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The Top 5 Things Employers Need to Know About Employee Privacy Rights

by D. Scott Lamb

1. Electronic Monitoring of Employees

- Examples of Monitoring
 - surveillance cameras and records
 - computer and communications equipment
 - biometric technologies (eg. finger prints, eye and facial recognition and voice print technologies)
 - global positioning systems (GPS)

1. Electronic Monitoring of Employees (cont'd)

- Used for a Variety of Purposes
 - safety and security of employees
 - product safety and security
 - protection of property and corporate assets
 - monitoring of employee performance and compliance with contracts and corporate rules and policies.

1. Electronic Monitoring of Employees (cont'd)

- *Eastmond v. Canadian Pacific Railway*, 2004 (Federal Court)
 - Video cameras installed in railyard to:
 - deter incidents of theft, vandalism and trespassing
 - Improve employee security
 - Assist in investigations of incidents reported in railyard
 - Cameras could not pan or zoom. Recordings kept only for a limited time and were securely store.

1. Electronic Monitoring of Employees (cont'd)

- 4-Part Test from *Eastmond v. CPR*:
 - a) Is the measure demonstrably necessary to meet a specific need?
(i.e. Is the camera surveillance really necessary?)
 - b) Is it likely to be effective in meeting that need?
(i.e. Will the camera surveillance stop or reduce significantly the theft?)

1. Electronic Monitoring of Employees (cont'd)

- c) Is the loss of privacy proportional to the benefit gained?
(i.e. Is the significant recording of employees activities of a personal nature justified against the protection afforded to employees and corporate property in the surveillance?)
- d) Is there a less privacy – invasive way of achieving the same end?
(i.e. Will better locks and gates protect the employees and corporate property as much as surveillance cameras?)

1. Electronic Monitoring of Employees (cont'd)

- Remember Employers Cannot:
 - target employees specifically in surveillance
 - technology cannot be used to evaluate employee performance.
- Employers must:
 - notify and warn at minimum with signs and posted policies of technologies being used.
 - obtain express consent where the technologies and scope of surveillance are particularly privacy invasive.

2. Personal v. Corporate Property

- Employer monitoring of employee electronic devices and equipment (eg. Laptops, tablets and smart-phones) whether corporate property or owned by employees and used for work purposes.

2. Personal v. Corporate Property (cont'd)

- *R. v. Cole*,
2012 (Supreme Court of Canada)
 - Employees have a reasonable expectation of privacy in the personal information contained on workplace computers and devices.
 - A written policy stating that all data and messages generated on the employer's computers and devices are subject to the employer's monitoring will not eliminate the employee's reasonable expectations of privacy.

2. Personal v. Corporate Property (cont'd)

- Employers need to get employees to read, sign and agree to abide by a comprehensive privacy policy governing appropriate use of employer's computers and devices:
 - reserve right to monitor use for legitimate and reasonable business purposes, including breaches of company policies, fraud and other unlawful activity.

2. Personal v. Corporate Property (cont'd)

- obtain acknowledgement that employee using the IT systems of the company, consents to the collection, use and disclosure of personal information pursuant to legitimate and reasonable business purposes.
- advise that when accessing the company's IT systems on their own personal device, a reasonable expectation of privacy will be limited with respect to such devices.

2. Personal v. Corporate Property (cont'd)

- Remember
 - Need to balance protecting corporate data and information against invading employee's right to personal data and information.
 - consider all means to avoid inadvertent collection of employee personal information

3. Drug and Alcohol Testing

- Testing can be imposed where:
 - reasonable cause exists
 - there is a workplace accident or “near-miss”
 - there is a rehabilitation plan for the employee

3. Drug and Alcohol Testing (cont'd)

- Regular testing cannot be imposed except where:
 - there is a safety-sensitive environment
 - you must show satisfactory evidence of enhanced safety risks due to drug and alcohol use (i.e. does the workplace have problems with drugs and alcohol?)
 - Irving Pulp & Paper Ltd. (2013) Supreme Court of Canada

3. Drug and Alcohol Testing (cont'd)

- Pre-employment testing
 - be cautious – generally not permitted
 - need to show necessity for intended employment (i.e. highly safety sensitive workplace)
 - Human rights issue – duty to accommodate

4. Reference and Background Checks

- Reference and background checks by employers and their agents are best done with express consent
- Background Checks
 - BC Privacy Commissioner recommending changes to limit information disclosed by police departments in employment related background checks

4. Reference and Background Checks (cont'd)

- Currently Police Departments in BC will disclose:
 - prior criminal convictions
 - outstanding charges
 - contact with police during an investigation
 - apprehensions under the *Mental Health Act*.

4. Reference and Background Checks (cont'd)

- The BC Commissioner is recommending that in employment – related background checks:
 - Police Departments stop releasing mental health information
 - Legislation be introduced to prohibit the release of non-conviction information outside of the vulnerable sector
 - Police Departments stop releasing non-conviction information where the employee is not working with children or vulnerable adults.

4. Reference and Background Checks (cont'd)

- Police Departments require employer's requests for information about convictions be confined to specific risk categories which are relevant to the person's employment (eg. offences related to drugs, alcohol, sex, violence, theft and fraud)
- The processing of records checks from the varied and disperse practices of police department be centralized under one office.

4. Reference and Background Checks (cont'd)

- Reference Checks
 - An employer is entitled to contact the names for references listed in a résumé of a prospective employee as in doing so the prospective employee has provided consent
 - If an employer wishes to speak to people not listed in a prospective employee's résumé (eg. former employer) the employer may do so, but the employer must give notice to the prospective employee first and the individuals contacted should obtain the consent of the prospective employee (eg. former employee) before discussing information.

5. Employee Access to Personal Information

- An employer must provide employees:
 - access to the personal information under the control of the employer
 - information about the ways in which the personal information has been and is being used by the organization
 - names of individuals and organizations to whom the personal information has been disclosed

5. Employee Access to Personal Information (cont'd)

- But employers do not have to disclose to an employee:
 - information protected by solicitor-client privilege
 - confidential commercial information that could harm the competitive position of the employer
 - information that was collected or disclosed without consent for purposes of an investigation

5. Employee Access to Personal Information (cont'd)

- An employer must not disclose personal information to an employee where disclosure:
 - could reasonably be expected to threaten the safety or health of an individual (other than employee requesting disclosure);
 - could reasonably be expected to cause immediate or grave harm to the safety or health of the employee who requested the disclosure;
 - would reveal personal information about another individual; or

5. Employee Access to Personal Information (cont'd)

- would reveal the identity of an individual who has provided personal information about another individual and such person does not consent to disclosure of their identity



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