It's None Of Your Business – Or Is It?

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Abstract

Workplace privacy is a growing area of concern for employees, companies, legislatures, and the courts. With increasing pressures to improve productivity and profitability, employers are taking advantage of various methods to monitor and control the activities of their employees – both on and off the job. In addition, improved technology is affecting not only the manner in which employers gather such information, but also the location, time, and way in which employees perform their jobs. A survey was conducted to gather perceptions about whether or not employers should be able to take certain actions or gather certain information in ten specific areas. The results provide insights into the three practices deemed most objectionable as well as the three areas of least concern. Court opinions and the professional literature relating to these topics are reviewed. Finally, the law, literature, and survey results are synthesized to produce a series of practical recommendations to help employers and employees deal with workplace privacy in a legal, practical and constructive manner.

Introduction

Workplace privacy is a growing area of concern for employees, employers, legislatures, and the courts. The results of a survey administered over a number of years provide insight into the areas that employees deem most objectionable, and which therefore might subject the employer to the most liability. On the other end of the spectrum, the survey also indicates the areas of lesser concern, where employers may be at liberty to take action without fear of complaint. The survey results are explained against a backdrop of court opinions and professional literature analyzing the rights and responsibilities of the employment relationship. Finally, the law, literature, and survey results are synthesized to produce a series of practical recommendations to help employers and employees deal with workplace privacy in a constructive manner.

In response to concerns about productivity and profitability, employers are using a variety of methods to monitor and control the activities of their employees – both on and off the job. Technological advancements affect not only the manner in which employers gather such information, but also the location, time, and way in which employees perform their jobs. The world of work is not as clearly defined today as it was in previous decades, as cell phones and home computers impact time away from the office. Flexible schedules and part time workers further complicate the issues. Added to traditional occupational concerns are society's growing preoccupation and knowledge about substance abuse,

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genetic testing, health and wellness, and, of course, individual privacy rights.

A 1999 survey of more than 1000 businesses by the American Management Association International found that 67% of companies use electronic monitoring or surveillance, 45% review e-mail and phone calls, 39% keep logs of the location and time of phone calls, and 16% videotape employees at work. For the most part, companies believe employees are aware of these activities, as 84% said workers were informed about such policies. The director of the association conducting the survey said "a good deal of this is done because it can be done, because the technology allows it" (Stevens, 1999 at A-12). As ease of surveillance increases, so will the scope and topics of monitoring, and that will only raise more concerns about privacy rights among employees. The very recent controversy over proposed OSHA regulations for home offices is a harbinger of things to come (Coff, 2000).

The Survey

In order to assess the relative sensitivity of various topics dealing with privacy in the employment relationship, a survey was constructed and administered to students in undergraduate and graduate Human Resource Law classes. The survey was given as part of a "reflection paper" writing assignment, in which students were asked to give their personal reactions as to whether or not an employer should be able to take certain actions or have access to certain information. Ten broad topic areas were defined, two of which were further broken into subtopics involving differing levels of intrusion. The students were then asked to rate the three "most objectionable" and the three "least objectionable" employment practices. The results of nine classes over a period of five years were compiled and tabulated, with a total number of 180 students being surveyed.

The premise of the survey is that it is important for employers to recognize and factor in the emotional quotient of employees' reactions to a new policy or procedure. *How* something is done may be far more important than *what* is actually done. Miscommunication or inept implementation of a legitimate policy can result in hard feelings, a sense of betrayal, and an impression of unfairness among workers. As any manager knows, once these negative perceptions exist, they are difficult to eradicate. Corporate culture is related to productivity, and a harmonious work environment is obviously connected to concepts of trust, fairness and dignity.

Legally, how a person feels about an issue may play a large role in how much money a corporation ultimately has to pay to defend its actions. Individuals are less likely to sue those who treat them honestly and equitably, but cannot get to a lawyer fast enough when they experience what they believe to be a personal injustice. Successful informal negotiation of a dispute is more probable in an atmosphere of good faith and trust. Finally, if the incident does end up in court, the amount of damages awarded may be determined by how egregious a jury deems the behavior of the employer.

