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WORKPLACE PRIVACY FOR THE 1990s

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ABSTRACT

Employers have a legitimate need to know certain things about their employees. Warning signals have surfaced that impose increased employer liability for privacy violations. Employers can no longer ignore the impact of statutory and judicially imposed workplace privacy mandates. Federal and state statutory protections of employee privacy interests are increasingly being considered and adopted. To understand this developing area, privacy's increased importance for employers is discussed as it affects the workplace.

PRIVACY'S HISTORICAL DEVELOPMENT

The concept of privacy within the United States is generally traced to the *Harvard Law Review's* 1890 article by Samuel D. Warren and Louis D. Brandeis [1]. Prior to 1890, no claim for damages could be brought in American courts for a privacy invasion. The Warren and Brandeis article was stimulated by the press' prying into Warren's private affairs. Warren and Brandeis maintained that even though no prior case law explicitly supported a privacy right's existence, a reasoned development of common law principles and society's changing circumstances supported it. Their basic assumption was that the law recognizes innovative causes of action [1, p. 193]. They noted the need for this innovation due to the newly developed methods of invading private and domestic life through photography and newspapers [1, p. 195].

Warren and Brandeis recognized that the privacy right was not unlimited. They proposed rules setting forth its scope in that: 1) the right does not prohibit publication of matter of public or general interest; 2) the right does not prohibit communications privileged under libel and slander law; 3) there is probably no redress for oral invasions absent special damages; 4) the right terminates upon the

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subject's own publication or consent; 5) truth is not a defense; and 6) the absence of "malice" is no defense [1, pp. 214-218]. Remedies were also suggested for the right's violation [1, p. 219].

WORKPLACE PRIVACY'S SETTING

Workplace Privacy

Today, workplace privacy is a growing concern. Since George Orwell raised the spector of "Big Brother" with his book *1984*, computer technology, electronic communications, court decisions, government intrusion, and the employer's quest to know more about the individuals they employ have eroded the employee's sense that his/her life is a private matter. It is in these circumstances that privacy becomes an increasingly important matter to employees and employers, and that it affects the entire workplace.

Privacy concerns the nature and extent of an employee's "right to be let alone" or to be free from "unwarranted intrusions" [2]. From the moment an individual first confronts an employer, privacy rights are placed into issue and may be relinquished. As a condition to securing employment, employees must disclose personal facts about their background and continually submit to employer scrutiny that may or may not be performance- or job-related. The employee may confront a physical examination, polygraph examination, honesty test, psychological evaluation, or even an antibody test for Acquired Immune Deficiency Syndrome (AIDS). Physical intrusion may also occur through locker searches or frisking employees as they leave the workplace, even though no reasonable suspicion of theft exists.

Privacy interests are implicated where an employer conducts routine surveillance and monitoring. Employers have been known to operate video cameras in employee restrooms. Some employers have installed computers to monitor performance of video display terminal operators. Electronic mail is also subject to employer prying. These employer probings reveal information about the employee that was previously private and within the employee's exclusive control. Much of this information may have little, if anything, to do with the job.

Workplace privacy concerns extend to employer efforts to collect personal information that is not job-related. Employers have a legitimate need to know job-related information about their employees, including their abilities, honesty, and prior employment histories. Some employers want to know much more. They assert, mistakenly, that everything about an employee is relevant to employment and that it is necessary to examine the "whole person" to determine whether employment suitability exists. For example, the employer, absent any job-relatedness, may want to know whether the employee smokes marijuana at home, is a homosexual, or socializes with the "wrong" kind of people.

When employers disclose employment information to third parties, other workplace privacy interests are implicated. These disclosures are primarily made to prospective employers as job references. The employer may disclose an employee's confidential medical records to those who have no legitimate need to view them or may disclose negative private facts out of spite or revenge. This information may cause embarrassment by subjecting the employee to ridicule from friends and acquaintances. It may injure the employee's reputation and limit future employment prospects.

"Privacy" and "confidentiality" are similar, yet distinct. Workplace information "privacy" concerns what should be collected, how much should be maintained, and what should be disclosed. Through "confidentiality," the employer represents to those from whom it collects information that unauthorized uses or disclosures of private information will not be made, by establishing and implementing procedures that ensure this information's security. Confidentiality requires security controls in oral and written communication as well as in manual and computerized records.

Today, legislatures and courts are increasingly concerned about workplace privacy. While employers may have legitimate business or job-related interests that sometimes require infringing on an employee's privacy, there are compelling reasons to limit the employer's trespass where no legitimate business or job-related reason exists.

Defining Workplace Privacy

Privacy has varied workplace meanings. It encompasses a broad spectrum of employment interests. These interests relate to the intrusiveness and fairness of information collection, maintenance, use, and disclosure along with employee lifestyle regulation at and outside the workplace. They arise prior to, during, and after the employment relationship is terminated.

