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Employment Privacy Law for the 1990's

Kurt H. Decker*

"The right to be let alone is indeed the beginning of all freedom."
—Justice William O. Douglas¹

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1. Public Util. Comm'r v. Pollack, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

I. INTRODUCTION

Record-keeping, disclosure, and privacy-related statutes along with their accompanying case law, are creating a surge in employment privacy law. This law establishes new or revised privacy requirements that force employers to constantly review personnel forms, policies, and practices. Some of these privacy requirements may be conflicting, mandating that employers maintain employee confidentiality and yet also disclose employment information.

Many employers collect, maintain, and use vast quantities of data about their employees which the unions, the government, and others frequently attempt to access. Unaccustomed to outside scrutiny, many employers are surprised to learn that they must disclose certain information to these groups as well as to their own employees.

Employment privacy law has no clearly defined boundary. It encompasses a myriad of employment statutes and case law, and finds support in constitutional law. As a field, it developed as part of specialized employment law areas involving record-keeping and disclosure, labor relations, health and safety, labor standards, and fair employment practices.

Just as the erosion of at-will employment dominated the 1980's, privacy will be the main theme for employment law in the 1990's. To understand this developing area this article outlines the increasing importance of privacy in employment law by examining, in particular, privacy's setting, privacy's significance, and finally, the major areas of concern.

II. PRIVACY'S SETTING

A. *Employment Law*

Employment law is a maze of common law doctrines, statutes, contractual rules, judicial pronouncements, and administrative agency findings. As a consequence, few clearly discernible legal patterns are recognizable and the law is neither uniform nor predictable. In fact, even within a narrow employment issue, the law can vary considerably depending upon whether an administrative agency or a court is involved.² Statutes and court decisions reflect the conflict between

2. Pursuant to the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982) (NLRA), the National Labor Relations Board (NLRB) occasionally does not follow the court decisions in determining the correct employment law principle to be applied. This nonacquiescence of the NLRB with court decisions has occurred over: (a) whether the NLRB should initially defer its review procedures in unfair labor practice cases for resolution under the collective bargaining agreement's grievance arbitration procedure; and (b) who constitutes a "successor" employer. See C. MORRIS, *THE DEVELOPING LABOR LAW* 694-756, 914-91 (2d ed. 1983); Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471 (1986); see also Bakaly & Bryan, *Survival of the Bargaining Agreement: The*

the employee and the employer,³ and make employment law⁴ such a hot political issue.⁵

Employment law provides a mechanism for dealing with conflicts involving not only wages, hours, and employment conditions, but also

Effect of Burns, 27 VAND. L. REV. 117 (1974); Nash, Wilder & Banov, *The Development of the Collyer Deferral Doctrine*, 27 VAND. L. REV. 23 (1974).

Most courts have not taken kindly to the disrespect for authority reflected in an agency's refusal to follow court decisions. See *NLRB v. Blackstone Co.*, 685 F.2d 102, 106 n.5 (3d Cir. 1982) ("We consider the Board's contrary instructions to its administrative law judges to be completely improper and reflective of a bureaucratic arrogance which will not be tolerated."). Nonacquiescence by administrative agencies has also occurred under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982) (OSHA), and the Social Security Act, 42 U.S.C. §§ 301-1397(f) (1982) (SSA). See, e.g., *Holden v. Heckler*, 584 F. Supp. 463 (N.D. Ohio 1984) (SSA); *Jones & Laughlin Steel Corp. v. Marshall*, 636 F.2d 32 (3d Cir. 1980) (OSHA).

3. For discussion of the labor movement within the United States, see C. MORRIS, *supra* note 2, at 1-67. The NLRA's adoption in 1935 illustrates the shifting conflict between employee and employer. Prior to the NLRA's adoption, three major themes illustrated this employee, union, and employer conflict:

1. The case law afforded a cumulative demonstration that the courts were not institutionally capable of formulating or implementing a [uniform, cohesive, and] workable labor policy.
2. The course of legislative and judicial action revealed increasing awareness that the role of organized labor presented a question of national proportions that no state was capable of answering definitively [on an individual basis].
3. There was the development of two mutually incompatible national policies toward organized labor: one regarding it as creating market restraints inimical to the national economy, and the other regarding it as necessary to a regime of industrial peace based upon a balanced bargaining relationship between employers wielding the combined power of incorporated capital wealth and unions wielding the power of organized labor.

Id. at 3.

4. The conflict that resulted in the NLRA's adoption is similar to what is currently occurring in the at-will employment area where either the employee or employer can terminate the employment relationship at any time and for no reason. See generally H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* chs. 1, 9 (2d ed. 1987).