The students who participated in the survey were taking a College of Business Human Resource Law class in a regional public university. The class was an elective class on the graduate level, attracting both business students and students from other colleges within the institution. On the undergraduate level, the class was an elective for most students, although for the last two years, it has been a required course for a human resource emphasis in management. The background of the students was fairly eclectic in terms of work experience and knowledge of relevant law: some had extensive work experience, a few had never worked; others were employed in the human resource area, although most were not; some were managers or owners of companies, others were entry level employees; a number had broad experience with the legal topics involved, others had none. The results more than likely reflect the perceptions of em-

ployees rather than employers due to the phrasing of the scenario presented and the fact that the great majority of the respondents have more experience as employees than as employers.

The questions and ten areas of query were as follows: First, do you think an employer should have the right to do any or all of the following? Second, list the three you find least objectionable, and the three you find most objectionable. Then explain your reasoning, recognizing the issues from both the employer's and employee's points of view (pros and cons of each).

1. at work, listen in on employees' phone conversations and/or read their e-mail?
2. know employees' genetic make-up or their family's medical history?
3. know about employees' psychiatric history? what if they received psychiatric treatment under the employer's employee assistance program (EAP)?
4. limit employees' off-work recreational activities, such as sports in which they participate?
5. limit other off-work activities, such as drinking alcohol or smoking cigarettes? drug use? eating habits?
6. know what medications employees are taking?
7. have a say-so in employees' romantic life (i.e., whom they date, live with, sleep with, etc.)?
8. know about employees' personal finances (i.e., credit history, debts, etc.)?
9. search employees' desks or file cabinets? their purses, briefcases, or pockets? cars?
10. videotape employees' off-work activities?

The following tables summarize responses from the 180 students. The tables indicate the number of students who ranked each item as either among the three most objectionable or three least objectionable actions. Actual numbers are restated as percentages and margins of error have been calculated at the 95% confidence level.

Results

The three practices ranked most objectionable are videotaping off work activities, having a say-so in employees' romantic lives, and limiting off-work recreational activities. For example, 52.22% of the students considered videotaping off work activities most objectionable. This result has a margin of error of plus or minus 7.30%, indicating that the results from the underlying population would be between 44.92% and 59.52%, a strong indication of how objectionable this practice is. Moreover, only 3.33% of the students rated this practice as least objectionable, thus lending additional support to the notion that this practice is not acceptable.

Likewise, 42.78% of the student sample rated having a say-so in employees' romantic lives as among the most objectionable, with only 8.33% ranking this action as least objectionable. Again, a large difference is observed between the 42.78% of students rating limiting off-work recreational activities as objectionable and the 7.78% who considered it among the least objectionable activities.

The three practices found least objectionable are knowing what medications employees are taking, monitoring phone and e-mail conversations, and searching desks, file cabinets, etc. Here, however, the differences observed between those who ranked these particular practices as least objectionable and most objectionable are large in some instances but not in others. For example, 48.33% ranked knowing medications among least objectionable, and only 3.89% ranked this practice as one of the three most objectionable. On the other hand, 47.78% rated monitoring phone and e-mail conversations among least objectionable while 15.56% felt this to be objectionable. Likewise, 31.11% felt searching desks and file cabinets was among the

least objectionable activities, but 16.11% ranked this activity as among the most objectionable.

The Most Objectionable

The three most objectionable actions of employers are videotaping off-work activities, having a say-so in employees' romantic lives, and limiting off-work recreational activities. The key factor tying these together is the perception that these areas are not directly related to the job, and as a result are more personal in nature.

Respondents, not surprisingly, react strongly to both the videotaping as a means of surveillance, but also to the situational aspects of this question. Words such as "appalling," "outrageous," and "unconscionable" are used to describe such behavior, and the respondents often mention they can not fathom a situation where this would be acceptable. Most, of course, put themselves in the employee's position, and being honest individuals, simply do not envision themselves ever doing anything that would warrant videotaping by an employer. The "big brother" connotation is also unacceptable to many. Those who do realize possible justification for such behavior emphasize that it would only be appropriate as a last resort, or for extreme behavior by an employee.

Respondents see their romantic liaisons as being a private, personal area in which the employer has little right to interfere. While many acknowledge the existence of limited reasons for employers to be concerned about the personal relationships of employees, most see their sexual, love, and marriage relationships as far too important to their happiness and future to allow a boss to dictate their parameters. As a practical matter, people today develop social relationships via the workplace, and meet dating partners or future mates as a result. Some commented that in fact, employees might be more productive if they are working with people they are close to and enjoy, including romantic partners.