Workplace privacy interests exist in: 1) the employee's person, property, or private conversations; 2) the employee's private life or beliefs; 3) the use of irrelevant, inaccurate, or incomplete facts to make employment decisions; and 4) the disclosure of employment information to third parties [3]. They can be summarized into the five main workplace privacy themes of:

1. *Speech*—What is said about someone
2. *Beliefs*—What one privately thinks
3. *Information*—What is collected, maintained, used, and disclosed
4. *Association*—With whom one shares similar interests
5. *Lifestyle*—How one lives

It is these privacy interests that recur throughout employment as they relate to hiring, the workplace, and life outside the workplace.

Information and Behavior Privacy

Within the employment relationship there are two basic privacies. One concerns "information privacy" or the interest in controlling employment data collection, maintenance, use, and disclosure. The other relates to "behavior privacy" or the interest in participating in activities free from employer regulation or surveillance at and outside the workplace.

Individuals are generally comfortable in relating the more intimate aspects of their lives to a friend. They are secure with the friend's use of what is learned or known. The friend is trusted to continue respect for them, despite what may be known.

An important difference between an individual's relationship with family and friends and a relationship with employers is that employers continually evaluate performance. Among family and friends the individual's life is perceived to be conducted "in private," and involving "private relations" promote a certain openness and comfortable feelings. Individuals believe themselves safe from scrutiny and feel secure. This same feeling is not present in the employment relationship. Through information and behavior privacy, the employee is affected at and outside the workplace, eroding any feeling of comfort regarding what the employer may learn or know.

Privacy Interests at the Workplace

In entering into the employment relationship, the employee must often relinquish considerable autonomy and control of his/her well-being. This is necessary to secure employment. Most employees are not in a position to negotiate the terms and conditions of their employment. Little, if any, negotiations leverage exists, unless special or unique skills are present. Employees generally must adhere to the employer's unilateral imposition of terms. If they do not follow or accept these employment terms, they may not be employed.

If employed by a large employer, the employee must conform with the employer's expectations, rules, and procedures that define specific rights and responsibilities. In today's society, most employees are wholly dependent upon their employers for their economic well-being. If this relationship is suddenly terminated, the employee may face economic ruin.

Based on the anticipated continuance of the employment relationship, the employee creates various social and financial commitments. These may include marriage, children, home, automobile, etc. This establishes a social or financial reliance in others that is also dependent upon the employee's economic relationship with the employer.

Absent statutory restrictions, an employer can generally collect, maintain, use, and disclose employment information along with influencing an employee's lifestyles [4]. Likewise, where an at-will employment relationship exists, an employer can generally terminate an employee who objects to the employer's

collection, maintenance, use, and disclosure of information along with how the employee's lifestyle is regulated at and outside the workplace [5]. The employee can accept, protest by confronting possible termination, or voluntarily terminate employment. For the employee, none of these options are desirable or realistic, in that economic loss may result.

Workplace privacy concerns exist while hiring, at the workplace, and outside the workplace. All involve the collection, maintenance, use, and disclosure of employment information along with employee lifestyle regulation outside the workplace.

Hiring privacy alone can affect an employee through advertisements, applications, interviews, credit checks, arrest records, criminal convictions, fingerprints, photographs, immigration requirements, reference checks, medical screening, genetic screening, blood testing, skill testing, polygraph examinations, honesty testing, handwriting analysis, negligent hiring, etc. Workplace privacy creates questions over employment records, medical records, health and safety, smoking, employee assistance programs, alcohol and drug abuse, acquired immune deficiency syndrome (AIDS), sterilization, searches, monitoring, union meeting surveillance, workplace surveillance, employee manipulation, camera surveillance, electronic surveillance, literature solicitation and distribution, jury or witness duty, voting time, whistle-blowing, dress codes and grooming, spousal policies, nepotism, third-party representation, performance evaluations, name changes, identification tags, religious accommodation, privacy misconduct, language requirements, etc. On the other hand, privacy may be impacted outside the workplace through employee personal associations involving employee bankruptcy/debtors and unions, lifestyle regulation, loyalty, conflicts of interest, off-duty misconduct involving noncriminal or criminal activities, residency requirements, etc. It is in these areas that workplace privacy becomes increasingly significant and susceptible to employer breaches for which employees today may seek redress for damages through a variety of litigation theories.

Significance for Employees

Employment is generally a close relationship between employee and employer that anticipates a hopeful continuation over an indefinite time period. During this relationship, many situations arise where privacy may become significant.

Privacy concerns arise whether or not an employment relationship is created. They are present at hiring, during employment, and after employment terminates. Involved are employment information: 1) collection for hiring decisions; 2) storage, retention, and maintenance; 3) internal use in making decisions after hiring; and 4) disclosure to third parties. Accompanying these employment information interests is employee lifestyle regulation at and outside the workplace.

Collection normally begins with an application form requesting employment, educational, financial, medical, and criminal histories [6]. Despite legal

restrictions regarding what may be included on applications, many employers still solicit prohibited information. During employment, other records are created. These may include performance evaluations, promotion reports, discipline notices, payroll data, government reports, fringe benefit records, pension information, and health insurance data [6, pp. 225-26]. This employment information may be maintained in a record-keeping system that is either manual or computerized. Access to this information may or may not be controlled.

