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## Privacy in the Workplace

### Who, What, Why . . .

*Who does it apply to:* Any employer who monitors employee emails, issues employees a cell phone, or might ever want to search an employee's workspace. Even if you don't think you are the snooping type, there may come a day where you think an employee is stealing, on drugs, or misusing company facilities in ways you never imagined and you will suddenly care.

*What privacy rights do citizens have in general:* The 4th Amendment protects private citizens from government intrusions and there are legal claims available for citizens to bring against other citizens who intrude on their privacy, but these are more limited than you might think.

*How do privacy rights translate into the workplace:* Simply put, they don't effectively translate. Private employers are not subject to the 4th Amendment, and they can make employees surrender most of their other privacy rights as a condition of employment.

*Where can employers conduct physical searches:* Unless the employer creates an expectation of privacy (intentionally or unintentionally) an employer can search anywhere on its premises.

*Can an employer look at employee email:* It depends on the type of email. An employer can search and read employees work email that is provided through a company server. A private webmail account that the employee looks at on the company computer is a different story. Employees have an expectation of privacy in a separate email account for which the employee holds the sole password. Unless the employee surrenders the password in advance and uses the webmail account for work purposes, employers should steer clear.

*What about work phone calls:* An employer might think that they are automatically entitled to listen to employee calls. After all, the employer owns the phone. Unfortunately,

that is not accurate. Employers must obtain advance consent from their employees to listen in on calls, and even so, employers must hang up on any call as soon as they determine it is personal.

*Are cell phones the same:* It is virtually impossible for an employer to listen in on a cell phone call as it occurs. There simply isn't technology to support it. That leaves voicemails, text messages, photos, and video. For these items, it is still necessary for the employer to obtain consent, even if the employer pays for and issues the cell phone.

*What about video cameras:* Employers may place video cameras in their facilities, however, a little common sense is necessary. You cannot place a video camera in a restroom or locker room because employees do have a right to expect some level of privacy there. Also, if you are going to use video, you need to let the employees know so they don't expect privacy in that environment.

*When are polygraphs acceptable:* Generally polygraphs are not allowed under the law, but there are a few exceptions which will be discussed in the EH piece next month.

*Can I monitor the internet:* Employers can monitor employee internet usage at work. That said, employers must be careful of monitoring employees on social media sites. Employers cannot fire employees for complaining about supervisors, wages, or working conditions on the internet. This is considered pre-union activity and protected under law.

*What about employee health information:* Employers must protect employee private health information under the federal Health Insurance Portability and Accountability Act. This topic will be discussed in more detail in a later EH piece.

## Common Situations:

*Employee lockers:* Acme Lock and Safe provides lockers for its employees to store their personal items, but allows employees to use their own personal lock. Acme has no written policy regarding privacy in the workplace. One day, the company suspects that someone is stealing locks. They cut all the locks off employee lockers and search. Mia stores her purse in her locker and the company rifles through it finding nothing. Can Mia sue Acme for violation of her privacy? Yes. Even though Acme owns the lockers, it permitted the employee to develop a sense of privacy by using her own lock without maintaining a key.

*Conceal and carry:* An employer institutes a policy against employee's bringing guns into the workplace. Joe does not believe this policy applies to him because he has a conceal and carry license and his employer does not have the state required notice to prevent him from carrying into the office. The employer discovers Joe is still bringing a weapon into the office and fires him. Has the employer violated his rights? Though firing Joe without a chance to correct his misapprehension might be a bit severe, it does not violate his rights. An employer may set policies for employees about bringing weapons in the workplace without following the state notice requirements, though it is good to clarify this point in the policy.

*Privacy in the parking lot:* An employer believes that one of its employees is sneaking out secret company plans in the employee's car. The employer has a policy regarding

searches to employer property and demands the employee provide access to his car so that the employer may inspect it. Does the employer have the right to examine an employee's car? It depends. If the employer owns or leases the parking lot as part of its space, it can extend its search policy to the car. If not, the demand is inappropriate.

## What Should I do:

*Good:* Have a policy putting employees on notice of what privacy rights, if any, you allow in your place of employment with respect to personal space, internet usage, email, and phones.

*Better:* In addition to a policy, employers should have employees consent to searches of personal space, listening in on business calls in the office, and consent to provide access to all types of data (voicemails, texts, internet site usage, photos, and video) on company issued or reimbursed cell phones.

*Best:* Maintain a policy and obtain advance consents as noted above, but layer over that with consent to be signed by the employee at the time of the search doubling up protection against an argument that you forced the search.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at [mkelsheimer@grayreed.com](mailto:mkelsheimer@grayreed.com) or by phone at **469.320.6063**