Courts are indicating that they are not institutionally capable of formulating or implementing a workable policy to address the needs of employees and employers involved in the at-will employment relationship. See, e.g., *Veno v. Meredith*, 357 Pa. Super. 85, 99 n.3, 515 A.2d 571, 579 n.3 (1986); *Martin v. Capital Cities Media, Inc.*, 354 Pa. Super. 199, 221, 511 A.2d 830, 841 (1986); *Darlington v. General Elec.*, 350 Pa. Super. 183, 191, 504 A.2d 306, 309 (1986); see also Decker, *At-Will Employment in Pennsylvania After Banas and Darlington: New Concerns for a Legislative Solution*, 32 VILL. L. REV. 101 (1986) [hereinafter Decker, *New Concerns*]; Decker, *At-Will Employment: Abolition and Federal Statutory Regulation*, 61 U. DET. J. URB. L. 351 (1984) [hereinafter Decker, *At-Will Employment*]; Decker, *At-Will Employment: A Proposal for its Abolition and Statutory Regulation*, 1 HOFSTRA LAB. L.F. 187 (1983) [hereinafter Decker, *Statutory Regulation*].

5. See Huges & McCarthy, *Collective Bargaining in the 1980's—Comments and Observations*, 1 HOFSTRA LAB. L.F. 23 (1983).

power contests within and between various groups and personalities. Such contests may include confrontations between employees, union officials, and employers. The National Labor Relations Act (NLRA) protects employee rights by providing for full freedom of association, self-organization, and designation of representatives for negotiating the terms and conditions of employment or other mutual aid or protection. Thus, the Act statutorily restrains and defuses potential conflict between employee, union, and employer⁶ by transforming physical violence and economic coercion into collective bargaining.⁷

B. The Employment Relationship

Employee and employer relationships are the basis of our economic structure and affect most people over the greater part of their lives. Increasingly, people depend on others for the opportunity to produce their daily income, and the loss of this employment can be a considerable hardship with disastrous consequences. The employer-employee relationship has become fundamental to society.⁸ Besides marriage, no other relationship preoccupies daily affairs so completely.

The employment relationship has become very complex because of multi-faceted human resource functions, wage and benefit programs, and government regulation. One of the consequences has been the generation of large quantities of documented information and records. Once the employee enters the employment relationship, he has little or no choice over whether to provide sensitive and often detailed information. This information may reveal the employee's innermost beliefs, ethical attitudes, and outside interests and activities.⁹ Such information may fall into the hands of co-workers not privileged to receive it. As a result, the information may cause co-workers to form incorrect and unfavorable opinions of the employee which may affect his standing and reputation inside and outside the

6. 29 U.S.C. § 157 (1982).

7. See Sanders, *Some Comments on Labor Dispute Settlement Processes*, 27 VAND. L. REV. 5, 12-13 (1974).

8. We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. *For our generation, the substance of life is in another man's hands.*

F. TANNENBAUM, *A PHILOSOPHY OF LABOR* 9 (1951) (emphasis in original); see also Comment, *Employee Privacy Rights: A Proposal*, 47 FORDHAM L. REV. 155 (1978).

9. See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960) (striking down a statute which required teachers, as a condition of employment, to list every organization to which they belonged, as a violation of their freedom of association).

workplace.¹⁰ Further, the employee may experience restricted opportunities to develop and maintain political, economic, and social relationships.

Historically, an employee's ability to challenge an employer's unfair, intrusive, or damaging practices has been limited.¹¹ The employment relationship generally "denies any right to the employee who is arbitrarily treated [by his employer and is] . . . without a union or a contract."¹² Absent a statutory or contractual restriction, an employee or employer can usually terminate the employment relationship at any time for good reason, bad reason, or no reason at all. This type of relationship is said to be at-will.¹³

Congress and various state legislatures have prohibited the summary termination of an at-will employee in certain instances.¹⁴ Courts have determined that an employer may terminate an employee for any reason unless expressly not allowed by statute.¹⁵ The primary federal statutes limiting an employer's right to terminate an at-will employee are the NLRA¹⁶ and certain sections of the Civil Rights Act of 1964 (Title VII).¹⁷ The NLRA provides that an employer may not terminate an employee where the employee was exercising the right to organize and select an employee representative.¹⁸ Title VII prohibits termination based upon discrimination involving race, color, religion, sex, or national origin.¹⁹ In ad-

10. Huff, *Thinking Clearly About Privacy*, 55 WASH. L. REV. 777, 782 (1980).

11. See H. PERRITT, JR., *supra* note 4, at 1 n.1.

12. Bok, *Discussion of Current Confrontations in Labor Law*, PROCEEDINGS OF THE NINETEENTH ANNUAL WINTER MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 104 (1966).

13. RESTATEMENT (SECOND) OF AGENCY § 442 (1958) refers to at-will employment as follows: "Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events." *Id.*

14. United States government employees, along with various state and municipal employees, may not be terminated without a hearing. See, e.g., Civil Service Reform Act of 1978, 5 U.S.C. § 7513 (1982). The Civil Service Reform Act provides that a government agency may remove or otherwise discipline a covered employee only for such causes as promote the efficiency of the civil service. It also provides a notice period prior to adverse action, affords the employee the right to be represented by an attorney, and the right to a written decision enumerating the reasons for the action taken. *Id.*

15. See, e.g., *NLRB v. Condenser Corp. of Am.*, 128 F.2d 67, 77 (3d Cir. 1942) (holding that discharge of employee was proper where no statutory prohibition).

16. 29 U.S.C. §§ 151-169 (1982).

17. 42 U.S.C. §§ 2000e-1 to -17 (1982).

18. 29 U.S.C. § 158(a)(1), (a)(3).