Information provided to create and maintain the employment relationship may potentially harm an employee. The employee disclosed this information for a specific employment purpose only. Years later other persons, prospective employers, credit agencies, governmental agencies, etc. may be granted access to this information. This may occur absent the employee's knowledge or consent. It is here that safeguarding workplace privacy takes on particular significance.

The employment relationship produces a need for reliance on vast amounts of written information for decision making [6, pp. 13-14]. Little, if any, employee control exists in the collection, maintenance, use, or disclosure of this information [6, pp. 13-14]. This information is usually unilaterally employer administered. The search of an employee's desk, personal files, or locker presents other privacy concerns.

Employment information is often maintained long after the original collection purpose expires. Records are written memories not subject to forgetfulness unless destroyed. No statutory requirement or employer promise of destruction exists and a risk for potential misuse is constantly present.

Normally, it is the employer who decides what information should be disclosed and when it should be provided. Economic circumstances surrounding continuing employment compel the employee's submission to the employer's information requests and releases. Rarely can an employee verify this information's accuracy, contents, and use or participate in deciding when, where, and to whom it is disclosed.

The employee can only surmise and guess regarding what employment information exists. There may be official as well as unofficial employment records. Identifying errors and finding their source may be difficult. The employee does not know whether those with which a confidential relationship is thought to exist may have disclosed information to others without knowledge or prior consent. Through the collection, maintenance, use, and disclosure of employment information, the employee loses substantial control over personnel information in the employer's possession. Overshadowing these concerns is the manner in which an employer regulates the employee's lifestyles at and outside the workplace.

Significance for Employers

Recordkeeping, disclosure, and privacy statutes, along with their accompanying case law, have made privacy a significant workplace concern. Employers find

themselves with conflicting privacy requirements that restrict their operations [7]. While recordkeeping requirements mandate information collection, privacy statutes restrict that process. Similarly, while privacy requirements seek to protect employment information, disclosure statutes require access [7, pp. 214-26].

Increased governmental regulation of the employment relationship has expanded employer recordkeeping obligations. Employers are subject to federal statutes that impose explicit and implicit record-keeping requirements [8]. The Occupational Safety and Health Act of 1970 (OSHA) [9] and the Civil Rights Act of 1964 (Title VII) [10] have the greatest impact. OSHA requires employers to conduct employee medical surveillance and maintain records concerning employee occupational health [11]. Title VII requires an annual statement of the employer's workforce's racial, ethnic, and sex composition [12]. This results in extensive and detailed employer governmental record-keeping for which employee information must be collected.

Despite these statutory requirements, employers must themselves collect, maintain, use, and disclose employment information to effectively operate their businesses. Information from employees is necessary to make decisions for hiring, promotion, training, security, compensation and benefits, retirement, disciplinary actions, termination, and other job opportunities. It is here that the employee's privacy rights must be balanced with the employer's need to make legitimate and job-related business decisions.

As additional privacy statutes are enacted, employers must become more cautious in their collection, maintenance, use, and disclosure of employment information. Unaccustomed to outside scrutiny, employers are surprised to discover that certain employment information must be disclosed. Unions also request and obtain employment information [13]. To deal with this, employers must know what federal and state statutes specify about employment information disclosure to avoid and limit their potential liability. Disclosure should not violate privacy rights. Employer familiarity with these requirements is critical to protect workplace privacy, limit liability, operate effectively, and maintain good relations with other organizations.

Legislative Action

No comprehensive nationwide statutory protection of workplace privacy currently exists. However, federal and state statutes impose certain privacy restrictions. Actions by state legislatures have been more innovative and far-reaching than similar federal responses. States have recognized the need to balance privacy interests against other societal values.

Constitutional protections for personal privacy have traditionally been safeguards against governmental rather than private intrusions. That distinction, however, has disappeared in states whose constitutions protect against both.

While the United States Supreme Court was reviewing a constitutional privacy right [14], the Freedom of Information Act (FOIA) [15] was signed at the federal level. The FOIA's purpose was to allow the public to "have all the information that the security of the Nation permits" [16]. It also exempted certain confidential information from public disclosure; i.e., "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" [15 at § 552(b)(1)(A)(6)].

In 1974, the United States Congress enacted legislation increasing the protection of governmental information maintained on individuals [17]. Under the Privacy Act, an individual has input over what government information is maintained, as well as how and by whom it is used [17 at § 552a(e)(1)]. The individual may request the correction, amendment, or deletion of information, and may take legal action if the request is denied [17 at § 552(d)(2)].

The Privacy Act defines an "individual" as "a citizen of the United States or an alien lawfully admitted for permanent residence" [17 at § 552a(a)(2)]. This has been construed to exclude foreign nationals, nonresident aliens, and corporations [18]. The "records" protected include anything containing "name, or the identifying number, symbol, or other identifying particular assigned to the individual" [17 at 552a(a)(4) (1988)]. Subject to twelve exceptions, records may not be released unless pursuant to a written request by, or with the individual's prior consent [17 at 552a(b)(1)-(12)]. Unfortunately, these federal statutes have a minor effect on workplace privacy, in that most private sector employment activity occurs outside of their scope.