Off-work should mean off-work, say the majority of respondents, as the reason for objecting to the monitoring of off-work recreational activities. The notion of "big brother" overseeing all of one's activities is a frightening prospect, particularly if it extends to sports or other pleasurable pursuits. The need for stress reduction and physical fitness was the reasons that many of the respondents participated in such activities, and many viewed the stress as being work-induced. Therefore, any attempt to regulate such activity was seen as counterproductive to a healthy workplace.

The Least Objectionable

The three least objectionable practices are for an employer to know what medications an employee is taking, to monitor phone and e-mail conversations, and to search the office premises, including desks and file cabinets. Somewhat more objectionable was the search of personal items on company premises, such as briefcases, purses, or automobiles.

Regarding knowledge of medications, it is important to note that nearly every respondent linked the need for such knowledge to safety and protection of the worker, such as the necessity of knowing if a diabetic needed insulin, or if an epileptic is on controlling medication. Therefore, viewed as a protective measure for the good of the employee, this question raised few objections. Very few individuals perceived any potential for misuse of such information, but this point is taken up in a later section of this paper.

The main justification noted for monitoring e-mail and phone conversations is that it is the employer's equipment and company time that is being used. Furthermore, many respondents are familiar with industries such as stock brokerage and telemarketing in which conversations are routinely recorded. Apparently, in today's business world, such monitoring is fairly common and therefore not objectionable. Of the respondents who elaborated on this issue, nearly

Privacy Tabulation (n = 180): Most Objectionable

	Employer actions/query	# of Resp.	% of Resp.	Margin of Error (95% Confid.)
#1	Listen in on phone/read e-mail	28	15.56%	5.29%
#2	Know genetic make-up/family medical history	58	32.22%	6.83%
#3	Know psychiatric history	15	8.33%	4.04%
#4	Limit off-work recreational activities	77	42.78%	7.23%
#5	Limit off-work activities like drinking, smoking, drugs, eating	26	14.44%	5.14%
#6	Know medications	7	3.89%	2.82%
#7	Say-so in romantic life	77	42.78%	7.23%
#8	Know personal finances	26	14.44%	5.14%
#9	Search desks, file cabinets/ purses, briefcases, pockets/cars	29	16.11%	5.37%
#10	Videotape off work activities	94	52.22%	7.30%

Privacy Tabulation (n = 180): Least Objectionable

	Employer actions/query	# of Resp.	% of Resp.	Margin of Error (95% Confid.)
#1	Listen in on phone/read e-mail	86	47.78%	7.30%
#2	Know genetic make-up/family medical history	21	11.67%	4.69%
#3	Know psychiatric history	48	26.67%	6.46%
#4	Limit off-work recreational activities	14	7.78%	3.91%
#5	Limit off-work activities like drinking, smoking, drugs, eating	36	20.00%	5.84%
#6	Know medications	87	48.33%	7.30%
#7	Say-so in romantic life	15	8.33%	4.04%
#8	Know personal finances	37	20.56%	5.90%
#9	Search desks, file cabinets/ purses, briefcases, pockets/cars	56	31.11%	6.76%
#10	Videotape off work activities	6	3.33%	2.62%

all noted that workers occasionally need to have personal communications while at work, and that this need should be accommodated by employers.

With respect to searches of offices, including desks and file cabinets, the reasoning is primarily the same as for e-mail and phone monitoring. The fact that it is the employer's property and on the company premises is influential. In addition, the need to find files or other information in an employee's absence figured strongly in many answers. Only a few respondents had a problem with this practice, and those who did object did so on the grounds that employees often keep very personal items in their offices that merit some protection. Approximately half of all respondents differentiated between employer-owned property like desks, and employee-owned items like purses or briefcases and cars. In order to accept search of the more

