



NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 9 | Number 1

Article 7

Winter 1983

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Recommended Citation

Arthur P. Menard & Anne K. Morrill, *The Employer and the Law of Privacy in the Workplace - The U.S. Model to Date*, 9 N.C. J. INT'L L. & COM. REG. 93 (1983).

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The Employer and the Law of Privacy in the Workplace—The U.S. Model to Date

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and Anne K. Morrill**

“An American has no sense of privacy. He does not know what it means.” Shaw.

If George Bernard Shaw could see America fifty years later, he would have to publish an immediate retraction. Indeed, in the last two decades, employers have been beset by a bewildering plethora of laws pertaining to privacy rights of employees. These laws relate to personnel files, medical records, arrest records, eavesdropping, employment applications, blacklisting, and even fingerprinting. The laws also concern the acquisition, retention and dissemination of employee information. Although it is basically state laws which affect private employers, federal law cannot be wholly ignored, particularly the Fair Credit and Reporting Act. Moreover, there must be a recognition of the impact of common law.

The purpose of this article is to provide an overview of these laws as they affect the employer. Thus, this analysis will highlight pertinent state law, as well as federal and common law which significantly affects the private-sector employer. Although their relevance cannot be wholly ignored, federal and state constitutional law, and other federal laws (*e.g.*, the Freedom of Information Act and The Privacy Act of 1974) will not be discussed.

One conclusion flowing from this examination of the laws of privacy as they affect the workplace is that the internal adoption of fair privacy and information practices by private companies may be both a well-guided labor relations decision and a defense to potential common law or even arbitral causes of action.

I. Overview of Right to Privacy Sources

To develop the primary focus of this analysis, namely, the relation-

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ship of privacy law to employment from a management perspective, it is necessary to examine the legal framework within which privacy law has evolved.

One aspect of the privacy concept is "informational privacy," a triangular configuration composed of the individual, the government, and the employer, which must be distinguished from that aspect of personal privacy which is termed "autonomy."¹ An individual's interest in informational privacy encompasses the manner in which the government gathers and uses personal information, as well as the impact the disclosure of such information to third parties has upon him.² Concomitantly, the employer must be aware of individual concerns and the protection which the law affords an employee, in order to know what governmental information is legitimately available to it and the purposes to which it legally can be put.

Apart from access to data from governmental entities, an employer must inform itself of information which legitimately is available to it from non-governmental sources. The employer must look to the following catalogue of laws: the federal constitution, some state constitutions, numerous federal and state laws, and the common law of most of the fifty states.

II. The Common Law Right of Privacy

Recent cases discuss and sometimes give cognizance to the rights of individuals to exert some control over personal information, as well as the duty of the government to protect individuals' rights. Additionally, the cases discuss the duty of an entity, including an employer, not to disclose certain information, or to disclose it only under controlled circumstances. This latter duty carries with it the reciprocal right of private employers to have access to, and to utilize, various kinds of information. These cases are usually tort actions brought under the common law of the several states.

In 1960, Dean Prosser re-examined the law of privacy as it had evolved to that time³ and determined that no independent privacy right existed. Rather, he found four distinct torts, that is, "four distinct kinds of invasion of four interests." He classified these as:⁴

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
2. Public disclosure of embarrassing private facts about the plaintiff;

¹ Mitau, *Toward a Comprehensive Fair Information Standards Law: A Commentary on the Data Privacy Issue in Minnesota*, 62 MINN. L. REV. 649, 653-654 (1978). [hereinafter cited as *Data Privacy*].

² *Id.*

³ Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

⁴ *Id.* at 389.

3. Publicity which places the plaintiff in a false light in the public eye;
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Cases involving public disclosure of embarrassing private facts, Prosser's second category, have been analyzed for the relevance of this common law tort to an employee's challenge to a company's right to disseminate personal and medical files.⁵ To prove the tort of public disclosure of embarrassing private facts, an injured party must show⁶ that publicity was given to matters concerning his private life, the publication of which would be highly offensive to a reasonable person of ordinary sensibilities, and that the matter publicized is not of legitimate public concern.

A. Publicity

The "publicity" requirement must be distinguished from the term "publication," as the latter is used in libel actions.⁷ The disclosure of information, even to fairly large groups, does not necessarily constitute a sufficient amount of "publicity" for a valid invasion of privacy cause of action, while "publication" includes *any* communication to a third person. The publicity argument may serve as a shield for any employer who has supplied information which is subsequently disclosed but not "publicized." An employer should ascertain before disclosure, however, the uses to which information is to be put, as well as its accuracy, and should attempt to place limitations on subsequent uses of the information.⁸

B. Private Facts

The concern for possible employer liability for disclosure of information has implications with regard to a company's access to information. Thus, while some information, such as age and number of children, is a

⁵ W. CONNOLLY & M. CONNOLLY, A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY, 475-505 (1979) [hereinafter cited as A PRACTICAL GUIDE]. The authors conclude that the torts of "intrusion," "appropriation" and "false light" would be available only in limited circumstances, *e.g.*, where an employer carried out unreasonable surveillance of an employee or inquired into his or her private affairs, causing mental stress, shame or humiliation to persons of "ordinary sensibilities;" where an employer used an employee's name or picture without his or her consent and for a commercial purpose; or where an employer publicized employee records containing serious error and such action was taken with knowledge of the falsity or reckless disregard as to the truth or falsity of the information. *Id.* at 479-80. To the extent that a cause of action might arise in these contexts, Greguras, *Torts — Informational Privacy and the Private Sector*, 11 CREIGHTON L. REV. 313, 324-25 (1977), suggests that employers obtain release forms to guard against or minimize the possibility of being found liable for "appropriation;" and use reasonable care, *i.e.* tailor their activities to a negligence standard, in the collection and dissemination of information, which could place individuals in a "false light." *Id.* at 319-20, 326.

⁶ See A PRACTICAL GUIDE, *supra* note 5, at 481-85.

⁷ The tort of defamation has been characterized as a significant legal control over the use of personal information. Greguras, *supra* note 5, at 315.

⁸ A PRACTICAL GUIDE, *supra* note 5, at 483-84.

matter of public record and, therefore, not protected, the employer should take care to remain within the parameters discussed under the publicity argument above. A plaintiff must be identifiable from a publication in order to prevail in a privacy action. Therefore, release of, or access to, an information profile from which an individual's identity could not be detected would not expose an employer or other supplier of information to liability.

C. Reasonableness

Publicity will not be found actionable unless it is determined that a person of usual or ordinary sensibilities would be offended by it. Thus, some information contained in personnel records "may be considered so innocuous as to not cause embarrassment to a normal, reasonable person."⁹

D. Defenses

Business necessity may provide a qualified defense to management under certain circumstances,¹⁰ as may consent, whether express or implied.¹¹ Analysis of decisions construing these defenses suggests that an employer may successfully argue that it has qualified privilege to disseminate employee medical or other records to those outside the company if business necessity warrants the disclosure.¹² A defense based on consent, however, may be more tenuous since, in the absence of employee knowledge of and acquiescence in such use, it is unclear whether a court would be persuaded that consent had been given.¹³

⁹ *Id.* at 485.