Other federal statutes and executive orders also have a limited effect on workplace privacy interests. These include: the Fair Credit Reporting Act [19], the National Labor Relations Act (NLRA) [20], the Civil Rights Act of 1964 (Title VII) [21], the Age Discrimination in Employment Act of 1967 (ADEA) [22], the Vocational Rehabilitation Act of 1973 [23], the Americans With Disabilities Act [24], the Civil Rights Statutes (Sections 1981, 1983, 1985, and 1986) [25]; Executive Order 11246 (Affirmative Action) [26], the Occupational Safety and Health Act of 1970 (OSHA) [27], the Omnibus Crime Control and Safe Streets Act [28], Bankruptcy Act [29], Executive Order 12546 (Drug Testing) [30], Hatch Act [31], Whistleblowing Protection [32], Immigration Reform [33], and the Polygraph Protection Act [34].

"Miniprivacy acts" were enacted by various states in the 1970s to address the need for increased workplace privacy. In acknowledging the right to "be let alone," these statutes require the collection, maintenance, use, and disclosure of information about individuals by state and local agencies. Like the Federal Privacy Act of 1974, these state statutes generally: 1) give an individual the opportunity to know what information government collects, maintains, and discloses; 2) permit an individual to correct or amend inaccurate government records; and 3) regulate the collection, maintenance, use, and disclosure of information by government. Other state responses to privacy affecting the workplace

involve: 1) disclosure of credit information; 2) little "Hatch Acts"; 3) whistleblowing; 4) employee access to personnel files; 5) regulating medical files; 6) disallowing employers to ask a prospective employee or an employee about arrests and convictions; 7) fingerprinting; 8) employment references; 9) prohibiting polygraph examinations in employment; 10) psychological matters; 11) highly communicable diseases; 12) sickle cell anemia; 13) smoking; and 14) voting.

Judicial Responses

Judicial protection of workplace privacy is generally premised on constitutional, tort, or contract theories. In their constitutions, the federal government and some states provide a limited right to personal privacy or a right to be free from intrusion into one's private affairs. These rights differ between the federal constitution and what each state provides. Some state constitutions guarantee employees certain workplace privacy rights that can be judicially enforced [35]. Invasion of privacy, defamation, false imprisonment, intentional infliction of emotional distress, negligent maintenance or disclosure of employment records, fraudulent misrepresentation, intentional interference with contractual relations, and public policy also protect workplace privacy interests.

Invasion of privacy is recognized in four forms: 1) intrusion upon one's physical solitude or seclusion; 2) public disclosure of private facts about an individual; 3) publicity placing an individual in a false light before the public; and 4) appropriation of one's name or likeness [36].

Public disclosure of private facts has been used in the workplace privacy context [37]. This tort requires public disclosure; i.e., "publicity" or communication to a large number of persons, of true, embarrassing, private facts [36 at § 117]. Information contained in personnel files involving performance evaluations, test scores, salary histories, and medical information constitutes "private facts" that, if disclosed by an employer, would form the tort's basis [37]. Normally, an employer's communication of private facts about an employee will not be to a sufficient number of persons to constitute "public" disclosure [38]. There are indications, however, that as workplace privacy becomes more significant, this cause of action will take on greater importance [39]. Appropriations of name or likeness without consent may also offer redress [40].

Defamation consists of the publication of an untrue statement that holds a person up to ridicule, hatred, contempt, or opprobrium [36 at § 111]. In the employment relationship, defamation may arise when an employer communicates false or derogatory employee information. Negative performance evaluations or reasons for termination may create liability [41]. Employers are protected by a qualified privilege [36 at § 115]. This absolves employers of liability when the communication is made in good faith, in response to a legitimate inquiry, and within the employment relationship's information channels.

False imprisonment protects the individual's interest in freedom from restraint of movement [36 at § 11]. It occurs in the employment context when an employer or its agent restrains an employee. This is usually to search or interrogate the employee regarding employer property theft [42].

Conduct constituting an intrusion into an employee's privacy must rise to the level of outrageous conduct for the tort of intentional infliction of emotional distress. This tort redresses the most extreme workplace privacy invasions [43]. This may arise where an employee is terminated for refusing to discontinue a social relationship with another employee outside the workplace where no adverse employee job performance results or it negatively affects the employer's business.

The tort of negligent maintenance of employment records is also recognized. A duty exists to act carefully in maintaining employment records or in providing employment references. Employees have recovered damages against employers who negligently disclosed to third parties inaccurate employment information [37].

Fraudulent misrepresentation may exist where an employer induces an employee to act or to refrain from acting. The employer could misrepresent reasons for collecting, maintaining, using, or disclosing employment information [44].

Intentional interference with contractual relations may arise where the employer interferes with a prospective contractual relationship. Privacy interests are affected by the employer's interference in matters where no right exists. This could occur where an employer writes another employer that an employee should not be hired [45].

With at-will employment's continued modification, public policy violations may also protect workplace privacy interests. Causes of action have been permitted for violating a clear statutorily declared policy [46], reporting unlawful or improper employer conduct [47], and for refusing to accede to improper employer demands [48].