19. 42 U.S.C. § 2000e-2(a).

dition, several federal statutes contain provisions which directly or indirectly restrict employee terminations including the Age Discrimination in Employment Act of 1967,²⁰ the Occupational Safety and Health Act of 1970 (OSHA),²¹ the Vietnam Era Veterans' Readjustment Assistance Act,²² the Fair Labor Standards Act,²³ the Rehabilitation Act of 1973,²⁴ the Employee Retirement Income Security Act of 1974,²⁵ the Energy Reorganizations Act of 1974,²⁶ the Clean Air Act,²⁷ the Federal Water Pollution Control Act,²⁸ the Federal Railroad Safety Authorization Act,²⁹ the Consumer Credit Protection Act,³⁰ and the Jury System Improvements Act of 1978.³¹ Some state statutes contain similar limitations.³²

Federal and state legislation has been primarily focused on promoting unionization as a countervailing force against employer power and control,³³ and establishing a minimum level of economic entitle-

20. 29 U.S.C. §§ 621-634 (1982) (prohibiting discrimination based on age).

21. *Id.* §§ 651-678, 660(c)(1) (prohibiting discrimination against an employee for asserting rights guaranteed under OSHA).

22. 38 U.S.C. §§ 2021-2026, 2021(a)(A)(i), (a)(B), (b)(1), 2024 (1982) (guaranteeing the right to re-employment upon satisfactory completion of military service and prohibiting termination "without cause" within one year after re-employment).

23. 29 U.S.C. §§ 201-219, 215(a)(3) (1982) (prohibiting employee termination for filing any complaint or instituting any proceeding under the Fair Labor Standards Act).

24. *Id.* §§ 701-796i, 794 (requiring affirmative action to advance the employment of handicapped individuals by government contractors or subcontractors).

25. *Id.* §§ 1001-1461, 1140, 1141 (prohibiting employee termination to prevent them from attaining vested pension rights).

26. 42 U.S.C. §§ 5801-5891, 5851 (1982) (prohibiting employee termination for assisting, participating, or testifying in any proceeding to carry out the purposes of this Act).

27. *Id.* §§ 7401-7642, 7622 (prohibiting employee termination for commencing, causing to commence, or testifying at proceedings against an employer for the Act's violation).

28. 33 U.S.C. §§ 1251-1376, 1367 (1982) (prohibiting employee termination for instituting or testifying at a proceeding against the employer for the Act's violation).

29. 45 U.S.C. §§ 421-444, 441(a), (b)(1) (1982) (prohibiting railroad companies from terminating employees who file complaints, institute or cause to be instituted any proceeding under or related to enforcement of federal railroad safety laws, testified, or are about to testify, at such a proceeding, or who refuse to work under conditions they reasonably believe to be dangerous).

30. 15 U.S.C. §§ 1631-1677, 1674 (1982) (prohibiting employee termination because of a wage garnishment for indebtedness).

31. 28 U.S.C. § 1875 (1982) (prohibiting employee termination for service on grand or petit juries).

32. Several states, including Arizona, California, and Kentucky have statutes prohibiting terminations based upon political activity. See [1987] *Ind'l Empl. Rights Manual* (BNA) 541 (State Laws). A few states, including Idaho, Massachusetts, Michigan, North Dakota, and Vermont prohibit termination for serving as jurors or for indicating their availability as jurors. *Id.* Another common provision in state laws is a prohibition against retaliatory termination for filing a workers' compensation claim, for example, California, Ohio, and Texas. *Id.*

33. See NLRA, 29 U.S.C. §§ 151-169 (1982).

ment for employees.³⁴ It has also endeavored to combat discrimination against specific groups in the hiring and terminating process,³⁵ protect employee health and safety,³⁶ and guarantee a minimum level of security for retirement and for the survivors of wage earners.³⁷ Additionally, the "assumption of risk doctrine" as applied to employment has been effectively repealed by workers' compensation laws.³⁸

Until recently, courts consistently upheld the legality of arbitrary terminations and denied damage claims even where the employee had been terminated for reasons based upon false information, mistake, or malice, or in instances where the employer did not follow its own published disciplinary and appeal procedures.³⁹ However, courts and legislatures are now creating exceptions to this *laissez faire* attitude toward employment relationships by permitting employees to contest certain actions.⁴⁰ These exceptions may arise out of public policy considerations⁴¹ or rest on the assumption that an implied covenant of good faith and fair dealing, whether oral or written, exists in every employment relationship.⁴² Despite the influential criticism of

34. See Federal Unemployment Tax Act, 29 U.S.C. §§ 3301-3311 (1982); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1982).

35. See Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982); Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. §§ 2021-2026 (1982); Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -17 (1982) (sections limiting an employer's right to terminate an at-will employee).

36. See OSHA, 29 U.S.C. §§ 651-678 (1982).

37. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 2, 88 Stat. 829 (codified in scattered sections of 5, 18, 26, 29, 31, 42 U.S.C. (1982)); Social Security Act, Pub. L. No. 271, § 1, 49 Stat. 620 (1935) (codified in scattered sections of 42 U.S.C. (1982)).