¹⁰ Under the tort of public disclosure of embarrassing private facts, employers have carved out a qualified privilege to respond in good faith to questions asked by unions and prospective employers inquiring into reasons for an employee's discharge. *See Munsell v. Ideal Food Stores*, 208 Kan. 909, 921, 494 P.2d 1063 (1972) (report to union of disciplinary action taken by employer against union member engenders a qualified privilege: "It is well recognized that a communication pertaining to the reasons for discharge of a former employee is qualifiedly privileged if made in good faith by a person having a duty in the premises to one who has a similar interest therein." But, imputations made by an employer of employee dishonesty or unethical practices are libelous *per se*). Under the tort of intrusion into seclusion, qualified privilege exists and will protect employers who investigate employees claiming job-related injuries. *See McLain v. Boise Cascade Corp.*, 271 Ore. 549, 533 P.2d 343 (1975). (Employer not liable for privacy invasion when it hired detectives to investigate the validity of an employee's workman's compensation claim). *See generally* cases cited at A PRACTICAL GUIDE, *supra* note 5, at 486.

¹¹ The privacy right may be waived and if waiver is found, it will bar the tort action. A PRACTICAL GUIDE, *supra* note 5, at 488.

¹² *See id.* at 487.

¹³ A PRACTICAL GUIDE, *supra* note 5, at 489. *But see* Comment, *Employee Privacy Rights: A Proposal*, 47 FORDHAM L. REV. 155, 162 (1978) [hereinafter cited as *Employee Privacy Rights*] (The author asserts that even without express consent an employee may be found to have consented implicitly to disclosure by voluntarily supplying information to an employer, or by failing to object to collection of information from third parties.). It would seem, however, that a cogent argument could be made that employees, who have traditionally been perceived as possessing inferior bargaining power when compared to that of their employer, have not in fact "voluntarily" given over information. Caution, therefore seems warranted.

Beyond this, it has been suggested that business organizations in the private sector use release forms to minimize potential liability *vis a vis* their employees.¹⁴ If this is impractical, the accuracy of facts to be disseminated becomes even more important. Accuracy, however, is not dispositive. Recent developments in the law of defamation suggest that "a private figure has a greater range of private facts than a public figure."¹⁵ As such, a private figure may have more privacy protection. In the end, however, insurance may be the most dependable answer to minimizing liability.¹⁶

At least one commentator has observed that information developed independently by an employer, such as a performance evaluation, would not be regarded as private and thus its disclosure would not be tortious.¹⁷ "Information about the plaintiff which was already known to others could hardly be regarded as private to the plaintiff."¹⁸ That author has concluded that while the theories of the common law privacy right afford valuable protection to society as a whole, they have little, if any, application to the employment relationship in terms of granting employees protection.¹⁹ The obverse of this would seem to be that employers have attained such protection under common law privacy right causes of action. In fact, case law is not sufficiently developed to be definitive on the question.

E. Physicians' Confidential Duty

It has been argued that, apart from privacy actions, employees could conceivably sue their employers for breach of the confidential relationship between a physician and patient if the company released medical files compiled by company doctors.²⁰ Traditionally, however, case law has found the physician-patient privilege inapplicable in the context of the employment situation.²¹

F. Terminability at Will

Another related common law concept, the right of an employer "to discharge an employee for any reason or no reason in the absence of an agreement to retain him for a specified period of time,"²² is implicated to

¹⁴ Greguras, *supra* note 5, at 329-30.

¹⁵ *Id.* at 330.

¹⁶ *Id.*

¹⁷ *Employee Privacy Rights*, *supra* note 13, at 162.

¹⁸ *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 569, 255 N.E.2d 765, 770, 307 N.Y.S.2d 647, 654 (1970).

¹⁹ *Employee Privacy Rights*, *supra* note 1, at 163.

²⁰ A PRACTICAL GUIDE, *supra* note 5, at 491.

²¹ Company doctors have been found to owe no confidential duty to employees. *See, e.g.*, *Lotspeich v. Chance Vought Aircraft*, 369 S.W.3d 705 (Tex. Civ. App. 1963); *Mracheck v. Sunshine Biscuit, Inc.*, 308 N.Y. 116, 123 N.E.2d 801 (1954); *Jones v. Tri-State Tel. & Tel. Co.*, 118 Minn. 217, 136 N.W. 741 (1912).

²² *Employee Privacy Rights*, *supra* note 13, at 158.

the extent that "terminability at will" permits an employer to fire any employee who objects to the employer's collection and use of information about him.²³ Thus, it has been argued that an employer may actually collect and use information with virtually no constraint.²⁴ In fact, this practice has come under increasing attack, and employers may not have the latitude that the terminability at will concept implies.²⁵

III. Federal Statutory Law

Federal legislation has imposed restraints on the use of information in the private sector as well as the public sector. The Fair Credit Reporting Act (FCRA),²⁶ has been called "the most important federal effort to regulate privacy-invasive activities in the private sector."²⁷ The FCRA is germane to a consideration of privacy concerns within the workplace because credit agencies frequently distribute their reports to employers, who can use them to make employment decisions. By definition, a "consumer report" allows the employer access to pertinent information. The term refers to any written, oral, or other communication of information by a consumer reporting agency concerning a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living, which is used or collected as a factor in establishing the consumer's eligibility for, among other things, employment purposes.²⁸

Once an employer has requested consumer report information, and, as a result, takes adverse action in an employment decision which is based either wholly or in part on such information, the employer must inform the prospective employee of the adverse action and must supply the name and address of the consumer reporting agency that made the report.²⁹ An individual may, at that point, request the "nature and sub-

²³ *Id.*

²⁴ *Id.* at 159.

²⁵ See, e.g., Note, *Protecting At Will Employees Against Wrongful Discharge*, 93 HARVARD L. REV. 1816 (1980) (The rule is flawed because it does not consider that if an employer and prospective employee had adequate information about the proposed relationship, and truly negotiated a contract, job security would be one of the key terms bargained for.). There is some case law support for this position. See, e.g., *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 134, 316 A.2d 549, 551 (1974) (bad faith termination of an "at will" employee breached the employment contract). *But see* *Howard v. Dorr Wollen Co.*, 120 N.H. 295 (1980) (*Monge* applies only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn); *Cloutier v. Great Atlantic & Pac. Tea Co.*, 436 A.2d 1140 (N.H. S. Ct. 1981) (plaintiff in wrongful discharge case must show that the defendant was motivated by bad faith, malice, or retaliation and that he performed an act that public policy would encourage, or refused to do something that public policy would encourage, or refused to do something that public policy would condemn; nonstatutory public policies may be actionable; the existence of a public policy sufficient to give rise to wrongful discharge action is a jury question).

²⁶ Fair Credit Reporting Act, Pub. L. No. 91-508, tit. VI, § 601, 84 Stat. 1128 (codified as amended at 15 U.S.C. §§ 1681(a)-(t) (1982)).

²⁷ *Employee Privacy Rights*, *supra* note 13, at 164.

²⁸ 15 U.S.C. § 1681a(d) (1982).

²⁹ *Id.* § 1681m(a). No corresponding right exists where an employer makes a favorable

stance” of most of the information about himself or herself, including the sources of the information.³⁰ The individual may take steps to challenge any item in the file and to have it reinvestigated.

