

Privacy in the Workplace: A Need-To-Know Guide for California Employers

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Sources of Privacy Rights

- No single source of the right to privacy
- U.S. Constitution: **4th amendment** right to be secure in persons, houses, papers and effects against unreasonable search and seizures. Key: reasonable expectation of privacy
- California Constitution: **Article 1 Section 1**, inalienable rights include the right of privacy.
 - ▶ both government/public sector and private sector covered
 - ▶ private right of action exists if
 - defendant engaged in conduct violating privacy interests
 - plaintiff had reasonable expectation of privacy as to interests invaded
 - invasion was serious
 - caused injury, suffering, harm

More Sources of Privacy Rights

- Common law (e.g. tort of intrusion into seclusion)
- National Labor Relations Act
 - ▶ concerted activity (applies in both union and non union workplaces)
 - ▶ surveillance
- Specific statutes, examples
 - ▶ Arrest Records
 - ▶ Fair Credit Reporting Acts
 - ▶ Electronic Stored Communications laws
 - ▶ Recording/Eavesdropping
 - ▶ Lots and lots and lots more

Expectations of Privacy

- Expectations of privacy can be created and shaped by
 - ▶ court cases
 - ▶ statutes and regulations
 - ▶ workplace policies and practices
 - ▶ express and implied promises and assurances (locks & passwords)
 - ▶ widely held social norms that change over time
 - ▶ degree to which activity is regulated and controlled
- Situational case-by case balancing approach: how strong are the privacy interests vs. how strong and important are the governmental or business interests.
 - ▶ the bad news— it's a very gray and uncertain area to navigate

2010 U.S. Supreme Court Case *City of Ontario v. Quon*

- ▶ City's electronic communications policy didn't include pagers
- ▶ Lieutenant advised that pager personal use was allowed if employees paid for overage
- ▶ Quon used pager to send "sexts" to wife, girlfriend & a co-worker
- ▶ Lieutenant complained to chief about accounting, resulting in an audit
- ▶ Quon sued both the city and the wireless provider; 9th Circuit found that provider violated the Stored Communications Act by disclosing texts and that the City's informal policy created an expectation of privacy that was violated by the audit
- ▶ **Supreme Court reversed: there was an expectation of privacy, but search of Quon's text messages was reasonable, audit was limited**

Physical Searches

- Must balance employee's reasonable expectations of privacy versus business needs
- Is the search methodology tailored to meet the need (least intrusive means)?
- The sliding scale
 - ▶ lockers, company lock
 - ▶ locker, private combination
 - ▶ desks
 - ▶ backpacks, briefcases and purses
 - ▶ body searches
- What helps: clear policies, consent, reasonable scope, consistency, specific business purpose, respectful treatment

Cameras in the Workplace

Video Surveillance

- ▶ location, location, location (Cal. Labor Code 435)
- ▶ occasion, occasion, occasion
- ▶ hidden camera vs. obvious camera
- ▶ coercing, deterring union activity
- ▶ mandatory bargaining subject

Hernandez v. Hillsides, Inc. 47 Cal. 4th 272 (2009)

- ▶ very strong business interest
- ▶ whether actual filming occurred not clear
- ▶ current employees, no economic damage
- ▶ shared office

Case by case, fact-specific

Audio Taping and Telephone Eavesdropping

- California is a two party consent state; tape recording or listening in without consent is a crime. Cal. Penal Code Sec. 632
 - ▶ person doing the taping AND person being taped must both consent
 - ▶ best practice to put the consent on the tape
- Business and quality control telephone monitoring
 - ▶ announcements and implied consent
 - ▶ special tone on the recorded phone line
 - ▶ for employees, provide unrecorded/unmonitored alternatives
- Tape recording of confidential conversation made without consent is inadmissible

