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Introduction

We are in an age of information. With our advances in technology, we collect data on just about anything, store it in a smaller space, sort it every which way, create profiles and conclusions, implement responses automatically, and distribute the information and resulting knowledge in seconds. With the Internet and e-mail, millions of people have worldwide access to more data than we could ever imagine.

These capabilities also mean that more people have quicker access to more information about us. Political candidates know how easy it is to profile everything about us down to our breakfast preferences. We have tax records, credit records, employment records, health records, and more. Telemarketers use bar codes, caller ID, purchased address lists, and other methods to identify our tastes and habits. Doctors can look at our genes and tell our parents even before we are born what we might die from.

Information technology has created new business capabilities and allows companies to achieve new standards of productivity, quality, and service. It also gives you greater ability to collect information about job applicants and employees and to use that data in support of business objectives. However, at what point does a perceived need and use for information intrude unnecessarily on the privacy of workers’ persons and affairs? Where does the individual worker stand against all this technology? Does the employee have any privacy in the employment relationship?

The Aftermath of September 11, 2001. Heightened security is the inevitable consequence of the September 11 terrorist attacks and subsequent threats of bioterrorism or other incidents. Should you implement closer checks of IDs and personal belongings of employees and other visitors entering your facilities? Should you increase monitoring of incoming mail, telephone calls, and computers? Should you respond more vigorously to employee concerns and tips about suspicious behavior? Should your background checks be more thorough? Indeed, any or all of these may be reasonable steps based on circumstances, and employees may have little trouble accepting them as such. On the other hand, you should remain cognizant of the legal ground rules. Provide clear notice and obtain consent for additional measures; do not engage in racial, ethnic, or religious profiling; and, if
suspicious behavior or materials are discovered, contact public authorities promptly.

This special report explores boundaries of employee privacy rights and wrongs. Although there are limits, management, in fact, has extremely broad discretion to collect information on employees, monitor them, and use the data collected for business purposes. Employees have some justified expectations of privacy in the workplace, but not many. This report examines the following areas: monitoring of employees’ work and nonwork behavior; testing of job applicants and employees; information on employees’ backgrounds and nonwork activities; employees’ right to see what information management has collected about them; and the disclosure of information about employees.

In addition, invasion-of-privacy claims have been successfully brought both by victims of sexual harassment and by accused perpetrators. Sexual harassment is the subject of a separate HR Executive Special Report, *Workplace Harassment Trail Guide: Avoiding the Avalanche Zone*. 
Privacy rights arise from numerous sources: constitutions, statutes, regulations and local ordinances, and in the common law (courtmade law) of torts or contracts. Protection from governmental intrusion into individual privacy is rooted in the U.S. Constitution’s Bill of Rights and in similar declarations by the states. Federal, state, and local legislation provide a basic source of protection against invasion of privacy by private parties, including employers. However, legislation also limits privacy rights that may otherwise exist under common law or other statutes. Company policies, to the extent permitted by law, likewise may increase or reduce expectations of privacy.

WHERE DOES THE CONSTITUTION SAY “PRIVACY”?

The Bill of Rights to the U.S. Constitution does not contain the word “privacy.” However, the U.S. Supreme Court has ruled that the Constitution creates zones of privacy protected from government intrusion. For example, it guarantees freedom of press and religion, prohibits the quartering of troops in private homes, guards against unreasonable searches and seizures, and offers protection against self-incrimination. Also, the Fourteenth Amendment says that no person shall be denied life, liberty, or property without due process of law. This protection of “liberty” and the Ninth Amendment preserve rights not specifically enumerated elsewhere.

The Supreme Court has relied on these zones of privacy to find a “right to privacy” in various fundamental decisions, such as marriage, contraception, and abortion. Moreover, the Court says that only a “compelling” government interest can outweigh the expectation of privacy with respect to these fundamental rights. However, some argue that a lower “reasonableness” standard should be applied when the government acts as an employer.

A second type of constitutional right to privacy also has been recognized. This is the right to avoid disclosure of personal matters, for example, confidential medical information. Unlike fundamental decisions, an expectation of informational privacy is balanced against the reasonableness of the government’s action. This is a lower standard than the compelling interest test.
State constitutions create similar zones of privacy protected against government intrusion. In the constitutions of nine states, the right to “privacy” is expressly reserved — Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, and South Carolina.

