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Employee/Employer

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Employee/Employer

Sandra S. Klein

ABSTRACT. The issue of privacy as it relates to employment in general is one of great concern, both to employers and employees. Both groups are faced with increasing threats to their individual or corporate privacy. Given that such threats carry personal, economic and social consequences, it is not surprising that many people are concerned. The bibliography which follows provides the reader with many sources which should prove useful to those well-versed in the subject, as well as to those who are looking at this issue for the first time.

Within the overall context of general privacy concerns, employment issues form an increasingly important subset. Both employers and employees, whether in the public or private employment arenas, face real threats to their individual or corporate privacy. Since such threats carry personal, economic, and social consequences, the issue of privacy as it relates to employment in general is one of great concern.

As might well be expected of a complex question, an exploration of employment issues is one that is unavoidably wide-ranging and complicated itself. Several areas of privacy-related concern come immediately to mind: Drug testing, intelligence and personality measurement, HIV/AIDS, corporate privacy, general employee privacy, the Freedom of Information Act and its relationship to corporate privacy matters, health and genetic appraisals, honesty mea-

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surement, homosexuality and the workplace, and electronic surveillance.

Each of these represents a major element of concern in and of itself, and each of these pose analytical problems for those interested in their evaluation. Some of the issues are uniquely personal in nature, while others seem more general in scope; in the final analysis, however, it is fair to say that each issue has the potential to impinge in some way on most employees as well as on most employers. As it is with most other privacy issues, this potential "generality of application" is what makes this subject matter of significant concern to society in general.

Of all employment privacy issues, the one least likely to be thought of by even an interested public is the specific issue of corporate privacy. Anita L. Allen, in her article "Rethinking the Rule against Corporate Privacy Rights: Some Conceptual Quandaries for the Common Law," notes that in general, ordinary business corporate entities are not accorded any common law right to privacy. Corporations, because they are not "individuals," and because they are thought to be protected by other legal constructs (e.g., trade secret laws), are generally left unprotected by a specific right to some kind of corporate privacy shield. She argues that the law is too philosophically restrictive, that corporations do in fact exhibit a kind of "personhood" in modern society, and should not, therefore, be left without privacy protection.

Similarly, the case for privacy protection is offered where the Freedom of Information Act (FOIA) disclosure guidelines are subject to implementation. James N. Benedict and Thomas N. O'Connor, in "The Need for Legislation in the Wake of *Chrysler Corporation v. Brown*," argue that companies should not necessarily be made to open every corporate door in the face of FOIA disclosure requests. They suggest that the nine FOIA exemptions are discretionary, only, and that corporations are not adequately protected by the Trade Secrets Act.

In a related matter, Lawrence W. Bigus, argued in "Administrative Investigation—Preventing Agency Disclosure of Confidential Business Information," that corporations are especially in need of protection where government agencies are involved. Because such agencies routinely require more and more confidential business

information as part of the contracting and/or regulatory process, it is necessary to protect that information from disclosure by those same government agencies pursuant FOIA and other routine requests by third parties.

In a more individual sense, Susan M. Fitch reviewed some of the issues related to sexuality in "National Gay Task Force v. Board of Education of Oklahoma City," while Marsha Jones tackled the same question in "When Private Morality Becomes Public Concern: Homosexuality and Public Employment." Sexual discrimination in general was considered in depth by Mayer G. Freed and Daniel D. Polsby in their article, "Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment."

In an equally personal sense, AIDS as an employment issue was considered by several authors. Mark H. Floyd, in "AIDS: Employers' Potential Tort Liability," presented several legal theories on which an employer's tort liability might rest, including negligence, defamation, invasion of privacy, and infliction of emotional distress. In a more exhaustive analysis, William F. Banta, in his book, *AIDS in the Workplace: Legal Questions and Practical Answers*, provides a practical overview of federal, state, and local laws relating to AIDS as it affects the employee-employer relationship.

Of increasing concern to workers is the employment issue of health privacy—an issue that will only take on greater importance as the health care crisis in America worsens and cost-saving measures are sought by companies looking for every possible savings. Here, a basic article by Ann L. Diamond, "Genetic Testing in Employment Situations: A Question of Worker Rights," relates to genetic testing specifically, but can equally serve as a metaphor for the need for protection of employee health records in general.