Contracts may form another basis on which to raise workplace privacy concerns. These may arise out of: 1) oral and written employment contracts [49]; 2) restrictive covenants [50]; 3) employment handbooks and policies [51]; or 4) collective bargaining agreements [52].

INFORMATION CONCERNS

Workplace Information Collection

"We live, inescapably, in an 'information society' " [6, p. 5]. Increasingly, employment information collection must be conducted with government agencies, record-keeping organizations, and employers as partners [6, p. 13]. Concerns arise in: 1) the initial collection; 2) ensuring accurate collection; 3) restricting use to the collection purpose; and 4) to what extent disclosure occurs.

When applying for employment, an individual provides personal information to assist the employer in making the hiring decision. This information may be supplemented and verified by testing, interviews, medical screening, references, and credit reviews along with a background investigation. Should hiring occur, this information is expanded to accommodate records for wages, benefits, performance evaluations, promotions, attendance, etc.

Absent hiring, information is still created about applicants and employees. Because of this information's extent, entities unrelated to the employment relationship often consider it a valuable resource. This may include governmental agencies [53]. Confidentiality in information use and disclosure is of legitimate concern to the applicant and employee. Correspondingly, the employer's inquiries about applicants and employees should not become intrusive.

The first employment information collection record established by employers is the application form. It collects basic employment information. Employers not only collect information directly from an employee, but also from third parties. It is not uncommon to request reports from credit agencies whose information is frequently based on interviews with friends, neighbors, and relatives.

Sophisticated employer information collection processes have been developed that may intrude upon the employee's mental or physical privacy. Psychological testing, polygraph examinations, honesty testing, and electronic storage of personal data are among these. Collection methods should not violate an employee's privacy. Information that is irrelevant, confidential, or likely to be used unfairly in decisions should not be collected.

Other employment information collection tests include fingerprinting, blood tests, physical examinations, and work area surveillance. These can be distinguished from polygraph and personality tests. They have generally been considered valid collection methods because their scope of inquiry is not as broad [54]. They are related more to collecting evidence than to compulsory extraction of incriminating facts [55]. Fingerprinting is "only a means of verifying the required information" and "involves no additional intrusion" [56]. A routine physical examination or blood test is likewise not an offensive prying [57]. Photographing employees in work areas can be a reasonable employer method to improve efficiency when recording what is already public [58].

Employment information should be collected through methods of accepted reliability that seek to discover only job-related facts. In providing this information, the employee should be able to preserve dignity, prevent personal embarrassment, and foreclose economic harm. Responsibility in providing employment information, however, must be balanced with the employer's need for efficient decision making.

Employees should not be required to disclose private thoughts by submitting to collection methods producing anxiety and humiliation reminiscent of a criminal interrogation [59]. Employer background investigations should not interview individuals without employee knowledge. Requiring that the employee at least know

of the investigation would not be burdensome. Statutory or court protection should safeguard employees from collection processes that are overly inquisitorial and that obtain information unrelated to decision making.

Workplace Information Maintenance and Internal Use

After collecting employment information, internal employer use begins. This involves information disclosure within the employers' organization and the decisions based on that information. Decision making utilizing employment information concerns: 1) selection and placement; 2) developmental decisions of transfer, promotion, demotion, and training; 3) discipline; 4) administration of employee benefits; and 5) separation by involuntary or voluntary termination.

Disclosure of employment information may involve the human resources department, the payroll department, or supervisory personnel. This is necessary for certain employer decision making. Specific employer decision making includes what person is hired, terminated, placed, transferred, promoted, demoted, trained, or disciplined, along with what compensation and benefits are to be paid.

Every employer decision maker does not need to review or have access to all of this employment information. It is unnecessary for a supervisor preparing a performance evaluation to review an employee's medical and financial history. Likewise, a payroll check should not review and employee's performance evaluations. This employment information is not essential or job-related for the particular decisions they are making.

Employees have a legitimate interest in restricting information use to the purpose for which the employer originally collected it. The employee normally has no right to prevent these disclosures. Usually, the employee is not aware they might occur. Concern has been expressed for the employee's interest in employment information collection along with its improper use and disclosure [37].

Improper internal use can be minimized by requiring disclosures only for a "routine use" to designated personnel having a job-related "need to know" [17 at § 552a(a)(7)]. "Routine uses" for employment information should be established. Each routine use should be evaluated according to whether it corresponds with the job-related purpose for which the information was collected and the decision for which it is applicable. A performance evaluation's routine use would include job-related decisions about promotions, wages, or discipline. It would not be used for fringe benefit decisions. This is clearly not job-related. Routine uses for medical information would include decisions about hiring and employee medical and life insurance plans. It would not be used for employee wage-rate decisions.

Employment information access should only be granted by the employer on a job-related "need to know" basis. Limiting access based on a job-related "need to know" does not hinder an employer's operational efficiency. It minimizes employment information misuse and protects the employee.

Workplace Information Access

Employees portray several "roles" in the lives they lead. These roles are acted out within the family, marriage, work, church, politics, and social relationships. In each role, the employee's response to daily situations may, or perhaps must, be different depending on what needs or requirements exist.