The FCRA further provides that a consumer report may not include obsolete information.³¹ Thus, bankruptcies more than ten years old at the time of the report, suits or judgments, delinquent accounts, paid tax liens and information concerning arrests, indictments, or convictions more than seven years old at the time of the report, cannot be reported; nor can any adverse information which is more than seven years old at the time of the report. None of these strictures applies, however, if the subject of the report is applying for a job at an annual salary of \$20,000 or more.³²

Finally, an employer may request a more thorough report which will encompass the interviewing of neighbors, friends or associates of the subject. This type of request triggers a requirement that the individual who is the subject of the report be notified, though no such notification must be given when the report is being prepared to evaluate an individual for a job.³³

*Goodnough v. Alexander's, Inc.*³⁴ indicates that the limitations on disclosure of obsolete information will be strictly construed. In that case an employer discharged a seventeen-year-old department store clerk when it learned from a credit report that the employee had been accused of shoplifting when she was twelve years old.³⁵ Because this information was less than seven years old and, therefore, not obsolete under FCRA standards, the credit agency was found to have an absolute right to report it.³⁶ The court, while noting the department store's "moral abdication" in using such information, further observed that there was no law to prevent it.³⁷ Moreover, the employee was found to have no remedy against the employer because she was employed "at will;" such may no longer be the case, of course, depending upon the state in which the case is heard.³⁸

Another case dealing with the reporting of information stored in a

decision, *e.g.*, a job offer; thus, an employer has no obligation to disclose where no adverse use of the information occurs. See *Employee Privacy Rights*, *supra* note 13, at 165, n.67.

³⁰ 15 U.S.C. §§ 1681g(a)(1)-(2) (1982). However, sources for the more comprehensive investigative consumer report need not be disclosed. *Id.* § 1681g(a)(2). In this connection, it should be noted that the FCRA recognizes a distinction commonly made between "credit bureaus" and "credit reporting bureaus." It does so not by using these terms, but by distinguishing between "consumer reports" in § 1681a(d) and "investigative consumer reports" in § 1681a(e).

³¹ 15 U.S.C. § 1681(c) (1982).

³² *Id.* § 1681c(b)(3). Section 605(b) of the proposed Fair Financial Information Financial Practices Act, Title I: Privacy Protection Amendments of 1979, H.R. 559, 96th Cong., 1st Sess. (1979) would raise the \$20,000 figure to \$40,000.

³³ 15 U.S.C. § 1681d (1982).

³⁴ 82 Misc. 2d 662, 370 N.Y.S.2d 388 (S. Ct. 1975).

³⁵ *Id.* at 370 N.Y.S.2d 388 (S. Ct. 1975).

³⁶ *Id.* at 390.

³⁷ *Id.* at 391.

³⁸ See *supra* note 25.

credit agency's report is *Peller v. Retail Credit Co.*³⁹ In *Peller* the plaintiff was rejected for employment when the results of a lie detector test required by the company indicated that the plaintiff had previously smoked marijuana.⁴⁰ A second company subsequently hired the plaintiff, but dismissed him from employment when the new employer obtained a copy of plaintiff's credit report and discovered the marijuana use. The plaintiff's suit against the first employer and administrator of the lie detector test, alleging invasions of privacy and violations of the FCRA, was dismissed. The court first found that neither the employer nor the test administrator were consumer reporting agencies and, thus, they were not governed by the FCRA's provisions.⁴¹ The court also found that because the FCRA forbids invasion of privacy suits based on information obtained under its provisions unless a showing of malice can be made, the plaintiff's claims did not fall within the protection of the Act.⁴² The minimal requirements imposed on users of credit reports did not warrant any action against the second employer who had obtained the report and dismissed the plaintiff.

As the above cases illustrate, despite the characterization of the FCRA as the most important federal effort to regulate privacy-invasive activities in the private sector, much latitude remains for employers who utilize information obtained in credit reports.

IV. State Statutory Law

A. State Consumer Report Legislation

At least eleven states have enacted legislation concerning consumer reporting agencies.⁴³ With the exception of Texas and New Mexico, the law of the remaining states very closely resembles the federal Fair Credit Reporting Act,⁴⁴ discussed above. A consumer reporting agency may legally furnish reports to a person whom the agency has reason to believe will use the information for employment purposes. Ten states specifically provide for this use in language which often tracks the federal law verbatim.⁴⁵ While these laws differ in some details, from an employer's

³⁹ 359 F. Supp. 1235 (N.D. Ga. 1973), *aff'd mem.*, 505 F.2d 733 (5th Cir. 1974).

⁴⁰ *Id.* at 1236.

⁴¹ *Id.* at 1236-37.

⁴² *Id.* at 1236.

⁴³ Arizona [ARIZ. REV. STAT. ANN. §§ 44-1696 (West Supp. 1983-1984)]; California [CAL. CIV. CODE §§ 1786 (West Supp. 1983)]; Kansas [KAN. STAT. ANN. §§ 50-701 to 722 (1976)]; Maine [ME. REV. STAT. ANN. tit. 0, §§ 1311 to 1328 (1964 & Supp. 1982-1983)]; Maryland (MD. COM. LAW CODE ANN. §§ 14-1110 to 1218 (1983)]; Massachusetts [MASS. GEN. LAWS ANN. ch. 93, §§ 50 to 68 (West 1932 & Supp. 1983)]; Montana [MONT. CODE ANN. §§ 31-3-101 to 153 (1983)]; New Mexico [N.M. STAT. ANN. §§ 56-3-1 to 8 (1978)]; New Hampshire [N.H. REV. STAT. ANN. §§ 359-B:1 to :21 (Supp. 1981)]; New York [N.Y. GEN. BUS. LAW §§ 380 to 380-s (McKinney Supp. 1982-1983)]; and Texas [TEX. REV. CIV. STAT. ANN. art. 9016 (Vernon Supp. 1982-1983)].

⁴⁴ Fair Credit Reporting Act 15 U.S.C. §§ 1681 (1970); TEX. REV. CIV. STAT. ANN. art. 9016 (Vernon Supp. 1982-1983); N.M. STAT. ANN. §§ 56-3-1 to 8 (1978).

⁴⁵ ARIZ. REV. STAT. ANN. §§ 44-1692(3)(b) (West Supp. 1983-1984); CAL. CIV. CODE

perspective they are significant because they allow the employer to use information contained in a consumer report for purposes of evaluating a consumer for employment, promotion, reassignment or retention as an employee. Since the latitude available to consumer reporting agencies in collecting information is wide, their reports are an important source of information about prospective or current employees.

Certain information, however, is inadmissible for purposes of preparing the report. For example, New Hampshire⁴⁶ specifically prohibits the use, with certain exceptions, of information concerning bankruptcies more than fourteen years from the date of the report, and of information concerning suits, judgments, paid tax liens, accounts placed for collection or charged to profit and loss, records of arrest or conviction of crime and any other "adverse information" more than seven years old. These prohibitions are not honored in the case of a consumer credit report to be used in connection with the employment of any individual at an annual salary of twenty thousand dollars or more.

B. State Law Concerning Medical Records

Employers must be concerned about laws governing medical records from two perspectives: that of a requester of information and that of possessor of medical information of which state law might require disclosure. An initial source to check concerning information requests is the state's fair credit reporting act, if one exists. New Hampshire's Act, for example, defines "medical information" as information or records obtained, with the consent of the individual to whom it relates, from a licensed physician, medical practitioner, hospital, clinic or other medical or medically related facility.⁴⁷ Since the only prohibition on disclosure of medical information seems to apply to the consumer, medical information appears to be available to the employer to the extent a consumer reporting agency has access to it.