Privacy Tabulation: *Undergraduate and Graduate HR Law classes*

?#	UG'95	G'95	G'96	UG'97	G'97	UG'98	G'98	UG'99	G'99	SUM
1. least object.	20	8	17	7	4	9	2	11	8	**86**
most object.	3	3	4	1	2	2	1	6	6	**28**
2. least object.	6	3	3	0	0	4	1	2	2	**21**
most object.	6	5	10	8	8	5	2	9	5	**58**
3. least object.	3	4	7	6	6	8	0	6	8	**48**
most object.	3	2	2	1	3	1	0	1	2	**15**
4. least object.	1	3	2	1	1	1	0	3	2	**14**
most object.	19	4	13	5	6	7	3	12	8	**77**
5. least object.	7	1	4	2	7	2	0	12	1	**36**
most object.	4	4	4	2	0	2	1	2	7	**26**
6. least object.	17	8	17	6	8	8	3	11	9	**87**
most object.	1	1	0	1	0	1	0	1	2	**7**
7. least object.	2	0	2	3	0	1	0	6	1	**15**
most object.	15	8	15	6	7	8	4	6	8	**77**
8. least object.	6	5	6	0	6	2	3	4	5	**37**
most object.	5	1	5	4	2	3	0	2	4	**26**
9. least object.	6	5	6	8	7	7	2	5	10	**56**
Most object.	6	2	6	0	2	2	0	8	3	**29**
10.least object.	0	0	0	1	0	0	1	2	2	**6**
Most object.	17	6	17	8	10	11	1	15	9	**94**

personal items, most respondents wanted a strong justification, such as evidence of theft.

The Legal Viewpoint

The legal principles involved in workplace privacy will be outlined, and then the most and least objectionable behaviors will be discussed in light of these principles. The bottom line is that the employer has the legal right to do all of these things, with only a few exceptions or limitations. Certain states have statutes, constitutions, or case law that protect the privacy of employees in specific areas, and therefore the law in a given state should be reviewed. Public employers are somewhat limited by the Constitutional restraints on governmental actions, particularly with regard to Fourth Amendment search and seizure doctrines. Other laws, such as the Privacy Act of 1974 pertaining to federal employees' personnel records, and the Americans with Disabilities Act provisions regarding confidentiality of medical information may also come into play in some situations. Unless an employer is constrained by these factors, however, management is basically free to establish policies and guidelines as it sees fit for the particular enterprise. If an individual does not comply, then that is a legitimate reason for not hiring that person, or for appropriate disciplinary action (Wilborn, 1998 and Dworkin,1997).

Whether or not the employee had a "reasonable expectation of privacy" is the central tenet of the decisions in this area of the law. If, for example, the company policy states that particular activities or places may be monitored, then the employees have no expectation of privacy within those areas. Likewise, employees have no expectation of privacy for activities that occur in a public place (McLain v. Boise Cascade Corp., 1975). "Reasonable" is also a key word in deciding whether or not the employer acted appropriately. The nature of the invasion is important, as liability may exist where the intrusion "would be highly offensive to a reasonable person" (Borse v. Piece Goods Shop, Inc., 1991) and where the degree of that intrusion is "substantial" (Smyth v. The Pillsbury Company, 1996). Factors considered are whether the employees knew or should have known about the action, pertinent office practices and procedures, or industry regulation (O'Connor v. Ortega, 1987). Need for the information by the employer is also a significant consideration. Policies are usually upheld when safety is the goal, such as drug testing for transportation employees (Skinner v. Railway Executives Association, 1989). A policy aimed at preventing economic loss or improving customer service is also likely to be enforced by a court.

A company may violate the law if it goes further than necessary to accomplish the purported goal of a particular policy. For example, in one case, where the employer was monitoring phone calls in connection with a theft investigation but proceeded to listen in on many hours of personal conversations unconnected to the investigation, "the scope of the interception [was] well beyond the boundaries of the ordinary course of business" (Deal v. Spears, 1992). In another case, a marketing manager was fired because of her relationship with an employee of a competing company in violation of a policy dealing with conflicts of interest. While the court acknowledged the employer's right to safeguard its proprietary information, the fact that the fired employee did not have access to sensitive information which could have been useful to competitors led the court to decide in her favor (Rulon-Miller v. IBM Corp., 1984).