The last primary employment issue evaluated by several commentators is related to another personal concern of employees, that of freedom from untoward observation and electronic monitoring. Several articles consider this issue from several perspectives, including polygraph testing (Susan M. Flanagan: "Employer-Employee Relations—the Employee Polygraph Protection Act: Eliminating Polygraph Testing in Private Employment is not the Answer"), "truth" monitoring (Susan Gardner: "Wiretapping the

Mind: A Call to Regulate Truth Verification in Employment”), and general electronic monitoring (Jonathan J. Green: “Electronic Monitoring in the Workplace: The Need for Standards”).

Overall, the area of employment issues is one that is both inherently important and inherently complex: Important because these issues, and all those related privacy matters, have the potential of affecting all workers and all employers, and complex because the issues are both varied and possess far-reaching individual and social consequences.

The bibliography which follows provides a detailed review of the recent monographs and periodical articles dealing with this subset of the overall privacy issue. The range of years covered is 1980 through 1992. Annotations have been included for those titles which do not clearly speak to the contents of the article. Laymen, attorneys, and area-specific scholars should find considerable practical value in an exploration of the citations provided.

MONOGRAPHS

Banta, William F. *AIDS in the Workplace: Legal Questions and Practical Answers*. Lexington, Massachusetts: Lexington Books, 1988. An overview description and analysis of federal, state, and local laws relating to AIDS as it affects the employee-employer relationship. AIDS testing is reviewed in terms of theory and practice. The role of the union, and the labor-management agreement (including the elements of labor arbitration and workers' compensation) are also reviewed. Several practical problems associated with AIDS in the workplace are examined from the perspective of the employer, with emphasis being placed in policies, procedures, and checklists designed to assist in the management of employees in light of this health risk. Finally, US government guidelines (ca 1986) are given, as are various legal documents relating to AIDS and employment practices.

Bible, Jon D., and Darien A. McWhirter. *Privacy in the Workplace: A Guide for Human Resource Managers*. New York, N.Y.: Quorum Books, c.1990. Includes index.

PERIODICALS

Abbott, Debra A. "Workplace Exposure to AIDS. (Symposium on AIDS and the Rights and Obligations of Health Care Workers)." *Maryland Law Review* 48:1 (January 1989): 212-245. This article explores the relationship between employees and employers regarding AIDS. It considers the hole of OSHA (Occupational Safety and Health Act), state common-law tort duties, and various privacy considerations related to the privacy of employee diagnoses. The article concludes by suggesting that the risk of workplace exposure is too low to justify the invasion of employee privacy in general.

Abromowitz, David. "Past Claimant as Future Victim: Commercial Retaliation and the Erosion of Court Access." *Harvard Civil Rights-Civil Liberties Law Review* 17:1 (Spring 1982): 209-270. Discusses the emergence of computer databases which contain information about individuals who have filed lawsuits or claims against any provider in a given industry. This database provides employers with a list of applicants to avoid. Such databases are also available to doctors, attorneys, landlords, etc.

Allen, Anita L. "Rethinking the Rule against Corporate Privacy Rights: some Conceptual Quandaries for the Common Law." *John Marshall Law Review* 20:4 (Summer 1987): 607-639. This article explores the issue of the corporation and the common law right to privacy. In general, ordinary business corporations are not afforded a right to privacy because: they are not "individuals"; the weight of precedence appears contra to any such corporate right, and they are thought to have other rights similar to privacy (i.e., trade secret laws). Thus this obviates the need for extension of current legal doctrine.

The author examines these contentions and finds them lacking, especially in light of her conception of "social policy" and "moral rights." The historical arguments against corporate privacy, it is said, make sense only where the meaning of privacy is rooted in the concept of human privacy, and this seems to be too philosophically restrictive given the role of the corporation in contemporary society.