Beyond this source and apart from medical information generated in the course of an employment physical examination,⁴⁸ the traditional doctor-patient privilege, statutorily protected in virtually every state, would appear to bar an employer's access to medical information in most instances. New Hampshire,⁴⁹ for example, makes confidential the relations and communications between a physician, surgeon or psychologist

§ 1786.12(d)(1) (West Supp. 1983); ME. REV. STAT. ANN. tit. 10, § 1313(3)(b) (1964 & Supp. 1982-1983); MD. COM. LAW CODE ANN. § 14-1202(3)(ii) (1983); MASS. GEN. LAWS ANN. ch. 93, § 51(3)(b) (West 1932); MONT. CODE ANN. § 31-3-111(3)(b) (1983); N.M. STAT. ANN. § 56-3-4(A) (1978); N.H. REV. STAT. ANN. § 359-B:1(I)(c)(2) (Supp. 1981); and N.Y. GEN. BUS. LAW § 380-b(c)(3)(ii) (McKinney Supp. 1982-1983).

⁴⁶ N.H. REV. STAT. ANN. § 359-B:5 (Supp. 1981).

⁴⁷ *Id.* at § 359-B:3(IX) (Supp. 1981).

⁴⁸ Company physicians have been found to owe no confidential duty to employees. *See supra* note 21 and accompanying text.

⁴⁹ N.H. REV. STAT. ANN. §§ 329:26 & 330-A:19 (1976 & Supp. 1981).

and his or her patient. Such communications are given the same protection as the attorney-client privilege.

A number of states⁵⁰ have passed, or are considering, legislation which permits an employee or a designated physician, to inspect the employee's medical record in the possession of an employer.

C. State Laws Governing Personnel File Data

Laws pertaining to the use and dissemination of information contained in employer-controlled personnel files govern employee access to the files, and in some instances, the sharing of file data with third parties. Laws in California, Connecticut, the District of Columbia, Maine, Michigan, Oregon, Pennsylvania, Utah, and Wisconsin⁵¹ deal with this issue. In some cases the law covers only public employees; in other cases it affects employees in the private sector as well, sometimes treating them differently from public employees. While North Carolina law specifically provides that the personnel files of state employees shall not be subject to inspection and examination,⁵² all other state laws allow access by employees, upon their request, to their personnel files, usually at reasonable times and at reasonable intervals.

Personnel files have been defined as those papers, documents and reports relating to a particular employee which have been used to determine eligibility for employment, promotion, additional compensation, transfer, termination and disciplinary or other adverse personnel action.⁵³ The term "personnel file" does not, however, necessarily include stock option or management bonus plan records, medical records, reference letters, materials used by an employer to plan future operations, information in a separately maintained security file, test information, or documents being developed for use in civil, criminal or grievance procedures.⁵⁴ Some statutes are more cursory in their definition of personnel file, and merely refer to those files "which are used or have been used to determine [an] employee's qualifications for employment, promotion, additional compensation or termination or other disciplinary action."⁵⁵ This definition does exclude, however, employee records relating to the investigation of a possible criminal offense and letters of reference.⁵⁶

⁵⁰ See 1980 CONN. PUB. ACTS 80-158, § 3; MASS. GEN. LAWS ANN. ch. 149, § 19A (West 1976); 1979 OHIO LAWS 4113.23(A); R.I. GEN. LAWS § 5-37, 3-5(a) (1976); WIS. STAT. ANN. § 103-13(5) (West Supp. 1983); S.1967, Cal. Senate (1983); S.561, W. Va. Senate (1983).

⁵¹ CAL. LAB. CODE § 1198.5 (West Supp. 1983); 1980 CONN. PUB. ACT 80-158, § 3; D.C. MUN. REGS. tit. 2, § 3105 (1982); ME. REV. STAT. ANN. tit. 5, §§ 631, 638 (1964); MICH. COMP. LAWS ANN. § 423-501 (West 1980); OR. REV. STAT. § 652.750 (1981); PA. STAT. ANN. tit. 43, § 1321 (Purdon Supp. 1983); H.B. 141, Utah Cong. (1977); WIS. STAT. ANN. § 103.13 (West Supp. 1983).

⁵² N.C. GEN. STAT. § 126.22 (1981).

⁵³ See, e.g., OR. REV. STAT. § 652.750(b) (1981).

⁵⁴ *Id.*

⁵⁵ See, e.g., MICH. STAT. ANN. § 17.62(1)(c) (Callaghan 1980).

⁵⁶ *Id.* at § 17.62(1)(c)(i) and (iv).

Connecticut's statute forbids the disclosure of individually identifiable information contained in personnel files (or medical records) to one not employed by or affiliated with the employer, absent the employee's written consent.⁵⁷ An exception is made for information limited to employment dates, an employee's title or position, and wage or salary data.⁵⁸ Other exceptions include the disclosure of personnel information pursuant to the terms of a collective bargaining agreement.⁵⁹

Maine's statute covering private-sector employees allows, in addition to the usual information, access to non-privileged medical records or nurses' station notes and makes failure to comply with any of the statutory provisions a civil penalty.⁶⁰ Oregon excludes from its definition of "personnel records" confidential reports from other employers and those records relating to an individual's conviction, arrest or investigation of conduct constituting a violation of criminal law.⁶¹ The Oregon statute also provides for civil and criminal penalties for its violation.

Similarly, Pennsylvania law does not include in its definition of "personnel records" information relating to the investigation of a possible criminal offense, letters of reference, or documents prepared for civil, criminal or grievance procedures or medical records.⁶² In addition, records available to an employee under the Fair Credit Reporting Act are excluded. The term "employee" does not, in Pennsylvania, encompass an applicant for employment.⁶³ Wisconsin law allows an employee to designate in writing a union representative to perform the inspection of personnel records where the employee is involved in grievance proceedings, allows for personnel record correction by an employee, and excludes access to information of a personal nature about a person other than the employee if disclosure would constitute "a clearly unwarranted invasion of the other person's privacy."⁶⁴

The most comprehensive law dealing with both the issues of access to information by employees and disclosure of data by employers to third parties is the so-called "Bullard-Plawecki Employee Right to Know Act" of Michigan.⁶⁵ In addition to incorporating most, if not all, of the various features of the laws discussed above, Michigan's law excludes from its definition of "personnel records" those records maintained by educational institutions⁶⁶ and indicates that they are to be considered educational records under the Family Educational Rights and Privacy Act of

⁵⁷ 1980 CONN. PUB. ACTS 80-158, § 3.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ ME. REV. STAT. ANN. tit. 5, § 638 (1964).

⁶¹ OR. REV. STAT. § 652.750 (1981).

⁶² PA. STAT. ANN. tit. 43, § 1321 (Purdon Supp. 1983).

⁶³ *Id.*

⁶⁴ WIS. STAT. ANN. § 103.13(3) (West Supp. 1983).

⁶⁵ MICH. STAT. ANN. § 17.62 (Callaghan 1980).

⁶⁶ *Id.* § 17.62(1)(c)(vii).