The employee has an interest in maintaining privacy to live in these different roles without having performance in one role placed in conflict with another absent permission. By allowing the employee to "edit him/herself," the employer lets the employee adjust internal needs for solitude, companionship, intimacy, and general social intercourse with anonymity and responsible participation in society.

The employee should have access to employment information. This personal information was generally first in the employee's exclusive possession. It may reveal personal details affecting potential security, dignity, and reputation. This personal information was generally obtained by the employer through the employee's economic need.

Computer technology enables the employer to administer large volumes of employment information. Through these procedures, employers can transfer and assemble employment information almost anywhere within microseconds. Storage capabilities prolong employment information longevity making improper disclosure and misuses almost as permanent as the information itself.

To safeguard workplace privacy, employers should regularly purge their records of unnecessary and outdated employment information. Likewise, employees should be granted access to employment information for correction, supplementation, and deletion. This affords an employee knowledge of what information is maintained to assure accuracy regarding what could be disclosed to others. It should be the employee's responsibility to exercise this privilege. This access would minimize employment decisions made from inaccurate, incomplete, or irrelevant facts.

The employee's ability to present him/herself in different roles depends on society's accessibility to information. However, the employee should not be permitted to perpetrate fraud on an employer. Fraud could occur through the employee's failure to disclose discreditable personal information that would affect the employee's job performance or harm the employer's business.

Fraud may arise where an employer is induced to enter a transaction it would not enter had the truth been known. To the extent that an employee conceals personal information to mislead, the justification for according protection to this information is no better than that for permitting fraud in the sale of goods. The employee should be required to disclose all information directly related to job performance.

Workplace Information Disclosure to Third Parties

Employment information internal use is a necessary function. It relates to employee wage rates, promotions, reassignments, and work performance.

Disclosures to third parties are ordinarily discretionary. They primarily affect the employee's life outside rather than at the workplace. Frequently, they involve employment references for a new job or disclosures to credit agencies. A negative disclosure's adverse effect may continue for years. Mandatory employer disclosures to third parties include responses to subpoenas and reports required by government regulations.

While employer policy and practice has been to provide some confidentiality to employment information, whatever confidentiality exists is generally the result of employer voluntary action. Only limited statutory controls exist to preserve employment information confidentiality. Employment information disclosure to third parties involves the unpredictability or uncertainty of the employer's goodwill and personal value system in handling these.

The employee's ability to disclose knowledge and information about him/herself is the linchpin of privacy. This corresponds with the employee's opportunities to limit or monitor employer information disclosures about oneself. Random employment information disclosures absent an employee's knowledge or consent should be curtailed.

LIFESTYLES

Employee Lifestyles at and Outside the Workplace

Generally, an employee's private activities at and outside the workplace are not open to employer scrutiny or regulation. These activities outside the workplace are usually within the employee's exclusive purview. The employment relationship does not make the employer guardian of the employee's every personal action. Yet, in certain areas directly affecting the employer's business affairs, the employer may attempt to regulate the employee's lifestyles [60]. This may result in employee disciplinary actions up to and including termination where employee lifestyle actions adversely affect the employer's business.

Lifestyle regulation at the workplace may concern dress and grooming standards, spousal employment, consumption of alcohol, smoking, and drug use. Outside the workplace limits on an employee's lifestyle may be placed on who the employee may have contact with socially, other employment opportunities that may directly conflict with the employer's business, and what type of image the employee maintains in the community.

Where employee lifestyle regulation at and outside the workplace occurs, it should be reasonable and directly related to the employee's position. It should always be directly job-related. Regulation should occur only where the employee's lifestyle will have a definitive adverse result on the employer's business affairs. Each limit on an employee's lifestyle at and outside the workplace should be evaluated on its own merits [61].

Employee lifestyle regulation at and outside the workplace should be readily discernible and obvious to a third party as being in the employer's business interest [62]. It should be directly job-related and harmful in that the employer will sustain immediate financial loss absent the regulation. Mere speculation regarding impact on the employer's affairs should not suffice to permit a constraint placed on the employee's lifestyle at or outside the workplace [63].

CONCLUSIONS

Employers can no longer ignore the impact of statutory and judicially imposed workplace privacy mandates. Sufficient judicial warning signals have surfaced that impose increased employer liability for privacy violations as we enter the 1990s. Likewise, statutory protections of employee privacy interests are increasingly being considered and adopted at the federal and state levels.

Workplace privacy intrusions will become a significant judicial inquiry in reviewing violations of rights arising out of the employment relationship. Despite these possibilities, employers can protect themselves by using legitimate job-related information collection, maintenance, use, and disclosure techniques. Unless this occurs, employers will find themselves subject to litigation and liability for employee privacy violations.

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ENDNOTES

1. S. D. Warren and L. D. Brandeis, "The Right to Privacy," 4 *Harv. L. Rev.* 193-219 (1890).
2. *See Public Utilities Commissioner v. Pollack*, 393 U.S. 451, 467 (1952).
3. *See* Beaney, *The Right to Privacy and American Law*, 31 Law & Contemp. Probs. 253, 254 (1966).
4. *See, e.g., Hollenbaugh v. Carnegie Free Library*, 436 F. Supp. 1328-1330, 1333-34 (W.D. Pa. 1977) (termination of at-will employee discovered to be living together in "open adultery" held not to violate constitutional privacy right).
5. *See generally* K. Decker, *The Individual Employment Rights Primer*, Amityville, NY: Baywood Publishing Co., (1991) (the at-will employment relationship permits either

the employee or the employer the option of terminating employment at any time, for any or no reason, with or without notice).