The most objected to activity was videotaping off-work activities. The justification for such surveillance usually concerns suspected illicit activities by employees. In workers' compensation cases, the company or its insurer can save large amounts of money if it can be proven that an employee is doing heavy yard work on the weekends, while being unable to perform similar work at the job site. In one such case, the activities took place where they could be seen by neighbors or passersby, and therefore videotaping was not an invasion of privacy (McLain v. Boise Cascade Corp., 1975). Improper use of company property, such as vehicles, is another activity that could justify documentation by videotape. Violation of company policies, from relatively minor incidents like doing personal errands "on the clock" to major ones such as corporate espionage, also would support use of videotaped evidence. Where proof of suspected job-related misconduct cannot be easily documented by other means, however, the courts historically uphold off-work videotaping. Due to the rather extreme nature of this type of surveillance, employers are presumably reluctant to use it absent unusual circumstances, thus mirroring the tenor of responses collected in the survey.

The intrusion of a company into its employees' romantic relationships is far more common, and as a result, indicates the area in which there is the greatest divergence between actual practice and the opinions of survey respondents. Many firms have anti-nepotism policies that prohibit related individuals from working for the same company, within the same department, or in a direct supervisory position. These are generally seen as efforts to avoid favoritism, but may also relate to fears of embezzlement or attempts to avoid problems at work that stem from problems in the relationship. Other businesses have reacted to the increase in sexual harassment com-

plaints by establishing non-fraternization policies Still others are concerned about religious or moral tenets, particularly where same-sex relationships or cohabitation of non-married individuals is an issue. Finally, certain companies have prohibited employees from dating or marrying those who work for a competitor, in the interest of safeguarding trade secrets (Dworkin, 1997 and Segal, 1993). If a company is relying on such business-related rationales, the courts tend to support the policy, however objectionable employees may find it.

As to limiting off-work recreational activities, most companies use absenteeism, health insurance costs, and workers' compensation costs to justify these limitations (Alderman and Kennedy, 1996 and Dworkin, 1997). If the employee's physical condition is critical to performance of the job, such as a professional athlete, the job-related nature of the restriction is clear. For a desk job, however, the tie is less obvious. Nevertheless, the cost to companies of "lost time" injuries incurred during leisure time activities can be substantial, and many companies are prohibiting their employees from "dangerous" activities such as parachuting or mountain climbing (Schiller and Konrad, 1991). The law in this area is somewhat inconsistent, as many states are passing laws designed to protect the "private lives" of employees (Wilborn, 1998 and Dworkin, 1997), and some courts see excessive employer control in these areas as against public policy (Best Lock Co. v. Review Board., 1991). Companies in these states often find it difficult to prove a connection between the prohibited activity and the job. However, the more directly an employer can tie the "off-work" activity to a work-related cost or result, the greater likelihood of success in upholding the company policy. With increased use of telecommuting, this tie may become easier to establish. In strong employment-at-will states, the employer is free to implement such policies, even without a job-related reason – the employee can simply choose to comply or find work elsewhere (Player, et al, 1995).

The least objectionable activities, not surprisingly, are commonly approved by the courts and often found in business. The safety rationale logically supports the need for information on medications an employee is taking, at least regarding any side effects that might affect the employee at work or that pertain to the person's ability to do the job. However, respondents evinced a fairly naïve viewpoint from the authors' perspective, as few mentioned the potential misuse of this information, or questioned the employer's right to know about medications that have nothing to do with the workplace. For example, knowledge of an employee taking an AIDS-related drug could spark discriminatory actions that are illegal under the Americans with Disabilities Act or state legislation protecting sexual orientation. Use of medications such as birth control, heart medication, or anti-depressants could easily lead to inappropriate biases affecting hiring or evaluation decisions. The idealistic presumption of the employer using the information for the good of the employee may in fact portend very strong adverse reactions to such practices if an employer instead uses the information to the detriment of an employee.

On monitoring of e-mail and phone conversations, the law is line with survey responses, supporting such activity as long as it is reasonable and job-related. These criteria are usually not difficult for the employer to substantiate. Existence of a company policy notifying the employees of the possibility of such monitoring will eliminate any "expectation of privacy," and legitimate employer interests of proper use of work time or quality customer service easily justify the job-related aspect. While the Federal Wiretap Act generally prohibits electronic eavesdropping by third parties, it contains exceptions that normally protect employers scanning workplace communications. (Cozetto and Pedeliski, 1996). As technology improves, so will surveillance, as evidenced by recent concerns regarding appropriate workplace Internet usage (Borrus, 1999). A word of caution is raised by

the survey, however, as most respondents said employees should be allowed to take care of some personal concerns during work hours. To accommodate this need, suggestions ranged from employers providing a private phone (pay or free) to limiting the monitoring of personal conversations unless an employee abuses the privilege.