1974.⁶⁷

Beyond this, Michigan specifically precludes an employer from divulging a disciplinary report, reprimand letter, or other disciplinary action to third parties in the absence of an employee's consent.⁶⁸ It also forbids the keeping of records concerning an employee's associations, political activities, publications, or communications of non-employment activities. Moreover, the Michigan law deals with records of employer investigations of criminal activity by an employee when the activity may result in loss or damage to an employer's property, as well as the records of criminal justice agencies, as employers, when they are involved in the investigation of employee criminal activity.⁶⁹

D. State Laws Affecting Access to Arrest Record Information

A multiplicity of laws affect an employer's access to and reliance on information concerning arrest records. Although the issue usually arises in the context of a prospective employee's application for employment, it could arise, as well, when an employer seeks information directly from a criminal justice agency. Existing state laws may act as a barrier to the obtaining of arrest record data by an employer. Specific state enactments as well as state discrimination or fair employment laws should be consulted.

1. Specific State Statutes

Statutes concerning access to arrest data should not be confused with those concerning convictions. At least sixteen states have enacted specific legislation dealing with access to arrest data.

California law prevents an employer, "whether a public agency or private individual or corporation" from asking applicants for employment to disclose either information concerning arrest or detention which did not result in conviction or information concerning referral to or participation in any pre-trial or post-trial diversion program.⁷⁰ These same strictures apply to an employer's use of such information in order to determine any condition of employment, including hiring, promotion, termination or any training program.⁷¹ The law does allow an employer to seek arrest information, however, when a position involves regular access to patients in a health facility or access to drugs and medication.⁷² The law also forbids law enforcement personnel from knowingly disclosing that information.⁷³

⁶⁷ Family Educational Rights & Privacy Act of 1974, Pub. L. No. 93-380, tit. V, § 513(a), 88 Stat. 571-74 (codified as amended at 20 U.S.C. § 1232(g) (1982)).

⁶⁸ *Id.* § 17.62(6).

⁶⁹ *Id.* § 17.62(8).

⁷⁰ CAL. LAB. CODE § 432.7(a) (West Supp. 1983).

⁷¹ *Id.*

⁷² *Id.* § 432.7(b)(1) & (2).

⁷³ *Id.* § 432.7(f).

Variations on the California approach occur in Connecticut, Maryland, Massachusetts, New York, Pennsylvania, Utah and Virginia. A Maryland statute prevents an employer "in any application, interview or otherwise" from requiring an applicant for employment to disclose information concerning criminal charges which have been expunged and forbids an employer from discharging or refusing to hire a person for refusing to divulge information concerning such charges.⁷⁴ The statute also instructs that an applicant need not, in answer to any question concerning criminal charges that have not resulted in conviction, include a reference or information on charges that have been expunged.⁷⁵

In a similar vein, Massachusetts requires that an employer include the following statement on an employment application which seeks information concerning prior arrests or convictions:

An applicant for employment with a sealed record on file with the commissioner of probation may answer 'no record' with respect to any inquiry herein relative to prior arrests, criminal court appearances or convictions. In addition, any applicant for employment may answer 'no record' with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution.⁷⁶

Connecticut law is unique in that it requires that the portion of a job application form which contains information concerning the arrest record of a job applicant must not be available to any employee or member of the company interviewing an applicant except members of the personnel department, or the person in charge of employment in the absence of a personnel department.⁷⁷

New York law provides that upon the favorable termination of a criminal action or proceeding against a person, he or she shall not be required to divulge information pertaining to the arrest or prosecution, except in certain circumstances.⁷⁸ Pennsylvania is unusual in that whenever an employer is in possession of information which is part of an applicant's criminal history record, the data concerning arrests and misdemeanor convictions may be considered by the employer only to the extent to which it relates to the applicant's suitability for employment in the position for which the individual has applied.⁷⁹ Further, the employer must notify an applicant if a decision not to hire is based in whole or in part on information contained in the criminal history record.⁸⁰

Utah allows employers to inquire about arrests and convictions, but

⁷⁴ MD. ANN. CODE art. 27, § 740 (1957 & Supp. 1983).

⁷⁵ *Id.*

⁷⁶ MASS. GEN. LAWS ANN. ch. 26, § 100A (West 1932).

⁷⁷ CONN. GEN. STAT. ANN. § 31-51 (West 1972).

⁷⁸ N.Y. CRIM. PROC. LAW § 160.60 (McKinney 1916). While this provision does not specifically mention employers, it would seem to apply in the context we are discussing here.

⁷⁹ 18 PA. CONS. STAT. ANN. § 1925(b) (Purdon Supp. 1983-1984).

⁸⁰ *Id.* § 1925(c).

only to the extent that they have not been expunged or sealed. Should the employer ask about expunged or sealed arrests or convictions, a person may answer as though the arrest or conviction did not occur.⁸¹ Virginia accords the same treatment to arrest data and an applicant's prerogatives as does Maryland, except that there is no prohibition on an employer's discharge of, or refusal to hire, the affected person.⁸²

Apart from regulation of an employer's requests concerning the arrest data as they appear on applications for employment, the District of Columbia, Hawaii, Maine, Minnesota, Missouri, New Mexico, Ohio and Tennessee have enacted pertinent legislation. The District of Columbia requires that its Board of Commissioners require the keeping of arrest books containing such information as date of arrest, name, address, date of birth, color, birthplace, occupation and marital status of the arrestee, offense charged, and disposition of the case.⁸³ These records are open to public inspection when not in actual use, and so, are available to employers.

Hawaii, Minnesota and New Mexico forbid arrest records not followed by a valid conviction, and certain conviction records, from being used,⁸⁴ distributed, or disseminated, by state employers in connection with any application for public employment. Missouri provides that if a person is arrested and not charged with an offense within thirty days, all records pertaining thereto shall be closed to all persons except the arrested person.⁸⁵ If no conviction occurs within one year of the records' closing, the records shall be expunged.⁸⁶

Maine's extensive law makes it clear that conviction data may be disseminated "to any person for any purpose,"⁸⁷ and allows the disclosure by a criminal justice agency of "any and all criminal history record information in its possession which indicates the disposition of the arrest, detention or formal charges." Ohio makes the publication of a fair and impartial report of the arrest of any person privileged unless the publication was malicious.⁸⁸ Tennessee, while excluding arrest history from those records eligible for expunction, classifies them as confidential records not open for inspection by members of the public.⁸⁹ Additionally, Tennessee classifies all investigative records of its bureau of criminal identification as confidential.⁹⁰

As can be seen from the above statutory survey, certain state laws

⁸¹ UTAH CODE ANN. § 77-18-2(3) (1953).

⁸² VA. CODE § 19.2-392.4(A) (1983).

⁸³ D.C. CODE ANN. § 4-134 (1981).

⁸⁴ HAWAII REV. STAT. § 831-3.1 (1976 & Supp. 1982); MINN. STAT. ANN. § 364.04 (West 1983); N.M. STAT. ANN. § 28-2-3 (1978).

⁸⁵ MO. ANN. STAT. § 610.100 (Vernon Supp. 1983).

⁸⁶ *Id.*

⁸⁷ ME. REV. STAT. ANN. tit. 16, § 615 (1964).

⁸⁸ OHIO REV. CODE ANN. § 2317.05 (Page 1981).

⁸⁹ TENN. CODE ANN. § 40-4001 (1982).