38. See I. LARSON, WORKMEN'S COMPENSATION §§ 5.00-20, at 33-39 (1978).

39. See *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974); see also Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute*, 62 VA. L. REV. 481, 484-91 (1976).

40. For a detailed state-by-state analysis of at-will employment's modification, see C. BAKALY, JR. & J. GROSSMAN, MODERN LAW OF EMPLOYMENT CONTRACTS: FORMATION, OPERATION AND REMEDIES FOR BREACH app. A (1983) [hereinafter C. BAKALY, JR.].

41. The public policy considerations which prohibit terminating an employee include: (a) declining to commit perjury at the employer's behest; (b) refusing to participate in an illegal price-fixing scheme; (c) serving on a jury; (d) filing workers' compensation claims; (e) refusing to take a polygraph examination in a state prohibiting its administration; (f) mislabeling packaged goods; (g) avoiding payment of commissions; and (h) avoiding payment of a pension. See H. PERRITT, JR., *supra* note 4, §§ 5.8-.18.

42. *Id.* §§ 4.6-28; see, e.g., *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal.

several commentators,⁴³ some jurisdictions continue to adhere to the at-will employment concept.⁴⁴

C. *Privacy's Historical Development*

The concept of privacy within the United States is generally traced to the Harvard Law Review article written by Samuel D. Warren and Louis D. Brandeis in 1890.⁴⁵ Although similar concepts had been accorded recognition by other countries,⁴⁶ prior to 1890 no cause of action for an invasion of privacy could be brought in America.⁴⁷ Relying on then existing legal doctrines,⁴⁸ early commentators recognized a privacy right only in narrowly defined situations. Later, commentators based this right's existence on a complete immunity "to be

Rptr. 917 (1981); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

43. Because of the rapid developments in this area, commentators have considerably influenced the courts to modify or adhere to the at-will employment relationship. Decisions frequently outline the thoughts of these commentators. See, e.g., *Veno v. Meredith*, 357 Pa. Super. 85, 515 A.2d 571 (1986); *Martin v. Capital Cities Media, Inc.*, 354 Pa. Super. 199, 511 A.2d 830 (1986); *Darlington v. General Elec.*, 350 Pa. Super. 183, 504 A.2d 306 (1986). For a general discussion of the at-will employment relationship, see *Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); *Decker, New Concerns, supra note 4*; *Decker, Reinstatement as a Remedy for a Pennsylvania Employer's Breach of a Handbook or an Employment Policy*, 90 DICK. L. REV. 41 (1985); *Decker, Reinstatement: A Remedy for an Employer's Violation of a Handbook or a Written Employment Policy*, 3 HOFSTRA LAB. L.J. 1 (1985); *Decker, At-Will Employment: supra note 4*; *Decker, Handbooks and Employment Policies as Express or Implied Guarantees of Employment—Employer Beware!*, 5 U. PITT. J. L. & COM. 207 (1984); *Decker, At-Will Employment in Pennsylvania—Proposal for its Abolition and Statutory Regulation*, 87 DICK. L. REV. 477 (1983); *Decker, Statutory Regulation, supra note 4*; *St. Antoine, You're Fired!*, 10 HUM. RTS. 32 (1982);

For a detailed review of the influence of commentators on this area, see H. PERRITT, JR., *supra note 4*, § 1.11. Commentators have had considerable influence upon courts and legislators in other areas of law. An example relevant to the privacy discussions in this context is the 1890 law review article by Warren and Brandeis setting the parameters for the invasion of privacy tort. See *Warren & Brandeis, The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

44. See C. BAKALY, JR., *supra note 40*, at app. A.

45. Warren & Brandeis, *supra note 43*. Warren and Brandeis preferred the phrase "right to privacy," however, "right of privacy" has become the generally accepted expression used by legislatures and courts in privacy matters. See W. ZELERMYER, *INVASION OF PRIVACY* 28 (1959).

46. See S. HOFSTADTER, *THE DEVELOPMENT OF THE RIGHT OF PRIVACY IN NEW YORK* 1-2 (1954) (Hebrew law); Gutteridge, *The Comparative Law of the Right to Privacy*, 47 LAW Q. REV. 203, 204 (1931) (German and Swiss law); Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 357 (1915) (Greek and Roman law); Warren & Brandeis, *supra note 43*, at 214 n.1 (French law).

47. See Savell, *Right of Privacy—Appropriation of a Person's Name, Portrait, or Picture for Advertising or Trade Purposes Without Prior Written Consent: History and Scope in New York*, 48 ALB. L. REV. 1, 3-4 (1983).