6. Privacy Protection Study Commission, *Personal Privacy in an Information Society*, U.S. Government, Washington, DC, 72-78 (1977).
7. *See* Reinert, Jr., "Federal Protection of Employment Record Privacy, 18 *Harv. J. on Legis.* 207 (1980).
8. *See, e.g.*, 42 U.S.C. §§ 2000e-1-2002-17 (1988) (Civil Rights Act of 1964); 41 C.F.R. § 60 (1992); (Executive Order 11246); 29 U.S.C. §§ 621-634 (1988) (Age Discrimination in Employment Act of 1967); 29 U.S.C. §§ 701-7961 (1988) (Vocational Rehabilitation Act of 1973); 29 U.S.C. § 206 (1988) (Equal Pay Act of 1963); 29 U.S.C. §§ 651-678 (1988) (Occupational Safety and Health Act of 1970); 29 U.S.C. § 1001 (1988) (Employee Retirement Income Security Act of 1974).
9. 29 U.S.C. §§ 651-67 (1988).
10. 42 U.S.C. §§ 2000e-1-2002-17 (1988).
11. 29 C.F.R. § 1904 (1992).
12. Form EEO-1, 29 C.F.R. § 1602.7 (1992).
13. *See, e.g., Detroit Edison v. NLRB*, 440 U.S. 301 (1979); *see also Salt River Valley Water User's Ass'n. v. NLRB*, 769 F.2d 639 (9th Cir. 1985) (union access to confidential personnel information upheld).
14. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (penumbra of the Bill of Rights); *see also Roe v. Wade*, 410 U.S. 113 (1973) (Fourteenth Amendment's concept of personal liberty); *Katz v. United States*, 389 U.S. 349 (1967) (Fourth Amendment).
15. 5 U.S.C. § 552 (1988).
16. 2 Public Papers of the President: Lyndon B. Johnson 199 (1967) (statement by President Lyndon B. Johnson upon signing Public Law 89-487 on July 4, 1966).
17. 5 U.S.C. § 552a (1988).
18. *See Raven v. Panama Canal Co.*, 583 F.2d 169 (5th Cir. 1978), *cert denied*, 440 U.S. 980 (1979); *Dresser Industries, Inc. v. U.S.*, 596 F.2d 1231 (5th Cir. 1979); *Oke Corp. v. Willliams*, 461 F.Supp. 540 (N.D. Tex. 1978).
19. 15 U.S.C. §§ 1681-1681t (1988).
20. 29 U.S.C. §§ 151-169 (1988).
21. 42 U.S.C. §§ 2000e-1-2002-17 (1988).
22. 29 U.S.C. §§ 621-634 (1988).
23. 29 U.S.C. §§ 701-796 (1988).
24. 42 U.S.C. §§ 12101-12213 (Supp. 1992).
25. 42 U.S.C. §§ 1981, 1983, 1985, 1986 (1988).
26. Executive Order No. 11246 (September 24, 1965); at 41 C.F.R. § 60 (1992).
27. 29 U.S.C. §§ 651-678 (1988).
28. 18 U.S.C. § 2510-20 (1988).
29. 11 U.S.C. § 525 (1988).
30. Executive Order 12546 (Sept. 15, 1986).
31. 5 U.S.C. §§ 1501(5), 7325(a) (1988).
32. 5 U.S.C. § 2302(b)(g) (1988).
33. Immigration Reform and Control Act of 1986, P.L. 99-603 [S. 1200] (November 5, 1986).
34. 29 U.S.C. §§ 2001-2009 (1988).