⁹⁰ *Id.*

deal specifically with an employer's rights to have access to, and to utilize, arrest record data. Others deal with that right only by implication. Apart from these explicit or implicit enactments, state laws on discrimination also play a role in an employer's ability to use arrest information.

2. *Fair Employment Laws*

As is true with specific state statutes governing the use of arrest data, state laws barring various forms of discrimination often distinguish between the use of that information and the use of records of conviction. Thus, statutes in Florida, Kentucky and New York forbid discrimination by an employer who looks to conviction records.⁹¹

For example, New York's law, which applies to both public and private employers, disallows the denial of employment because of the conviction of one or more criminal offenses or because of the finding of a lack of "good moral character" based upon a conviction of a criminal offense unless (1) there is a direct relationship between one or more of the previous criminal offenses and the specific employment sought, or (2) the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.⁹² The New York statute enumerates factors to be considered concerning a previous criminal conviction and provides for a written statement by the employer upon denial of employment.⁹³ It also requires that an employer give consideration to "a certificate of relief from disabilities or a certificate of good conduct issued to the applicant," which certificate creates a presumption of rehabilitation with respect to the offense(s) specified therein.⁹⁴

The issue of an employer's consideration of arrest records is addressed by the discrimination laws of at least five states: Hawaii, Illinois, Massachusetts, Michigan and Wisconsin, as well as the District of Columbia.⁹⁵

Additional sources which should be checked by employers wishing to ascertain the extent of their ability to obtain and utilize arrest record data are the advisory guidelines or regulations issued by various state agencies concerned with administering the state's fair employment or civil rights law. New Hampshire, for example, has no statutory prohibition on the use of arrest records, but has dealt with this issue in a publication called "Pre-employment Inquiries."⁹⁶ Guidelines such as this set out

⁹¹ FLA. STAT. ANN. § 112.011(1)(a) (Harrison's 1978 & Supp. 1982); KY. REV. STAT. ANN. § 335B.010(4) (Bobbs-Merrill 1983); N.Y. CORRECT. LAW § 751 (McKinney Supp. 1982-1983).

⁹² N.Y. CORRECT. LAW § 752 (McKinney Supp. 1982-1983).

⁹³ *Id.* § 753.

⁹⁴ *Id.* § 753(2).

⁹⁵ HAWAII REV. STAT. § 378-1(6) (1976); ILL. ANN. STAT. ch. 48, § 8539(e) and ch. 68, § 2-105 (Smith-Hurd 1966); MASS. GEN. LAWS ANN. ch. 151B, § 4(9) (West 1976); MICH. COMP. LAWS ANN. § 37.2205(a) (West 1980); D.C. CODE ANN. § 6-2276 (1981).

⁹⁶ *See* New Hampshire: Pre-Employment Inquiries, 8A LAB. REL. REP. (BNA) 445; 2501 (effective Nov. 26, 1982), for the guidelines.

examples of questions asked of prospective employees which the agency considers illegal, such as questions concerning arrest. Specifically, the guidelines indicate that it is considered potentially discriminatory to inquire about the number and kinds of arrests of a job applicant, although it is permissible to inquire about the numbers and kinds of convictions within the past five years.⁹⁷

The laws concerning an employer's access to and use of arrest data intertwine in many cases with that of conviction information and stem from a number of sources. An employer should at least be aware of specific laws concerning arrest information, discrimination laws and regulations, and generalized state laws concerning privacy, and credit reporting agencies.

E. Miscellaneous State Laws Affecting Privacy

A potpourri of additional types of state laws may at least tangentially affect an employer's analysis of privacy in the workplace. A number of these will be briefly examined, in order to point out other avenues of potential concern.

1. Blacklisting

While New Hampshire has no statute prohibiting an employer from blacklisting an employee, an early decision of the New Hampshire courts, *Huskie v. Griffin*,⁹⁸ states that an employee can recover damages from a former employer who attempted to prevent the employee's subsequent employment, where the attempt is found to be malicious, fraudulent representation, or motivated by self-interest without reasonable cause. The court held that "a statement of truth, made for the sole purpose of damaging the plaintiff [employee] by causing a third party [prospective employer] to refuse to further deal with the plaintiff, is actionable if damages ensue."⁹⁹

2. Employment Applications

An employer should ascertain whether state law prevents it from asking certain questions, apart from those with discriminatory or arrest record implications. Maryland statutory law precludes an employer from asking an applicant to answer any questions, whether oral or written, pertaining to any physical, psychological or psychiatric illness, disability, handicap or treatment which does not bear a "direct, material and timely relationship" to the applicant's fitness or capacity to perform properly the responsibilities of the desired position.¹⁰⁰ Similarly, Massachusetts law provides that no employment application may ask about

⁹⁷ *Id.*

⁹⁸ 75 N.H. 345, 74 A. 595 (1909).

⁹⁹ *Id.* at 348, 74 A. at 597.

¹⁰⁰ MD. ANN. CODE art. 100, § 95A (1957).

mental hospitalization where the person has been discharged and is no longer under treatment.¹⁰¹ Hiring discrimination under this provision is illegal against an applicant who fails to answer such an inquiry, and who can produce a psychiatrist's letter of mental competency to do the job, unless a bona fide occupational qualification exists.¹⁰²

3. *Fingerprinting*

In New York, no person may be fingerprinted as a condition of securing or of continuing employment, unless otherwise allowed by law.¹⁰³ Employers which are public galleries of art, or museums, or legally incorporated hospitals or medical colleges affiliated with such hospitals may, however, require fingerprinting as a condition of employment.¹⁰⁴

4. *Drivers' Records*

Upon the written request of an employer or prospective employer, the Commission of the Division of Motor Vehicles in Virginia, under that state's law, must provide an abstract of an individual's operating record, showing all convictions, accidents, license suspensions or revocations and any type of license possessed by an individual, so long as the person's position or the position he is being considered for involves the operation of a motor vehicle.¹⁰⁵

5. *Common Law Privacy Codification*

The Fair Employment Law of New Hampshire provides that it shall be an unlawful discriminatory practice for an employer to print, circulate, or cause to be printed or circulated any statement, advertisement or publication in connection with employment which expresses, directly or indirectly, any limitation, specification or discrimination as to race, sex, age, religious creed, color, national origin, marital status, or physical or mental handicap.¹⁰⁶ This statute appears to incorporate the publication aspects of the common law tort of public disclosure of private facts in the context of discrimination law.

V. **Arbitral Precedent and Privacy**

The observation has been made that the reason there exists a relative dearth of common law invasion of privacy suits involving the employee-employer relationship may be because conflicts over the issue arise and are settled in the arbitral arena.¹⁰⁷ At least one arbitrator has

¹⁰¹ MASS. GEN. LAWS ANN. ch. 151B, § 4(9A) (West 1932 & Supp. 1983).

¹⁰² *Id.*

¹⁰³ N.Y. LAB. LAW § 201-a (McKinney 1916 & Supp. 1982-1983).

¹⁰⁴ *Id.*

¹⁰⁵ VA. CODE § 46.1-31(6) (1980).

¹⁰⁶ N.H. REV. STAT. ANN. § 354-A:8 (1966 & Supp. 1981).