48. See, e.g., *The Legal Relations of Photographs*, 17 U. PA. L. REV. 1 (1869) (a person possesses a "natural copyright" in his physical features, and one who appropriates the person's image in a photograph is subject to an action for damages).

let alone" or a "reverence for personality."⁴⁹

As a result of harrassment by the press,⁵⁰ Warren sought to develop a right to privacy. Together with Brandeis, he argued that even though no prior case law explicitly supported a privacy right's existence, a reasoned development of common law principles and society's changing circumstances supported it.⁵¹ Their basic assumption was that the law recognizes novel causes of action.⁵² They noted the need for this innovation due to the newly developed methods of invading private and domestic life through photography and newspapers.⁵³

Warren and Brandeis recognized that the privacy right should not be unlimited. Accordingly, they proposed rules specifying that its scope would not prohibit publication of matters of public or general interest, or communications privileged under libel and slander law.⁵⁴ In addition, there was to be no redress for oral invasions in the absence of special damages and the right would terminate upon the subject's own publication or consent.⁵⁵ The proposed rules also provided that truth and the absence of "malice" would not constitute defenses.⁵⁶ Finally, remedies were suggested for violations of the right.⁵⁷ The article stimulated much complimentary⁵⁸ and critical⁵⁹

49. See, e.g., T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (1888) (the right to one's "person" may be said to be a right of complete immunity: "to be let alone"); *The Confidence of the Dead*, 3 ANDOVER REV. 275, 276-77 (1885) (ethics limit the unrestricted use of private correspondence and diaries in biographies of deceased persons based on a "reverence for personality" and a "right of confidence," both of which also apply to the claims of the living).

50. Warren had married into a socially prominent Boston family. He suffered considerable annoyance from the city's newly-developed "Yellow Press," which pried into his and his wife's "blue blood" social life in detail. See A. MASON, BRANDEIS: A FREE MAN'S LIFE 70 (1946). Warren discussed this matter with Brandeis, his law partner and Harvard Law School classmate. See M. ERNST & A. SCHWARTZ, PRIVACY: THE RIGHT TO BE LET ALONE 46 (1962).

51. See Savell, *supra* note 47, at 4-5.

52. Warren & Brandeis, *supra* note 43, at 193.

53. *Id.* at 195.

54. *Id.* at 214-18.

55. *Id.*

56. *Id.*

57. A tort action for damages would exist in all cases with substantial compensation for injury to feelings even absent special damages. Injunctions would rarely be issued. Criminal liability could only be imposed through statutory enactment. *Id.* at 219.

58. See, e.g., Hand, *Schuyler Against Curtis and the Right to Privacy*, 45 U. PA. L. REV. 745, 758 (1897) (privacy protection is "natural and sensible" and of "practical desirability"). This argument for a privacy right's recognition is similar to the argument over a "wrongful termination" cause of action. See, e.g., H. PERRITT, JR., *supra* note 4, § 1.11.

59. See, e.g., Hadley, *The Right to Privacy*, 3 NW. U. L. REV. 1, 3-4 (1894) (the right

comment in ascertaining this right's existence and subsequent development.⁶⁰

D. Employment Privacy

Employment privacy is a growing concern. In fact, next to at-will employment, privacy is the most rapidly evolving area of employment law. Commentators are becoming increasingly aware of this and are lending their influence to its development.⁶¹

Privacy concerns the nature and extent of an employee's "right to be let alone"⁶² or to be free from unwarranted intrusions. Yet, since George Orwell raised the specter of "Big Brother" with his book *1984*, computer technology, court decisions, government intrusion, and employers' rights to know more about the individuals they employ have all eroded the employees' sense that their lives are a private matter.⁶³ In fact, virtually from the moment an individual first walks through an employer's entrance, privacy rights are relinquished.⁶⁴ As a condition of employment, employees must disclose personal facts about their background and continually submit to employer scrutiny that may or may not be performance related. The employee may be subjected to a physical examination, polygraph, psychological evaluation, or even an antibody test for Acquired Immune Deficiency Syndrome (AIDS).⁶⁵ Physical intrusion may also occur through locker searches or frisking as employees leave the workplace, even though no reasonable suspicion of theft exists. Pri-

of privacy does not exist and arguments in its favor are based on a misunderstanding of the authorities cited).

60. Savell, *supra* note 47, at 5-6.

61. Commentators are recognizing the growing importance of employment privacy interests in the workplace. See, e.g., Belair, *Employee Rights to Privacy*, 33 N.Y.U. CONF. LAB. 3 (1980); Castagnera-Cain, *Defamation and Invasion of Privacy Actions in Typical Employee Relations Situations*, 13 LINCOLN L. REV. 1 (1982); Craver, *The Inquisitorial Process in Private Employment*, 63 CORNELL L. REV. 1 (1977); Diamond, *Genetic Testing in Employment Situations: A Question of Worker Rights*, 4 J. LEGAL MED. 231 (1983); Duff & Johnson, *A Renewed Employee Right to Privacy*, 34 LAB. L.J. 747 (1983); Fox & Ostling, *Employee and Government Access to Personnel Files: Rights and Requirements*, 5 EMPLOYEE REL. L.J. 67 (1980); Hauslet, *Employee Privacy, Information Needs, and the Law*, 14 INDUS. & LAB. REL. F. 23 (1980); Hermann, III, *Privacy, The Prospective Employee and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73 (1971); Murg & Maledon, *Privacy Legislation—Implications for Employers*, 3 EMPLOYEE REL. L.J. 168 (1977); Westin, *Privacy and Personnel Records: A Look at Employee Attitudes*, 4 CIV. LIBERTIES REV. 28 (Jan.-Feb. 1978).

62. *Public Util. Comm'n v. Pollack*, 343 U.S. 451, 467 (1951) (Douglas, J., dissenting).