- Arrants, George R., Jr. "Labor Law—Employment at Will—Public Policy Exceptions to the Employment at Will Doctrine." *Tennessee Law Review* 53 (Fall 1985): 199-219.
- Barry, Ann M. "Defamation in the Workplace: the Impact of Increasing Employer Liability." *Marquette Law Review* 72:2 (Winter 1989): 264-303.
- Barton, Gregory D. "Private Employer Drug Testing: Invading At-Will Employees' Privacy—Is it a Tort in Nebraska?" *Nebraska Law Review* 67 (Winter-Spring 1988): 211-233.
- Bemis, Kenneth E. "Prohibition of Pencil and Paper Honesty Tests: Is Honesty the Best Policy?" *Willamette Law Review* 25 (Summer 1989): 571-598.
- Benedict, James N., and Thomas N. O'Connor. "The Need for Legislation in the Wake of *Chrysler Corporation v. Brown*." *Corporation Law Review* 4:1 (Winter 1980): 43-61. In *Chrysler Corporation v. Brown* (1978), the Supreme Court determined that certain business information, that would otherwise have been confidential, might be made available through FOIA requests. Because the FOIA is a disclosure statute, those business organizations that submit information to government agencies do not have a say in whether or not such information should be disclosed, nor do they necessarily have a right to challenge an agency's ruling regarding such disclosure. The corporation seeking to show confidentiality accruing to its information, even in a "reverse FOIA" situation (seeking injunction against disclosure), is under a very onerous burden of proof. In *Chrysler*, the Court held that "the FOIA by itself protects the submittee's interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information," and that the nine FOIA exemptions are discretionary, not mandatorily to be imposed. The Court held further that even application of the Trade Secrets Act did not afford protection against unlawful disclosures. The author argues that the *Chrysler* decision implies a need for federal legislation in the area, and certain proposed legislation engineered to protect business information confidentiality is reviewed.

- Bigus, Lawrence W. "Administrative Investigation—Preventing Agency Disclosure of Confidential Business Information." *University of Kansas Law Review* 28:3 (Spring 1980): 467-486. As government regulation of business has expanded, regulatory agencies have demanded more and more confidential business information. Included here are appropriate legal actions corporate counsel might take to keep such information confidential: protective orders precluding agency disclosure; use of FOIA, Trade Secrets Act and APA (Administrative Procedure Act) and judicial review; constitutional considerations (fifth amendment protection of trade secrets); and actions to be used to prevent interagency transfer of information.
- Bookspan, Phyllis T. "Behind Open Doors: Constitutional Implications of Government Employee Drug Testing." *Nova Law Review* 11(1987): 307-370.
- Brunn, Lisa. "Privacy and the Employment Relationship." *Houston Law Review* 25 (March 1988): 399-418.
- Cain, April A. "Employment Litigation: Defamation and Invasion of Privacy Claims." *Annual Labor and Employment Law Institute Annual* 1988: 59-70.
- Calloway, Deborah A. "Equal Employment and Third Party Privacy Interests: an Analytical Framework for Reconciling Competing Rights." 54(December 1985): 327-375.
- Cowan, Melissa Skidmore. "Workers, Drinks, and Drugs: Can Employers Test?" *University of Cincinnati Law Review* 55:1 (Summer 1986): 127-151.
- Dangelo, Charles J. "The Individual Worker and Drug Testing: Tort Actions for Defamation, Emotional Distress and Invasion of Privacy." *Duquesne Law Review* 28 (Spring 1990): 545-559.
- Davidoff, Philip K., and Christopher C. Martin. "The Drug War in the Workplace: Employee Drug Testing under Collective Bargaining Agreements." *St. John's Journal of Legal Commentary* 5:1 (1988): 1-28.
- Decker, Kurt H. "Employment Privacy Law for the 1990's." *Pepardine Law Review* 15 (May 1988): 551-580.