¹⁰⁷ Note, *The Publicity Requirement and the Employee's Right to Privacy*, 16 AM. BUS. L.J. 360 (1979).

collated decisions and analyzed the requirement that employees supply personal information as it relates to their jobs.¹⁰⁸ This author notes that the general recognition that the employer may exercise reasonable managerial rights of supervision, even though this may not be set forth specifically in the collective bargaining agreement, generally allows requests for personal information where they are not arbitrary or unreasonable.

Thus, "management has been found to be justified in imposing reasonable and necessary requirements and restrictions for the proper direction of the working forces and the management of business."¹⁰⁹ As such, applicants for employment are frequently required to fill out detailed application forms seeking information concerning education, experience, and general personal and working background. One arbitrator has found, for example, that "there is no doubt that questions relating to past criminal activity are valid in applications for employment,"¹¹⁰ although he further observed that a trend exists whereby length of service to a company, in cases where disclosure of the criminal history has not occurred, reduces the significance of the omission. The right to seek arrest record information is implicit in other arbitral decisions.¹¹¹ Similarly, arbitrators have approved the practice of an employer's checking with an applicant's former employers shown on application.¹¹²

Apart from the application form itself, employers have generally been granted wide latitude to seek personal information, not necessarily restricted to the informational privacy aspects of an employee's work life. Thus, the courts have upheld such far ranging practices as requiring an employee to submit to a physical examination upon his return to work,¹¹³ hiring private checkers to observe workers in order to determine if they are adequately performing their jobs,¹¹⁴ opening employees' lockers to search for stolen property,¹¹⁵ opening an employee's briefcase for inspection,¹¹⁶ and searching an employee's lunch box for liquor.¹¹⁷

It has been noted that alleged invasions of an employee's privacy have sometimes been treated as an infringement upon his or her dignity or peace of mind.¹¹⁸ Thus, alleged violations run a wide gamut of issues.

¹⁰⁸ Scheiber, *Tests and Questionnaires in the Labor-Management Relationship*, 20 LAB. L.J. 695 (1969) [hereinafter cited as *Labor-Management Relationship*].

¹⁰⁹ *Id.* at 695-696.

¹¹⁰ Commonwealth of Pennsylvania, 66 LA 96, 97 (1976) (LeWinter 1980).

¹¹¹ *See, e.g.*, Huntington Alloys, Inc., 74 LA 176, 178 (1980) (Katy, Arb.) (falsification of application concerning arrest record gave employer right to discharge employee for just cause); Kaiser Steel Corp., 64 LA 194, 195 (1975) (Roberts, Arb.) (employer not justified in discharging employee for responding "No" to a question on an employment application asking if employee had ever been convicted of a crime, where employee was convicted of a misdemeanor).

¹¹² Atlanta Gas Light, 65 LA 1084, 1088 (1975) (Lipsitz, Arb.).

¹¹³ Chatfield Paper Corp. 46 LA 530 (1966) (McIntosh, Arb.).

¹¹⁴ Kroger Co., 40 LA 316 (1963) (Reid, Arb.).

¹¹⁵ International Nickel Co., 50 LA 65 (1967) (Shister, Arb.).

¹¹⁶ Friedrich Refrigerators, Inc., 39 LA 934 (1962) (Williams, Arb.).

¹¹⁷ Freuhauf Corp., 49 LA 89 (1967) (Daugherty, Arb.).

¹¹⁸ *See generally* F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS*, 727-28 (3d ed. 1976).

For example, where an employer required that an employee disclose an unlisted phone number, no invasion of the employee's right of privacy was found.¹¹⁹ The arbitral approach to the privacy issue has been summarized as follows:

In the conflict between the personal rights of the employees and management's right to impinge on the worker's right of complete privacy, management is supported in a number of cases which encompass diverse facets of alleged intrusions on rights of privacy.

A significant conclusion to be drawn from these decisions is that the employer is permitted by law and by contract to make such rules and regulations as are not inconsistent with the parties' collective bargaining agreement, and which are reasonably necessary for smooth, efficient conduct of the business — even though at times they may impinge on the employee's personal privacy.¹²⁰

The concern over privacy has surfaced in recent years in the context of questionnaires which employees or prospective employees have been asked to fill out, and which are designed to ascertain conflicts of interest. Especially when no collective bargaining agreement addresses this issue, it is vigorously contended that to permit such a requirement would pave the way for many other unilaterally imposed obligations on an employee which were never contemplated by the parties during negotiations. This issue has been thoroughly examined by one arbitrator¹²¹ who, when confronted with the issue of an employer's requirement that members of its news staff fill out a questionnaire regarding their financial interests, viewed the privacy right involved as follows:

The litmus test of a careful examination makes it clear that the right of privacy is, at best, a limited right which, in general, protects the individual from having his name, picture, actions and statements commercially made public and exploited without his consent. This right, however, only safeguards him from the publication of his private statements or actions.¹²²

The arbitrator apparently felt that common law concepts of privacy were applicable in the arbitral forum as well. He held that the requirement was a reasonable one and that it did not infringe upon an employee's privacy rights since no public disclosure of private facts occurred and the information was obtained for the legitimate and limited business reason of eliminating bias in news reporting.¹²³

Despite the increasingly prominent role that privacy concerns play in the workday environment, collective bargaining agreements do not appear to deal, to any great extent, with this issue. In light of the complexity of various laws governing informational as well as other aspects of privacy, and in light of the ramifications they may have for all concerned with obtaining access to and use of information which may be classified

¹¹⁹ Wyandotte Chemicals Corp., 52 LA 755, 758 (1969) (Seinsheimer, Arb.).

¹²⁰ *Labor-Management Relationship*, *supra* note 58, at 697.

¹²¹ *Id.* at 697-702.

¹²² National Broadcasting Co., 53 LA 312, 317 (1969) (Scheiber, Arb.).

¹²³ *Id.* at 319.

as personal or private, privacy issues would seem to be a fruitful area for negotiation at the bargaining table.

VI. Assessment of the Status of the Privacy Right

The Supreme Court has recently stated that "The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject for judicial notice."¹²⁴ Employers have been chided for failing to protect confidential information, for improperly using information to make personnel decisions, and for exchanging records among themselves. A recent report of the House Labor Subcommittee on Labor-Management Relations states that "Employers remain virtually unchecked in their ability to demand information from applicants" and that "the legal restrictions on the information an employer can acquire from secondary sources are limited."¹²⁵

Despite the views expressed in some quarters that employers are insensitive to the need for the safeguarding of data concerning their employees, a number of them have taken steps to guarantee that information will not be misused.¹²⁶ The current status of privacy in the workplace has recently been described as follows:

The long-running public debate over the rights and rules governing employee privacy has lately taken the shape of a baffling paradox. More insistently than ever, the advocates dedicated to guarding this privacy are arguing the need for tougher action and legislation to support their cause. Yet at the same time, a great many business leaders are responding with equal conviction — and some bewilderment — that they cannot comprehend such agitation over what appears to them a cause already largely won. The consequent paradox turns on the fact that both sides in this dispute may, essentially, be quite right.¹²⁷

Alan F. Westin, the author of the above quotation, points to an evolution in the thinking of a number of larger corporations which have come to feel that the opening of personnel files — which these companies do voluntarily — has helped to sharpen management judgment.¹²⁸ Additionally, they have determined that truly fair information practices require an open process, whereby employees share as much as possible the facts about how decisions affecting people are made.¹²⁹ Third, they have

¹²⁴ *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

¹²⁵ HOUSE LABOR SUBCOMM. ON LABOR-MANAGEMENT RELATIONS, 96TH CONG., 2D SESS., *PRESSURES IN TODAY'S WORKPLACE* 47 (Subcomm. Print 1981).