63. See Cook, *Invasion of Privacy: A 1984 Syndrome*, 28 INDUS. MGMT. 18 (Sept.-Oct. 1986).

64. For a concise discussion of employment privacy, see Kaplan & Paller, Jr., *The Protection of Employee Privacy*, in *THE EMPLOYEE TERMINATION HANDBOOK* 115 (J. Allen ed. 1986).

65. *Id.*

vacy interests are also implicated where an employer conducts routine surveillance and monitoring. Some employers, for example, have been known to operate video cameras in employee restrooms. Others have installed computers to monitor performance of video display terminal operators.⁶⁶

Employment privacy concerns further extend to employer efforts to collect personal information that is not job-related. Certainly, the employer has a legitimate reason to inquire about an employee's abilities, honesty, and prior employment history. But some employers want to know much more. They assert that everything about an employee is relevant and necessary in determining suitability for employment.⁶⁷ Thus, the employer feels it is important to know if the employee smokes marijuana at home, is a homosexual, or socializes with the "wrong" kind of people.

Other privacy concerns are raised when a former employer discloses information to a prospective employer in connection with the hiring of a potential employee. For example, the former employer may disclose an employee's confidential medical records to someone who has no legitimate need to view them, or embarrassing personal facts about an employee out of spite or revenge. This may subject the employee to ridicule from friends and acquaintances and even injure his reputation and limit future employment prospects.⁶⁸

Hardly surprising, legislatures and courts are increasingly concerned about employment privacy. While employers may have legitimate business interests that sometimes require infringing on employee privacy, there are compelling reasons to limit this intrusion where no legitimate interest exists.

E. Defining Employment Privacy

Employment privacy encompasses a broad spectrum of interests which relate to the intrusiveness and fairness of collecting information, maintaining, using, and disclosing information, and which extend to the regulation of employee lifestyle both in and outside the workplace. These interests arise prior to, during, and after the termination of the employment relationship.

Privacy interests exist in the employee's person, property, or private conversations, and private life or beliefs. They are also present

66. *Id.*

67. *Id.* at 116.

68. *Id.*

whenever irrelevant, inaccurate, or incomplete facts are used to make employment decisions, or when employment information is disclosed to third parties.⁶⁹ These interests may be summarized into the five main employment privacy themes: speech, beliefs, information, association, and lifestyle. The problem of invading these privacy interests impacts every aspect of employment from hiring, to life inside and outside the workplace.

Individuals generally feel more comfortable relating personal details of their lives to a friend since the friend can be trusted to continue respecting them, despite what they learn. An important difference between employees' relationships with family and friends and their relationship with employers, is that employers treat them as continuing performance evaluation objects.⁷⁰

Within the employment relationship there are two basic privacies. One concerns "information privacy," or the interest in controlling the collection, maintenance, use, and disclosure of employment information.⁷¹ The second concerns "behavior privacy," or the interest in participating in activities free from employer regulation or surveillance both inside and outside the workplace.⁷²

"Privacy" and "confidentiality" are similar, yet distinct, concepts. Employment "information privacy" concerns what employee information should be collected, how much should be maintained, and what should be disclosed. "Confidentiality" is concerned with restricting the unauthorized use or disclosure of employment information through procedures that ensure such security.⁷³ Confidentiality requires security controls in oral and written communications as well as in manual and computerized records.

Unwarranted appropriation of one's personality, publication of one's private affairs, or the wrongful intrusion into one's personal activities so as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities creates an employment privacy breach.⁷⁴ If an employee suffers an adverse effect from a

69. See U.S. PRIVACY PROTECTION STUDY COMM'N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY app. 3 (1977) [hereinafter PRIVACY PROTECTION]; see also Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROBS. 253, 254 (1966).

70. H. PERRIT, JR., *supra* note 4, § 8.15.

71. Belair, *supra* note 61, at 3-4.

72. *Id.*

73. The Privacy Act of 1974 requires that federal agencies "establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity . . ." 5 U.S.C. § 552a(e)(10) (1982). Agencies also must promulgate "rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records . . ." *Id.* § 552a(e)(9).

74. W. PETROCELLI, *LOW PROFILE—HOW TO AVOID THE PRIVACY INVADERS* 112 (1981).

breach of privacy or confidentiality, a remedy should be provided.⁷⁵

F. Exercising Employment Privacy Interests

Once the employees enter the employment relationship they must often relinquish considerable autonomy. Most employees do not bargain for their employment position, and must adhere to the employers' unilateral terms. If they do not follow these terms, they may not be hired.

Once employed, the employees must conform to the employers' expectations, rules, and procedures that define specific rights and responsibilities. Many are wholly dependent upon the employers for their economic well-being. Based on the anticipated continuance of this relationship, the employee makes various financial commitments, such as marriage, having children, or purchasing a home or automobile. These commitments further establish a financial reliance on the employment relationship.

Absent statutory restrictions, an employer may collect, maintain, use, and disclose employment information, as well as influence an employee's lifestyle.⁷⁶ In an at-will employment relationship, an employer can generally terminate employment of an individual who objects to any of these practices.⁷⁷ The employee has no acceptable option; he can either cede to the situation, protest and confront possible termination, or voluntarily terminate employment.