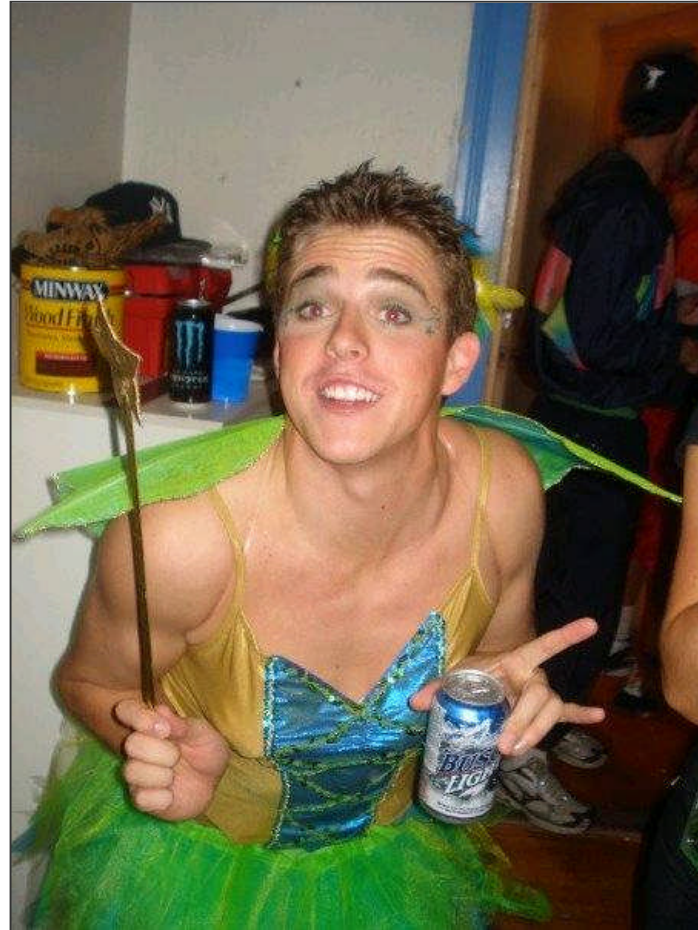
Electronic Communications Monitoring

- **Using Company Equipment, but Private Account**
 - ▶ Sporer v. UAL, United States v. Ziegler (9th Cir.2007)
 - ▶ Stengart v. Loving Care (N.J. App. 2009)
- **Password Protected Access**
 - ▶ Pietrylo v. Hillstone Restaurant Group (D. N.J. 2009)
 - ▶ Konop v. Hawaiian Airlines, Inc. (9th Cir. 2002)
- **Use of Personal Equipment for Company Business**
 - ▶ Sabin v. Miller (S.D. Iowa 2006)
 - ▶ TGB Insurance Services Corp. v. Superior Court (Zieminski) (2002)
- **Social Media**
 - ▶ Mackelprang v. Fidelity National Title Agency (D. Nev. 2007)
 - ▶ Download My Data tool

Electronic Communications Policy Language

- No expectation of privacy on company devices, despite passwords, private accounts
- No expectation of privacy if personal devices used for company business
- Despite privacy settings, social networking is not private
- Address extent to which personal use on company time or equipment is allowed
- Content boundaries
- Expect monitoring
- Records retention challenges
- Compensable time questions

Lawful Off Duty Conduct



Lawful Off-Duty Conduct

- State statutes can be based on use of lawful products (alcohol or tobacco), recreational activities, political activities or general
- Cal. Labor Code Sections 96(k), 98.6
 - ▶ Labor Commissioner may take assignment of claims for lost wages
 - ▶ Wrongful termination in violation of public policy
- Off-Duty Conduct May Impact the Job
 - ▶ provocative poses in uniform
 - ▶ intern with the wand lied about his whereabouts
 - ▶ need to be consistent (Simonetti v. Delta Airlines) (N.D. Ga 2005)

Off-Duty Surveillance

Rozell v. Ross-Hoist (S.D.N.Y. 2006) (supervisor hacked into computer and read attorney-client communications)

Lawlor v. North American Corp. (Cook County Ill. 2009)(private detective shadowed employee suspected of stealing trade secrets)

Mackelprang v. Fidelity National Title Agency (D. Nev. 2007) (employer sought social media account information for a plaintiff in a sexual harassment suit)

Krinsky v. Doe 6, 159 Cal. App. 4th 1154 (2008) (executives slammed in anonymous Yahoo posts sought to compel the identity of the authors via subpoena)