- Diamond, Ann Lusas. "Genetic Testing in Employment Situations: A Question of Worker Rights." *Journal of Legal Medicine* 4 (June 1983): 231-256.
- Edelen, Tim L. "Constitutional Law—County School Board or Superintendent Could not Deny Public Employment Because of Teacher's Involvement in Divorce Proceedings, a Constitutionally Protected Activity." *Journal of Family Law* 24 (June 1986): 710-713.
- Finner, Wendell. "Privacy of Employment Records in the Private Sector." *Annual Survey of American Law* (1986): 569.
- Fitch, Susan M. "National Gay Task Force v. Board of Education of Oklahoma City." *Akron Law Review* 19 (Fall 1985): 337-349.
- Flaig, Jeanne Marie. "Preserving Employee Rights During the War on Drugs." *Pacific Law Journal* 21:4 (July 1990): 995-1033.
- Flanagan, Susan M. "Employer-Employee Relations—the Employee Polygraph Protection Act: Eliminating Polygraph Testing in Private Employment is not the Answer." *Southern Illinois University Law Journal* 11(Winter 1987): 355-390.
- Floyd, Mark H. "AIDS: Employers' Potential Tort Liability." *Benefits Law Journal* 2:4 (Winter 1989): 433-451. The author discusses the common law tort theories most likely to be used in AIDS litigation. The theories include: "negligence, defamation, invasion of privacy, negligent and/or intentional infliction of emotional distress, and wrongful discharge."
- Freed, Mayer G., and Polsby, Daniel D. "Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment." *American Bar Foundation Research Journal* 1991 (Summer 1991): 583-636.
- Ganz, David H. "Government Employer Not Required to Possess Search Warrant or Probable Cause for Work-Related Search of Employee's Office." *Boston College Law Review* 30 (December 1988): 174-187.
- Gardner, Susan. "Wiretapping the Mind: A Call to Regulate Truth Verification in Employment." *San Diego Law Review* 21 (March 1984): 295-323.

- Green, Jonathan J. "Electronic Monitoring in the Workplace: the Need for Standards." *George Washington Law Review* 52:3 (March 1984): 438-458.
- Griego, Phillip J. "Do Mandatory Drug Tests Invade an Employee's Privacy?" *Santa Clara Computer and High-Technology Law Journal* 4 (April 1988): 165-194.
- Hartstein, Barry A. "Drug Testing in the Work Place: a Primer for Employers." *Employee Relations Law Journal* 12:4 (Spring 1987): 577-608.
- Holahan, Carol J. "Private Sector Drug Testing: Availability of State Statutory Remedies for Aggrieved Employees." *Suffolk University Law Review* 87 (Winter 1987): 1067-1090.
- Hudock, Michael J. III. "Behind the Hysteria of Compulsory Drug Screening in Employment: Urinalysis can be a Legitimate Tool for Helping Resolve the Nation's Drug Problem if Competing Interests of Employer and Employee are Equitably Balanced." *Duquesne Law Review* 25:4 (Summer 1987): 597-957.
- Hunter, Patricia A. "Your Urine or Your Job: is Private Employee Drug Urinalysis Constitutional in California?" *Loyola of Los Angeles Law Review* 19:4 (June 1986): 1451-1493.
- Hurd, Sandra N. "Use of the Polygraph in Screening Job Applicants." *American Business Law Journal* 22 (Winter 1985): 529-549.
- Jones, John W., and Philip Ash and Catalina Soto. "Employment Privacy Rights and Pre-Employment Honesty Tests." *Employee Relations Law Journal* 15 (Spring 1990): 561-575.
- Jones, Marsha. "When Private Morality Becomes Public Concern: Homosexuality and Public Employment." *Houston Law Review* 24 (May 1987): 519-547.
- Kanski, Andrea M. "Employee Drug Testing—Balancing the Employer's Right to Know with the Employee's Right to Privacy." *Detroit College of Law Review* 1987:1 (Spring 1987): 27-63.
- Kirk, Geoffrey T. "Employee Drug Testing: Federal Courts are Redefining Individual Rights of Privacy, Will Labor Arbitrators

Follow Suit?" *University of Miami Law Review* 44 (November 1989): 489-538.

Klare, Karl E. "The Public-private Distinction in Labor Law (Symposium: the Public-private Distinction)." *University of Pennsylvania Law Review* 130:6 (June 1982): 1358-1422. The author contends that much of labor law is affected by, or based in, the public/private distinction. The ultimate conclusion drawn is that any distinction between public and private (whether regarding privacy, personal versus regulatory life, or government versus family) is more hypothetical than real. These terms more accurately represent "a series of ways of thinking about public and private that are constantly undergoing revision, reformulation, and refinement . . . The public/private distinction poses as an analytical tool in labor law, but it functions more as a form of political rhetoric used to justify particular results." In effect, the paper offers an alternative "to liberal democratic theories that fracture social life between public and private domains," while at the same time providing for a perspective that "nurtures the capacity of every individual to experience self-realization" in the context of communal solidarity.

