that notifies employees that email, Internet, and telephone calls may be monitored.
- Implement a policy that prohibits use for unlawful purposes or for inappropriate, offensive communications.
- Have employees acknowledge their receipt of the policy.
- Investigate complaints of improper use.

Dress and personal appearance

- Generally, employers have wide latitude in governing how employees dress and appear at work.
- But there can be problems in some cases that relate to prohibited forms of discrimination.

Example

- Clothing store prohibited Muslim employee from wearing headscarf.
- U.S. Supreme Court ruled this was religious discrimination because religious accommodation was not undue hardship.

Example

- Restaurant had a no-beard policy.
- African-American sued because no-beard policy disparately affected African-American males.
- Approximately 25% of African-American males suffer from pseudofolliculitis barbae (PFB).
- In severe cases, they must abstain from shaving altogether.
- Policy would have been acceptable if there had been a legitimate business reason for rule.

Example

- Employer prohibited Sikh employee from having beard because of safety reasons.
- Employee had to wear gas-tight face mask to prevent exposure to toxic gas.
- Employer could do this.

Example

- Police officer wanted to wear gold cross with his uniform.
- City prohibited **all** pins.
- Court found this practice not to be a form of religious discrimination.

Best practices

- Implement a written dress code and grooming policy.
- Avoid rules or policies that appear targeted at a protected class or religion.
- Apply code in nondiscriminatory fashion.
- Evaluate requests for reasonable accommodations. (Don't just reject **all** requests.)

Drug and alcohol testing

- Generally, ADA prohibits inquiries about medications.
- But there is an exception for testing for illegal drug use.
- Common-law right of privacy can be implicated.

Violation of right to privacy

- Some state courts have ruled that **direct observation** of providing urine samples is a violation of privacy.
- Otherwise, employers can have legitimate safety and other business concerns for requiring drug testing.
- Generally, invasion of privacy claims will not stand when the employee refuses to submit to test.

Best practices

- Implement a clear policy that provides detailed circumstances about when drug testing will occur.
- Train supervisors to follow policy.
- Obtain employee's written consent before any pre-employment or post-employment testing.
- Keep results confidential.
- Make allowance for prescription drugs that employee may take for health or mental conditions.

Workplace violence

- For 2014, Occupational Safety and Health Administration (OSHA) reported that 9% of workplace fatalities were homicides.
- Each year, almost 2 million people report being victims of workplace violence.

High-risk occupations

- Exchanging money with public.
- Working alone or in isolated areas.
- Providing services and care (especially healthcare).
- Working where alcohol is served.
- Working late at night.
- Working in high crime areas.
- Working in law enforcement.

Two highest risk occupations

- Convenience store clerks.
- Taxicab drivers.

http://www.bls.gov/iif/oshwc/cfoi/work_hom.pdf

Potential legal liability

- **General rule:** Employer is not responsible for acts of violence committed against employees or customers by third party.
- But if employer knows about violent tendencies of employee, employer may be liable for negligent hiring, training, or supervision.
- Failure to prevent or abate known violence hazard can be basis of OSHA complaint.

https://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf

Best practices

- Establish zero-tolerance policy about workplace violence for **anyone** who may come into contact with employees.
- Implement training program on workplace violence that addresses reporting, safety precautions, and evacuation procedures.
- Implement appropriate safeguards, such as controlled access to workplace, security personnel, and so forth.

Off-duty behavior and activities

- **Legal concern:** Some states have passed laws prohibiting certain forms of discrimination based on off-duty behavior.
 - Some states prohibit discrimination against tobacco users.
 - Colorado prohibits discrimination based on participating in any lawful activity.
 - Some state now allow medical marijuana use or recreational marijuana use.

At-will employment doctrine

- At-will employment means that employee can be hired, fired, promoted, or demoted for—
 - A good reason.
 - A bad reason.
 - No reason at all.
- Big exception is for “protected classes”: race, color, national origin, sex, religion, age, disability, veteran status, genetics, and so forth.

Does off-duty behavior fall into protected class?

- If so, then off-duty behavior can't be a basis for employment decision.
- New laws in other states may create new protected classes—as in tobacco use.
- Alabama has no such laws, but Alabama employers need to be careful if they have employees who live or work in states that do.

Protected classes (continued)

- Generally, medical marijuana laws have **not** been held to prevent employer from “discriminating” against medical marijuana users.
- **But** employees making unfavorable remarks about employers are generally protected by National Labor Relations Act (NLRA).

Best practices

- If you employ people to live or work in other states, be careful the other states don't have some type of laws that prohibit discrimination for off-duty behavior (not among federal protected classes).
- Create exceptions to company policies if those state laws are not pre-empted by federal law.
- Don't use these laws to prevent you from investigating or disciplining behavior that occurred off-duty.

Questions?

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