¹²⁶ For explications of the approaches to privacy protection taken by such companies as IBM, Bank of America, and the Equitable Life Insurance Society, refer to *IBM's Guidelines to Employee Privacy*, HARV. BUS. REV., Sept.-Oct. 1976, at 82, reprinted in *INDIVIDUAL RIGHTS IN THE CORPORATION*, 214 (1980); A. Westin, *A Profile of Bank of America's Privacy Experience*, *INDIVIDUAL RIGHTS IN THE CORPORATION*, 226 (1980); A. Westin, *The Problem of Employee Privacy Still Troubles Management, Individual Rights in the Corporation*, 245 (1980) [hereinafter cited as *Individual Rights*].

¹²⁷ *Id.* at 245.

¹²⁸ *Id.* at 251.

¹²⁹ *Id.*

found that a clear definition of merit and demonstration of equitable treatment vitally affect management's credibility.¹³⁰ Fourth, they feel that organizations must provide explicit mechanisms for fair procedure, making clear what information is used to make decisions.¹³¹ Finally, all company policies must consider every employee's need for self-expression and individual dignity. "Without such a spirit animating management, all privacy policies are mere exercises in bureaucracy, where the letter killeth."¹³²

Westin concludes that such principles do not mean there is one perfect set of privacy policies and procedures appropriate for every company. Each business, with its own set of requirements and traditions, must design its own "fair practices" because, as he points out, it is the overall spirit of a privacy program, and not its details, which invests personnel administration with perceptiveness and sensitivity.¹³³ From this philosophy flows Westin's rejection of any "full code" model of privacy regulation, either federal or state, to specify the appropriate collection and use of employment information or personal data dissemination. Such a rigid approach, in his view, could not only warp responsible employment policies, but might also poorly serve employee interests, with management complying with the letter of regulation, but not moving any closer to a "humanistic style of corporate performance."¹³⁴

Yet, because he does not see purely voluntary procedures as sufficient, Westin argues for a "minimum rights" legislative approach, with remedies by individual lawsuit.¹³⁵ Such an approach would give employees the right to examine their personnel data, much as Michigan law currently does.¹³⁶ It would also specify rules for release of information outside the firm, as does Michigan. Apart from outlawing certain practices completely, such as the use of polygraphs, and Psychological Stress Evaluators in hiring, this approach would not attempt to otherwise enumerate or regulate what types of information to collect for effective personnel administration. Westin concludes that:

Such an approach reserves for voluntary action those areas where differences of function, organization, and style matter most in the selection of personnel. But it also makes open and clear — to employee and public alike — the facts on just what is being collected by employers and how it is being used. This would allow American society to decide — three or five years from now — whether business's response has been good enough or whether additional laws may be needed. And this seems both a just balance and a fair test.¹³⁷

Thus, employers would look not to an ever-increasing level of regulatory

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 252.

¹³⁶ See *supra* note 51 and accompanying text.

¹³⁷ INDIVIDUAL RIGHTS, *supra* note 75, at 252.

complexity, but to good personnel administration techniques within the parameters of legislation which currently exists and which gives them broad scope.

VII. Conclusion

A Uniform Information Practices Code, which seeks to establish a consistent method with access to the governmental records of various state agencies throughout the United States, has already been formulated.¹³⁸ In a similar vein, uniform legislation which would define for private sector employers and employees the basic operating principles upon which they may depend should also be articulated and promulgated.

As the above review of laws regulating the collection, maintenance, use and dissemination of information indicates, it is a herculean task for any employer to stay abreast of the numerous laws which affect informational privacy on both the federal and state level, and to sort out whether those laws have any applicability to the employer's business. Add to this responsibility the need for employers engaged in multi-state operations to determine the implications of not only a single state's laws, but also other states' possibly conflicting enactments and the matrix of employer responsibility within the privacy law area becomes unwieldy, expensive, time-consuming and formidable at the least. At the most, it is unworkable.

A "Uniform Privacy Act" governing informational privacy in the private sector would serve to set the parameters for a consistent, dependable policy of information use and dissemination. Such a policy would be to an employer's advantage because it could incorporate, in the form of a limited state law, those aspects of currently existing legislation which safeguard the interests of both employers and employees, eliminate those features which are duplicative or overreaching, and deal with the fundamental issues upon which a sound approach should be built in a uniform manner. Such an act would enable employers to operate with a minimum of confusion and a maximum of compliance.

A policy adopted by the American Telephone and Telegraph Company on January 1, 1980, titled "Your Private Records," demonstrates an enlightened approach to the privacy issue and can serve as the framework for legislation which would strike the balance between fair treatment of employees and efficient utilization of information by employers. The highlights of American Telephone and Telegraph Company's policy state that:

1. Personal information about employees will be kept accurate, complete, relevant, and up-to-date and, when feasible, obtained directly from the employees.

¹³⁸ See UNIF. INFORMATION PRACTICES CODE § 1-102, 13 U.L.A. 172 (Supp. 1981).

2. The Company will collect and retain personal information about employees only for valid business, regulatory or legal reasons.
3. Company records containing personal information about employees will be held in confidence and properly safeguarded. Access to such information will be limited to those who need the information to perform their jobs (*e.g.*, a payroll representative).
4. Employees will be informed periodically through appropriate employee media of the kinds of personal information maintained about them in Company records.
5. Employees will be given reasonable opportunity to examine their records and propose corrections, additions, deletions or changes to them. Because of its confidential nature, a very limited amount of personal information will generally not be made available for employee examination (*e.g.*, certain personnel planning information).
6. The Company will not disclose personal information about employees to anyone outside the Bell System except under very limited conditions. For example, personal information may be released if an employee gives permission in writing to do so; or in order for the Company to comply with legal requirements, valid legal process (*e.g.*, a court order or subpoena), or government agency investigations.”

The policy then goes on to discuss the correction and use of personal information, specific records that the Company needs and keeps, access to records, records not available for examination by employees, disclosure of personal information, and medical information.

A “Uniform Privacy Act,” which might encompass some of the approaches and areas of concern embraced by the American Telegraph and Telephone Company Policy, specifically delineating when disclosure of personal information will and will not occur,¹³⁹ could be formulated and enacted in order to put both employees and employers on notice that employees will be treated equitably and sensitively, while employers will be allowed to gather and utilize that information which is essential to their operations.

Until that occurs, however, it will be necessary for counsel both proactively and in the context of potential litigation to sift through the various state and federal laws affecting their employer clients to assure compliance and uncover both liabilities and defenses. The authors of this article only hope that it has provided some guidance to those embarking on such a searching journey.

¹³⁹ Disclosure provisions should deal with limitations on disclosure to the public, to government agencies, and to the employee involved; what constitutes clearly unwarranted invasions of personal privacy; the impact of disclosure on prevailing laws; permissible access to information by the affected employee and other business or governmental entities; collection and maintenance of information; correction and amendment of that information; disclosure of information for research purposes; and civil remedies and/or criminal penalties.