Public employee blogs protected by 1st Amendment if matters of public concern

Internet Background Searches

Best practices if you do internet searches on applicants

- ▶ avoid using protected characteristics as a basis for decision (Facebook can contain information about religion, politics, eeo classification, marital status, family status, lawful off duty conduct, disability, etc.)
- ▶ Develop a protocol and run the same searches consistently for all similarly situated applicants
- ▶ consider creating a firewall so decision-makers do not see TMI
- ▶ consider informing applicants up front and obtaining a consent
- ▶ consider asking applicants about adverse information before making a decision on information that may be unreliable
- ▶ avoid any pretext (e.g., “friending” to gain access to private areas)

Background Checks—Recent Developments

- **SB 909 Amendments to CA Fair Credit Reporting**
 - ▶ amends 1786.16 and 1786.20 Cal. Civil Code
 - ▶ requires that person who procures or who causes to be prepared a consumer investigative report must provide consumer reporting agency's web address or telephone number
 - ▶ liability to consumer injured by unauthorized access of consumer's information off-shore
- **Governor Didn't Sign AB 482**
 - ▶ bill that would have prohibited employers except for certain financial institutions from obtaining a consumer credit report for employment purposes unless
 - job related—access to money, other assets, trade secrets, other confidential information
 - some exceptions for DOJ and peace officers or where report required to be obtained by law

Federal Consumer Credit Reporting Law

Federal Fair Credit Reporting Act (FCRA)

- proper purpose needed
- requires disclosures before seeking a report (most employers make disclosure on application)
- certification required between employer and consumer reporting agency providing information
- notice to consumer of right to obtain copy
- notice of adverse decision based on report
- FACT Act exemption for investigations by 3d party
 - ▶ no disclosure or consent in advance needed
 - ▶ summary of report must be furnished, can be provided after adverse action

California Consumer Credit Reporting Law

- Different/tougher than federal law; hard on multi-state employers
- Broader definition of “investigative consumer report”
- Tougher pre-report disclosure requirements
 - ▶ separate disclosure statement
 - ▶ check-the-box if consumer wants a copy
- 3 business days to furnish if copy requested
- Internal data gathering from public records also covered
- Misconduct investigation exception
- If adverse action taken, copy must be furnished

Criminal Records

- Cal. Labor Code Section 432.7
 - ▶ employers may not ask, may not seek, may not use
 - ▶ information about **arrests not resulting in convictions**
 - ▶ Applies to both pre-employment and post-employment situations
- Exceptions: Can ask about status if released from custody on bail, bond, parole or on own recognizance; law enforcement; healthcare
- Can ask about most convictions (felony, misdemeanor, other) but watch adverse impact, should be job-related, business necessity
- Consumer agency reports are generally limited to convictions within 7 years
- Special rules for certain marijuana convictions
- Special rules for misdemeanors more than 2 years old for which probation was completed and case was dismissed.
- Sealed, expunged, pardoned, found factually innocent—gray areas
- Statement that conviction does not necessarily disqualify from employment

Fingerprints & Photographs

- California employers must not fingerprint or photograph employees to provide information to a third person who could use the information against the employee. (Cal. Labor Code § 1051)
- If an employee photograph is required, the employer must pay the cost.
- A limited number of California employers are able to check fingerprints (e.g., banks and management companies, broker dealers, schools, recreation involving minors, etc.)
 - ▶ firewall around arrests not resulting in convictions and convictions that cannot be considered
 - ▶ inform applicants that fingerprinting is required
 - ▶ compare information on employment application to conviction records
 - ▶ application should have a certification that content is truthful
 - ▶ have a process for new hires until results come back

Personnel Records & Contact Information

- Subpoenas--employment records are “consumer records”
 - ▶ Check for service of required documents (“notice to consumer”) before complying
 - ▶ Date to produce the records must give “consumer” time to object
 - ▶ Employee must get copy of the subpoena and supporting materials
 - ▶ Exceptions: state and local agencies, DIR, workers compensation
- Names and contact information of prospective class members--best practices
- Rights to inspect and copy personnel files and signed documents (Cal. Labor Code Sections 432.2 and 1198.5)

CLE Code

Polygraph Tests

- California employers must not **require** an applicant or employee to take a lie-detector test. (Cal. Labor Code § 432.2).
- Employers may **request** a person to take such a test, but only after first advising the person **in writing** at the time of the test, that the employer must not require the test.
- The Employee Polygraph Protection Act provides that a private employer generally cannot require a pre-employment polygraph test of an applicant and cannot fire an employee for refusing to take such a test. (29 U.S.C. § 2001 *et seq.*)
 - ▶ the EPPA provides several security related exceptions.