Kramer, Andrew M., and Calder, Laurie F. "The Emergence of Employees Privacy Rights: Smoking and the Workplace." *The Labor Lawyer* 8 (Spring 1992): 313-333.

Kruchko, John G. "Private Rights v. Public Protection; Drug Testing in the Working Place." *Compleat Lawyer* 3 (Summer 1986): 7.

Lake, Steven E. "Unrestricted Private Employee Drug Testing Programs: an Invasion of the Worker's Right to Privacy." *California Western Law Review* 23:1 (Fall 1986): 72-104.

Landis, Dean S. "Drug Testing of Private Employees." *University of Baltimore Law Review* 16:3 (Spring 1987): 552-570.

Lathers, Mary E. "Do You Abandon all Constitutional Protections by Accepting Employment With the Government?: Mandatory Drug Testing of Government Employees Violates the Fourth Amendment." *Santa Clara Law Review* 28 (Winter 1988): 169-194.

- Lawlor, John F. "Drug Testing of Government Employees and the Fourth Amendment: the Need for a Reasonable Suspicion Standard." *Notre Dame Law Review* 62 (Winter 1987): 1063-1082.
- Lindsay, William C. "When Uncle Sam Calls does Ma Bell have to Answer?: Recognizing a Constitutional Right to Corporate Information Privacy." *John Marshall Law Review* 18:4 (Summer 1985): 915-935. As corporate information becomes increasingly accessible through remote computers, businesses are taking note of their potential vulnerability. As a consequence, corporations seek to protect sensitive information, and to do so on a wider basis than that allowed by more traditional "trade secret" legal concepts. The author argues that the development of a *corporate* right to informational privacy is contingent upon the maturation of the individual right to information privacy still being developed in 1985. Primarily considered are reverse FOIA suits, and the application of fourth and fifth amendment doctrine to corporations.
- Lindsey, Charles E., Jr. "Drug Testing in the Workplace: A Legislative Proposal to Protect Privacy." *Journal of Legislation* 13 (Spring 1986): 269-291.
- Linowes, David F., and Ray C. Spencer "Privacy: the Workplace Issue of the '90s." *John Marshall Law Review* 23:4 (Summer 1990): 591-620. Details the results of a survey conducted at the University of Illinois to determine the extent to which large American corporations have policies in place to protect the personal information they collect and maintain about their former employees, employers, and applicants.
- Lipps, Alan J., and Michael C. Lueder. "AIDS in the Workplace: Privacy, Discrimination and Other Legal Issues" In *Fifth Annual Labor and Employment Law Institute*. Littleton, CO: Fred B. Rothman & Co., 1990, pp.177-188. Includes index.
- Meyers, John F. "Soroka v. Dayton Hudson Corporation—is the Door Closing on Pre-employment Testing of Applicants?" *Employee Relations Law Journal* 17 (Spring 1992): 645-653.
- Miller, Ronald L. "Worker Privacy and Collective Bargaining." *Labor Law Journal* 33:3 (March 1982): 154-168.