Concerns about employment privacy exist at the hiring stage and within and outside the workplace. At the hiring stage, an employee's privacy may be intruded upon by the employer's use of advertisements, applications, interviews, credit checks, arrest records, fingerprints, photographs, immigration requirements, reference checks, medical screening, blood analysis, skill testing, polygraph examinations, honesty testing, or handwriting analysis.

Within the workplace, privacy concerns are raised when dealing with employment or medical records, smoking, employee assistance programs, alcohol and drug testing, AIDS testing, sterilization, moni-

75. See, e.g., Privacy Act of 1974, 5 U.S.C. § 552a(g)(1)(D)-(g)(4) (1982) (damage action under the Act for failure to comply with any provision that results in an "adverse effect on an individual").

76. See, e.g., *Hollenbaugh v. Carnegie Free Library*, 436 F. Supp. 1328, 1330, 1333-34 (W.D. Pa. 1977) (termination of at-will employee discovered to be living together in "open adultery" held not to violate constitutional privacy right); *Wendler v. DePaul*, 346 Pa. Super. 475, 499 A.2d 1101 (1985) (negative employee evaluation is an opinion and not libel).

77. *Hollenbaugh*, 436 F. Supp. at 1333-34.

toring union meetings, camera or electronic surveillance, literature solicitation and distribution, jury or witness duty, whistle blowing, dress codes, nepotism, name changes, identification tags, religious accommodation, or language requirements.

Outside the workplace, privacy may be impacted through the disclosure of employee associations with bankruptcy and unions, loyalty, conflicts of interest, off-duty misconduct involving noncriminal or criminal activities, regulation of lifestyle, or mandatory residency requirements. It is in these areas that employment privacy becomes increasingly significant: these areas are most susceptible to employer breaches, and are most likely to result in litigation.

III. PRIVACY'S SIGNIFICANCE

In most instances, employment comprises a close relationship between an employee and employer that each anticipates will continue for an indefinite time period. As a result of this close and often prolonged association, however, many situations arise where privacy becomes a significant issue. Privacy concerns can arise whether an employment relationship exists or not because they may be present at hiring, during employment, or even after employment terminates. The problems usually involve employment information that has been collected to make the hiring decision, used internally to make decisions after hiring, and disclosed to third parties.

At the outset of the employment relationship, information pertaining to employment, educational, financial, medical, and criminal histories is usually collected as part of the application procedure.⁷⁸ Then, during employment, other information may be gathered, including performance evaluations, promotion reports, discipline notices, payroll data, government reports, fringe benefit records, pension information, and health insurance data. Such information may be maintained in a manual or computerized record-keeping system.⁷⁹

It is the nature of the employment relationship to rely on written information in decision-making.⁸⁰ The employee obliges by providing information specifically to create and maintain the employment relationship. Yet the employee has little, if any, control over how this information is maintained, used, or disclosed.⁸¹ Indeed, years later, other persons, including prospective employers, credit agencies, or

78. PRIVACY PROTECTION, *supra* note 69, at 72-78 (discussing the information on a credit application); *see also* Comment, *supra* note 8, at 157.

79. *Id.* at 225-26; *see also* A. WESTIN & M. BAKER, *DATABANKS IN A FREE SOCIETY* 9-10 (1972); Comment, *supra* note 8, at 157.

80. PRIVACY PROTECTION, *supra* note 69, at 13-14.

81. *Id.*

governmental agencies, may be granted access to this information without the employee's knowledge or consent. It is here that safeguarding employment privacy takes on particular significance.

Employment information is often maintained long after the original collection purpose expires. A written record, unlike the human memory, remains intact. Hence, the potential for misuse is constantly present.⁸² Normally, it is the employer who decides what information must be disclosed and when it must be provided. Rarely can an employee verify the accuracy or content of the information, or participate in deciding when, where, and to whom it is disclosed.

The employee can only surmise what employment information exists. There may be official as well as unofficial employment records. Identifying errors and finding their source may be difficult. Additionally, the employee does not know whether past or present employers may have disclosed information without the employee's knowledge or prior consent. Through the collection, maintenance, use, and disclosure of employment information, the employee loses control over personal information in the employer's possession.⁸³ Overshadowing these concerns, however, is the manner in which an employer may attempt to regulate the employee's lifestyle, both in and outside the workplace.

A. *Significance for Employers*

Record-keeping, disclosure, and privacy statutes, along with accompanying case law, have made employment privacy a significant employer concern. Employers find themselves with conflicting privacy requirements which restrict their operations.⁸⁴ For example, while record-keeping requirements mandate information collection, privacy statutes actually restrict that process. Similarly, while privacy requirements seek to protect employment information, disclosure statutes require access.⁸⁵

Increased governmental regulation of the employment relationship has expanded employer record-keeping obligations. Certain federal statutes, particularly OSHA⁸⁶ and Title VII,⁸⁷ impose explicit and im-

82. Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 288 (1977).

83. See Miller, *The Privacy Revolution: A Report from the Barricades*, 19 WASHBURN L.J. 1 (1979).

84. See Reinert, Jr., *Federal Protection of Employment Record Privacy*, 18 HARV. J. ON LEGIS. 207 (1981).

85. *Id.* at 214-26.