Social Security Numbers

Limits On Use of Social Security Numbers (Cal. Civ. Code §1798.85).

- ▶ Social Security Numbers cannot be:
 - Printed on mailed materials (unless required by law).
 - Posted publically.
 - Printed on password cards, or required for use as a password on an Internet device.
 - Required for use on the Internet unless the connection is secure or the SSN is encrypted.

Employer's Duty to Protect Personal Information

California businesses owning personal information must maintain reasonable security procedures and practices appropriate to the nature or the information, to protect the personal information from unauthorized access, destruction, use, modification, or disclosure. (Cal. Civ. Code §1798.81.5).

Employer's Duty to Disclose Security Breaches of Computerized Personal Information

California businesses owning any computerized data including personal information must, upon breach of the security of that information, notify the affected persons “in the most expedient manner possible and without unreasonable delay.” (Cal. Civ. Code §1798.82).

- ▶ Protected personal information includes medical and health insurance information.

Secure Disposal of Personal Information

The Fair and Accurate Credit Transactions (FACT) Act, passed in 2003, effective in 2005.

- ▶ The act allows consumers to request and obtain a free credit report once every twelve months from each of the three nationwide consumer credit reporting companies. The act also contains provisions to help reduce identity theft including a secure disposal requirement imposed upon those who use consumer reports. The Rule requires disposal practices that are reasonable and appropriate to prevent the unauthorized access to –or use of – information in a consumer report.
 - Examples of consumer reports include credit reports, credit scores, reports businesses or individuals receive with information relating to employment background, check writing history, insurance claims, residential or tenant history, or medical history.
- ▶ Covers all employers regardless of size that use consumer reports.

Medical Records (Cal. Civ. Code § 56)

- California employers must establish procedures to keep employee medical records confidential (i.e. in files separate from personnel files).
- With few exceptions California employers are prohibited from using or disclosing medical records unless the employee has signed an authorization.
- Employers may not discriminate against an employee for refusing to sign the authorization, but may take necessary action in the absence of such information if the employee refuses to sign.

Authorization for Use and Disclosure of Medical Information

Authorizations must meet several requirements (Cal. Civil Code § 56):

- ▶ Language must be separate from other language;
- ▶ Text must be at least 14 point font;
- ▶ Must be limited in time and purpose;
- ▶ Must specify who may disclose the information and;
- ▶ Contain an advisory that the employee is entitled to a copy of the authorization.

Protection of Medical Information in Workers' Compensation Proceedings

In workers' compensation proceedings, the employer's insurance carrier or a third party administrator often receives medical information about an employee (including deposition transcripts and medical reports). Cal. Labor Code § 3762 (c) forbids the disclosure of such information to the employer, except as to:

- ▶ (1) The diagnosis of the condition for which workers' compensation is claimed or treatment is provided and;
- ▶ (2) information needed to modify the employee's work duties.

Obligation to Deal With Counsel

- FEHA requires using an interactive process to determine reasonable accommodations.
- What if an employee is represented by counsel and says “talk to my lawyer”?
- An employer's refusal to communicate about reasonable accommodations with an employee's workers compensation attorney may raise a triable issue as to whether the employer failed to comply with its duty under FEHA to engage in an interactive process.
 - ▶ *Wysinger v. Automobile Club of Southern California*, 157 Cal. App. 4th 413 (2007).

Pre-Employment Disability Related Inquires

- California prohibits most pre-employment disability related inquiries. Thus, employers must not ask applicants about any physical disability, mental disability, or medical condition.
- Notwithstanding these prohibitions, employers may ask about the ability of applicants to perform job-related functions, may respond to applicant requests for reasonable accommodation, and may require a form of employment entrance medical examination. Govt. Code §12940 (e)(2),(3).