- Nowakowski, Elizabeth Greene. "Criminalizing Employment of Illegal Aliens: Work Authorization Cards May Invade Privacy." *Journal of Criminal Law and Criminology* 72:2 (Summer 1981): 637-670.
- Plass, Stephen. "A Comprehensive Assessment of Employment Drug Testing: Legal Battles over Delicate Interests." *San Diego Law Review* 27 (Jan.-Feb. 1990): 29-79.
- Reinert, Thomas E., Jr. "Federal Protection of Employment Record Privacy." *Harvard Journal on Legislation* 18 (Winter 1981): 207-251.
- Rosenblum, Michael F. "Security vs. Privacy: an Emerging Employment Dilemma." *Employee Relations Law Journal* 17 (Summer 1991): 81-101.
- Rudley, D.L. "Invasion of Privacy and Drug Testing in the Private Workplace: a Case for the Application of Constitutional Concepts." *University of West Los Angeles Law Review* 20 (1988): 43-85.
- Sand, Robert H. "Drugs in the Workplace: the Supreme Court, Congress, and the Federal Agencies Declare War." *Employee Relations Law Journal* 15 (Summer 1989): 125-134.
- Schulman, David I. "AIDS Workplace Law and Policy: a Systematic Analysis." *Saint Louis Public Law Review* 9:2 (1990): 543-560. The purpose of this article is to assist the Presidential Commission on the Human Immunodeficiency Virus (HIV) in the planning process which it recommends "by examining the impact of the epidemic upon workplace law and policy." The article begins with a discussion of privacy, and other, rights, and "concludes with model guidelines for developing AIDS workplace policies."
- Shartsis, Elsa M. "Privacy as Rationale for the Sex-based BFOQ (bona fide occupational qualification)." *Detroit College of Law Review* 1985:3 (Fall 1985): 865-902. Bona fide occupational qualification (BFOQ) is not prohibited by Title VII of the Civil Rights Act of 1964, so long as associated sex discrimination (whether in hiring or on-the-job treatment) is reasonably necessary to the normal operation of the particular business operations

- being reviewed. This BFOQ exemption, while meant to be applied only rarely, may have been largely misapplied, especially where a right to "bodily privacy" is thought to exist, even when based solely on speculative evidence. The author contends that the mere fact of one employee's objection to a different-sex employee's ministrations is not necessarily sufficient to preclude the second employee from being hired under Title VII.
- Stern, Deborah, and James L. Weeks. "Substance Testing vs. Workers' Rights: Litigation and Collective Bargaining Strategies to Protect the Private-Sector Employee." *West Virginia Law Review* 90 (Spring 1988): 337-363.
- Stern, Kenneth. "Government Drug Testing and Individual Privacy Rights: Crying Wolf in the Workplace." *Yale Law & Policy Review* 5:1 (Fall-Winter 1986): 235-259.
- Stone, Christopher D. "Corporate Vices and Corporate Virtues: Do Public-private Distinctions Matter? (Symposium: the Public-private Distinction)." *University of Pennsylvania Law Review* 130:6 (June 1982): 1441-1509.
- Tharnish, Deborah M. "Sex Discrimination in Prison Employment." *Iowa Law Review* 65 (January 1980): 428-445.
- Tiner, Michael, and O'Grady, Daniel J. "Lie Detectors in Employment." *Harvard Civil Rights-Civil Liberties Law Review* 23 (Winter 1988): 85-113.
- Tremper, Charles R., and Small, Mark A. "Privacy Regulation of Computer-Assisted Testing and Instruction." *Washington Law Review* 63 (October 1988): 841-979.
- Truman, Ronald W. "Drug Testing of Government Employees Should Not be a Matter of Fourth Amendment Concern, Cries a Lone Voice in a Wilderness of Opposition." *Brigham Young University Law Review* 1987 (Fall 1987): 1239-1269.
- Westphal, Edward E. "Public-Sector Employer Drug Testing Programs: Has Big Brother Finally Arrived?" *John Marshall Law Review* 20:4 (Summer 1987): 769-793. Before 14th amendment protection can be granted an individual employee, the intrusive action taken by the employer must be viewed as state action.

Drug testing, without notice and fair hearing elements, is shown to deprive an employee of 14th amendment due process. Additionally, employees should have an expectation of protection under fourth amendment guidelines insofar as mass and random drug tests violate constitutional mandates against illegal searches and seizures. In practice, however, such protection seems to be applied only where an individual has a "legitimate expectation of privacy." Drug tests are searches, for fourth amendment purposes, and must therefore be subject to review in this constitutional context.

Winters, Steven B. "Do Not Fold, Spindle or Mutilate: An Examination of Workplace Privacy in Electronic Mail." *Southern California Interdisciplinary Law Journal* 1:1 (1991-92): 85-131. The author argues that "workplace privacy on electronic mail (E-mail) should be protected." Currently, this form of communication is not protected in the federal constitution, nor by federal statutory law. The author presents several cases as examples to illustrate his points, and focuses in particular upon a case that is currently being tried in a California court.