35. *See, e.g., Luck v. Southern Pac. Transp. Co.*, 218 Cal. App.3d 1, 267 Cal. Rptr. 618 (1990) (private employer's random alcohol and drug testing program violated privacy provisions of California's constitution).
36. W. Prosser, *Handbook of the Law of Torts* § 117 (4th ed. 1971).
37. *See Quinones v. United States*, 492 F.2d 1269 (3d Cir. 1974) (release of inaccurate personnel file); *Bulkin v. Western Kraft East, Inc.*, 422 F. Supp. 437 (E.D. Pa. 1976) (negligent maintenance of employment records).
38. *See Kobec v. Nabisco*, 166 Ga. App. 652, 305 S.E.2d 183 (1983) (employer's disclosure of employee's attendance record held not to establish tort because of lack of physical intrusion).
39. *See, e.g., O'Brien v. Papa Gino's*, 780 F.2d 1067 (1st Cir. 1986) (privacy rights invaded by polygraph test).
40. *See, e.g., Colgate-Palmolive Co. v. Tullos*, 219 F.2d 617 (5th Cir. 1955) (using former employee's name for advertising purposes without consent).
41. *See Wendler, Jr. v. DePaul*, 346 Pa. Super. 479, 499 A.2d 1101 (1985) (negative employee performance evaluation); *Biggins v. Hanson*, 252 Cal. App.2d 16, 59 Cal. Rptr. 897 (1967) (reasons for employee termination).
42. *Faniel v. Chesapeake & Potomac Telephone Co*, 404 A.2d 147 (D.C. App. 1979); *Tocker v. Great Atlantic & Pacific Tea Co.*, 190 A.2d 822 (D.C. App. 1963); *Delan v. CBS, Inc.*, 111 Misc.2d 928, 445 N.Y.S.2d 898 (1981).
43. *See Patton v. J. C. Penney Co., Inc.*, 75 Or. App. 638, 707 P.2d 1256 (Or. App. 1985), *aff'd, rev'd in part*, 301 Or. 117, 719 P.2d 894 (1986).
44. *See Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.E.2d 732 (1985) (employer expressly promised that there would be no retaliation if misconduct by other employees was disclosed).
45. *See Gordon v. Lancaster Osteopathic Hosp. Ass'n*, 340 Pa. Super. 253, 489 A.2d 1364 (1985).
46. *See Perks v. Firestone Tire & Rubber Co*,, 611 F.2d 1393 (3d Cir. 1979) (refusing to take a polygraph examination in state prohibiting its employment use).
47. *See Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876 (1981).
48. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).
49. *See, e.g., Shebar v. Sanyo Bus. Sys. Corp.*, 111 N.J. 276, 544 A.2d 377 (1988) (promise of job "for the rest of his life" to forego rival employer's job offer sufficient to create enforceable contract).
50. *See, e.g., Martin Industrial Supply v. Riffert*, 366 Pa. Super. 89, 530 A.2d 906 (1987) (covenant void where parties entered into boilerplate noncompetition agreement, contained in book form, that had no geographical limitation inserted and was given worldwide application).
51. *See, e.g., Toussaint v. Blue Cross/Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980) (employment handbooks may create binding employee commitment).
52. *See, e.g.*, Klamath County & Operating Engineers, 90 Lab. Arb. (BNA) 354 (1988) (Lebark, Arb.) (imposing discipline in a manner that unduly embarrasses or humiliates an employee affects privacy interests present in how one is perceived by others).
53. Form EEO-1, 29 C.F.R. § 1602.7 (1992).
54. *See* Division 241, *Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976) (rules requiring blood and urine tests for public bus

drivers after any serious accident or suspicion of intoxication is not a violation of the Fourth Amendment because the state had a reasonable objective in furthering public safety and the actual conditions and the manner of the intrusion were not unreasonable); *Thom v. New York Stock Exchange*, 306 F. Supp. 1002 (S.D. N.Y. 1969) (statute requiring fingerprinting of stock exchange workers held constitutional as valid exercise of police power in combatting theft in the securities industry), *aff'd per curiam sub nom.; Miller v. New York Stock Exchange*, 427 F.2d 1075 (2d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970); *Thomas v. General Elec. Co.*, 207 F. Supp. 792 (W.D. Ky. 1962) (taking motion pictures of employees by an employer does not violate the employee's right to privacy when the purpose was to study manufacturing methods and processes); *Pitcher v. Iberia Parish School Board*, 280 So.2d 603, 607-08 (La. Ct. App. 1973), *cert. denied*, 416 U.S. 905 (1974) (requirement that public school teacher submit to annual physical examination is a reasonable interference with the right to privacy).

55. *Schmerber v. United States*, 384 U.S. 757, 764 (1966).
56. *Thom v. New York Stock Exchange*, 306 F. Supp. 1002, 1009 (S.D. N.Y. 1969), *aff'd per curiam sub nom.; Miller v. New York Stock Exchange*, 425 F.2d 1074 (2d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970).
57. *See Breithaupt v. Abram*, 352 U.S. 432, 439 (1957).
58. *Thomas v. General Electric Co.*, 207 F. Supp. 792 (W.D. Ky. 1962) (permissible to take motion pictures to study plant layout and evaluate employee jobs).
59. *See, e.g., Mansfield v. AT&T*, 747 F. Supp. 1329 (W.D. Ark. 1990) (terminating an employee who was questioned for six hours without notice, where she was laughed at and accused of lying, was not given an opportunity to defend herself, was not permitted to smoke or eat, was accused of having a lesbian relationship with a co-employee, was questioned while one employer representative unzipped his pants, and was not permitted to leave until she signed a statement admitting guilt).
60. *See Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1986) (police department's attempt to regulate white police officer's off-duty conduct in performing a "blackface" as offensive to the black community).
61. *See* Inland Container Corp., 28 Lab. Arb. (BNA) 312, 314 (1957).
62. *See Rulon-Miller v. IBM Corp.*, 162 Cal. Appl.3d 241, 208 Cal. Rptr. 524 (1984) (privacy invaded where no legitimate conflict of interest existed in dating employer's competitor, for which employee was terminated).
63. *See* Movielab, Inc., 50 Lab. Arb. (BNA) 632, 633 (1968) (McMahon, Arb.).

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