Medical Testing

- A “medical exam” is forbidden under FEHA and the ADA except in two circumstances:
 - (1) post offer, pre-hire examination of an applicant that “is job-related and consistent with business necessity”; and
 - (2) an examination of an employee that “is job related and consistent with business necessity.” (Cal. Govt. Code §12940 (e)(3), (f)(2)).
- HIV Testing: California employers must not require HIV testing or use of blood tests to determine insurability or suitability for employment. (Cal. Health and Safety Code § 120980).
- Genetic Testing: California employers must not subject applicants or employees to tests for genetic characteristics. (Cal. Govt. Code § 12940(o)) (See also slides on federal GINA).

Psychological Testing

- Federal law forbids all medical exams occurring before a job offer, California takes it one step further and forbids pre-employment medical examinations **and** psychological examinations. (Govt. Code 12940 (e)).
- California applicants have successfully challenged psychological tests that ask intrusive questions. *Soroka v. Dayton Hudson Corp.* 235 Cal. App. 3d 654 (1991).

Drug Testing

Drug testing implicates rights of privacy, which are especially strong in California.

- ▶ Reasonable suspicion testing is generally permissible.
- ▶ Random testing is generally not permissible, absent:
 - (1) a federal legal mandate to do so or;
 - (2) a strong case that the particular class of employees being tested would pose some imminent safety or health threat with irremediable consequences, if allowed to work under the influence of drugs.

FEHA Defines Drug Test As A Medical Exam

The ADA specifically permits employers to screen *applicants* for illegal drugs (42 U.S.C. 12114 (d)(1)), however, California is different.

- ▶ Testing for illegal drugs = “medical exam” for the purposes of California disability discrimination law.

- ▶ As discussed previously, a “medical exam” is forbidden under FEHA and the ADA except in two circumstances:
 - (1) post offer, pre-hire examination of an applicant that “is job-related and consistent with business necessity”; and
 - (2) an examination of an employee that “is job related and consistent with business necessity.” (Cal. Govt. Code §12940 (e)(3), (f)(2)).

Test: Legitimate Interest Must Outweigh Privacy Rights

- An employer must demonstrate a competing or legitimate interest that outweighs applicants' and its employees state constitutional rights to privacy to conduct drug and alcohol testing.
- ❖ Pre-employment drug testing of applicants should only be conducted after job offers have been made.
- ❖ Random testing should be limited to employees in safety or security sensitive positions.

Genetic Information and Testing

Title II of the Genetic Information Nondiscrimination Act (“GINA”), prohibits employers from discriminating against employees and applicants based on genetic information, regulates employers’ collection of genetic information and requires employers to keep genetic information confidential.

- ▶ On November 9, 2010, the EEOC issued final regulations on Title II of GINA.
 - Defining: “genetic information” & “genetic tests”.
 - Limits on acquiring genetic information (exception for voluntary wellness programs).
 - Personnel files.
 - Distinguishing GINA from the ADA.

GINA Best Practices

- Update equal employment policies to prohibit discrimination based on genetic information.
- Include claims based on genetic information in waivers and releases.
- Remove GINA protected information from personnel files and place in separate confidential medical files.
- Abandon requests for genetic information (particularly requests that seek family medical history).
- Use the “safe harbor” language.
- Train supervisors to understand and comply.
- Post notices advising employees of their rights under GINA.
- Revise post-offer, pre-employment exam health history questionnaires

GINA Safe Harbor Language

“The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of an individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. ‘Genetic information,’ as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.”

Conclusion: Privacy Best Practices

- **Set Expectations:** provide advance notice (pre-employment, handbooks, log-in) of areas employees should not expect to remain private.
- **Obtain consent:** (best obtained in advance and in writing).
- **Justification:** have strong business purpose for intrusions.
- **Do not intrude more than is necessary** to serve the business purpose. Chose the least intrusive means available.
- **Safeguard information:** Store, use, request and dispose of private information with appropriate safeguards.
- **Comply with specific statutes; stay current.**

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