It’s important to remember that constitutions generally offer protection only against governmental action. Thus, when a federal, state, or local government functions as an employer, their employees may be able to rely on the federal or state constitution to protect their privacy. Or, government policies, such as required drug testing for truck drivers, train engineers, or airline pilots, may implicate constitutional rights of private sector employees. Constitutions usually do not apply to employer-employee relationships in private industry. California courts have applied that state’s constitutional right to privacy to private employment, but that notion has been rejected in other states.

**STATUTES MAY PROTECT OR INTRUDE**

Statutes and implementing regulations may establish or diminish individuals’ expectations of privacy in employment relationships, in both the public and private sectors. For example, laws on electronic eavesdropping, lie detector tests, credit reports, medical records, and job discrimination create zones of privacy for employees. On the other hand, statutes that authorize alcohol or drug testing drastically reduce that expectation. Some statutes limit the privacy of employers in favor of employee access to information about themselves. Some states, notably Nebraska, Rhode Island, and Wisconsin, broadly adopt the common law right to privacy by statute. Massachusetts prohibits any unreasonable, substantial, or serious interference with privacy. These laws cover employment situations.

**COURTS CREATE STANDARDS, TOO**

Courts have created a body of common law that allows individuals to sue for invasion of privacy. Broadly defined, this common-law right to privacy covers four areas:

- **Intrusion** — unreasonable intrusion into a person’s physical solitude or seclusion. In other words, employees may have the right to be left alone, which can conflict with searches and monitoring of their activities.

- **Private affairs** — unreasonable publicity concerning a person’s private life or affairs. Disclosure of personal or medical information may amount to unreasonable publicity of private matters.
Privacy Rights Have Several Roots

- False light — publicity that unreasonably places someone in a “false light” before the public. Release of misleading or inaccurate information may be publication in a false light.
- Appropriation of name — appropriation of a person’s name or likeness without consent for the benefit of another. An example would be using someone’s name or picture in an advertisement without their permission.

Most employee lawsuits for invasion of privacy involve either intrusion into their seclusion or disclosure of facts they deem private. However, the employee must meet a relatively high burden of proof to win such a lawsuit. He or she must have a reasonable expectation of privacy under the circumstances, and management’s intrusion or disclosure must be highly offensive to a reasonable person. Courts weigh the level of expectation against legitimate business reasons for the intrusion or disclosure. Moreover, the publicity element generally requires more than disclosure to a few people, even if that disclosure is unnecessary.

Not all states recognize a common law right to privacy. Some states recognize some of the four privacy elements but have rejected or not ruled on others. Other states, like North Dakota, apparently have not had occasion to rule on any elements. Other closely related torts also may be recognized, such as defamation, negligent or intentional infliction of emotional distress, assault, or outrage.

Policies and Contracts Grant Privacy

Employers may provide safeguards to employee privacy through their policies or contracts, either express or implied. Whether out of a sense of fairness or to minimize the potential for liability, employers may agree that they will follow certain procedures or seek to ensure confidentiality of records. They may also recognize an employee’s right to access certain information. In some states, an employer’s practices may create a covenant of good faith and fair dealing that prevents it from making unwarranted intrusions or disclosures regarding their employees.
About the Author

Philip D. Dickinson is an attorney and legal writer residing in Winston-Salem, North Carolina. His professional background includes 25 years with CCH INCORPORATED as a law editor and Group Managing Editor for information services on labor and employment law, and human resources management. In these roles, he provided content and editorial supervision for the CCH Labor Law Reports, Human Resources Management, and Accommodating Disabilities: A Business Management Guide. Mr. Dickinson also is the author of “Workplace Violence and Employer Liability” and “Hiring Smart: How to Conduct Background Checks,” included in M. Lee Smith Publishers’ series of HR Executive Special Reports, as well as Employment Discrimination: Quick Answers to Everyday Questions, published by CCH Incorporated. In addition, he currently edits the CCH Wage and Hour Compliance Guide.

Admitted to practice in Maryland, Mr. Dickinson holds a J.D. from The George Washington University National Law Center in Washington, D.C., and an A.B. in History from Franklin & Marshall College in Lancaster, PA. Mr. Dickinson and his wife, Mary, are proud parents of two wonderful and talented children.
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