The law is also in line with respondents' reactions to the searching of desks and file cabinets. The fact that others may need information kept in files in the possession of an employee could justify a search of an otherwise "private" office during that employee's absence (O'Bryan v. KTIV, 1994), even if the employer is a governmental entity (O'Connor v. Ortega, 1987). Credible information of theft of company property would insulate the employer from liability for a more intrusive search into desk drawers or briefcases (New Jersey v. T.L.O., 1985). Searching desks and filing cabinets of a child protective investigator due to an anonymous tip she kept child pornography in her desk was justified in one case (Hatch and Hall, 1998). However, in situations where employees are led to believe they have a "private space," such as a locker with a lock bought by the employee, intrusion by the employer may be a violation of employee privacy rights (K-Mart Corp. Store No. 7441 v. Trotti, 1984).

Recommendations and Conclusions

Any employer contemplating actions that could possibly affect the privacy interests of employees should review the following checklist. Such a review should also be useful to businesses currently using such methods. Particularly for policies involving areas indicated as "highly objectionable" by the survey, management might want to more fully analyze these questions utilizing participative decision-making techniques like employee committees or focus groups.

1. *Need*: What is the job-related reason for acquiring this information? Can we justify our request for this data? Will we feel comfortable explaining this practice to our employees (or to the press or a jury)?
2. *Procedure*: How will the information be gathered? Will this be done routinely or only in exceptional circumstances where a clear problem or "suspicion" exists?
3. *Potential Abuse*: Could this information be used for inappropriate or illegal purposes? (Now, be creative on this one!) If so, what will prevent the unauthorized use? How serious are the consequences for the company if these safeguards are ineffective?
4. *Alternatives*: Is this the least invasive method of getting this information?
5. *Communication*: How and when will this policy be communicated to employees? Is there a need for signed employee consent forms? If it is not communicated, why not? Should there be a "grace period" between announcement of the policy and its actual implementation?
6. *Complaint Or Appeal*: Is there an appeals or complaint process connected with the contemplated activity? If not, should there be?
7. *Assessment*: Should there be set dates for review and revision of this practice to ensure its working as planned?
8. *Documentation*: How will the information gathered be compiled, stored and accessed?
9. *Enforcement*: What are the disciplinary or enforcement mechanisms for violation of the policy? Can we enforce it? Even if it can be enforced, will the responsible parties enforce it?
10. *Practicality*: Is it worth the costs, both tangible and intangible?

For example, for a non-fraternization policy, decide how to distinguish between a professional meal between mere friends and a romantic interlude between lovers. Furthermore, one might consider whether any greater danger is posed by relationships between lovers than between close platonic friends. If an employer were instituting a search policy, a grace period would allow employees the chance to remove

any "private" materials prior to its implementation. As far as practicality of e-mail monitoring, the loss of morale and inference of distrust may be costlier than the time lost on personal communications during work hours.

Summary

This survey indicates varying degrees of employee sensitivity in regard to their perceived privacy rights. The resulting information is useful to employers seeking to establish policies that will accomplish legitimate business needs while protecting concerns of their workers. The legal background is helpful as well, giving guidance as to the basic tenets operating in this area of law, and comparing them with the survey responses. Finally, the checklist of recommended questions will aid employers in avoiding common problems with potential privacy claims.

Rapidly changing technology will bring greater capabilities to monitor and gather personal information about current and prospective employees. In return, privacy advocates will attempt to block such intrusions. Savvy employers will attempt to find the narrow area in which their efforts will accomplish company goals, and at the same time, be acceptable to the courts and their employees. Management should be sensitive regarding policies that affect areas deemed "personal" and "private" by workers. Open communication, when possible, between the company and its workforce will also curtail problems. As with any management issue, common sense implementation and enforcement will go a long way toward avoiding misunderstandings, complaints, and lawsuits.

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