86. 29 U.S.C. §§ 651-678 (1982).

PLICIT record-keeping requirements on employers.⁸⁸ OSHA requires employers to conduct employee medical surveillance and maintain records concerning employee occupational health.⁸⁹ Title VII requires an annual statement of the racial, ethnic, and gender composition of the employer's workforce.⁹⁰ These regulations necessitate extensive and detailed record-keeping.

In addition to these statutory requirements,⁹¹ employers must collect and maintain employment information to effectively operate their businesses. This information is important in making decisions about hiring, promotion, training, security, compensation and benefits, retirement, disciplinary actions, termination, and other job opportunities. It is here that employee privacy rights must be delicately balanced with the employer's need to make legitimate, informed business decisions.

As additional privacy statutes are enacted, employers must become more cautious in their collection, maintenance, use, and disclosure of employment information. Unaccustomed to outside scrutiny, employers are surprised to discover that certain employment information must be disclosed. Unions also request and obtain employment information.⁹² Employers must be aware of federal and state statutory information disclosure requirements in order not only to avoid and limit their potential liability, but also to protect employment privacy, operate their businesses effectively, and maintain good relations with other organizations.

B. Legislative Action

No comprehensive nationwide statutory protection of employment privacy currently exists. However, certain federal and state statutes impose privacy restrictions. Actions by state legislatures have been more innovative and far-reaching than their federal counterparts. Constitutional protections for personal privacy have traditionally been safeguards against governmental rather than private intrusions. That distinction, however, has disappeared in states whose constitu-

87. 42 U.S.C. §§ 2000e-1 to -17 (1982).

88. See, e.g., Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982); Equal Pay Act of 1963, 29 U.S.C. § 206 (1982); OSHA, 29 U.S.C. §§ 651-678 (1982); Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1451 (1982); Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -17 (1982); 41 C.F.R. § 60 (1986).

89. 29 C.F.R. § 1904 (1986); see also M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 180-89 (1978).

90. Form EEO-1, 29 C.F.R. § 1602.7 (1987).

91. See sources cited *supra* note 88.

92. See, e.g., Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979) (union requested and obtained employee aptitude test scores); see also Salt River Valley Water User's Ass'n v. NLRB, 769 F.2d 639 (9th Cir. 1985) (union access to confidential personnel information upheld).

tions protect against both. States have recognized the need to balance an employee's privacy interest against other societal values.

While the United States Supreme Court was reviewing the constitutional privacy right,⁹³ the Freedom of Information Act (FOIA)⁹⁴ was signed at the federal level. The FOIA's purpose was to allow the public to "have all the information that the security of the Nation permits."⁹⁵ It also exempted certain confidential information from public disclosure, such as "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁹⁶

In 1974, the United States Congress debated on legislation that would increase the protection of governmental information which is maintained on individuals. A Senate bill provided for a Federal Privacy Board to oversee the collection, maintenance, and disclosure of information.⁹⁷ The House bill focused on federal agency standards for data collection and maintenance.⁹⁸ These two bills were combined, without a formal conference committee meeting and report, into the Privacy Act of 1974.⁹⁹

Under the Privacy Act, an individual¹⁰⁰ has input regarding what government information is maintained and how and by whom it is used.¹⁰¹ The individual may request the correction, amendment or deletion of information, and may take legal action if the request is denied.¹⁰² The "records" protected under this Act include anything containing the "name, or the identifying number, symbol, or other identifying particular assigned to the individual."¹⁰³ Subject to

93. *Katz v. United States*, 389 U.S. 347 (1967) (fourth amendment includes a reasonable expectation of privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of privacy found in the "penumbra" of the Bill of Rights).

94. 5 U.S.C. § 552 (1982).

95. Statement by President Lyndon B. Johnson upon signing Public Law 89-487 on July 4, 1966. 2 PUBLIC PAPERS OF THE PRESIDENT: LYNDON B. JOHNSON 199 (1967).

96. 5 U.S.C. § 552(b)(1)(A)(6) (1982).

97. S. 3418, 93d Cong., 2d Sess. (1974).

98. H.R. 16373, 93d Cong., 2d Sess. (1974).

99. 5 U.S.C. § 552a (1982).

100. The Privacy Act defines an "individual" as "a citizen of the United States or an alien lawfully admitted for permanent residence." *Id.* § 5520a(a)(2). This has been interpreted to exclude foreign nationals, nonresident aliens, and corporations. See *Raven v. Panama Canal Co.*, 583 F.2d 169, 171 (5th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979); *Dresser Indus. v. United States*, 596 F.2d 1231, 1237-38 (5th Cir. 1979); *OKC Corp. v. Williams*, 461 F. Supp. 540, 541 (N.D. Tex. 1978).

101. 5 U.S.C. § 552a(e)(1) (1982).

102. *Id.* § 552a(d)(2), (3)-(4).

103. *Id.* § 552a(a)(4).

twelve exceptions, records may not be released unless pursuant to the individual's written request or prior consent.¹⁰⁴

Other federal statutes also affect employment privacy interests.¹⁰⁵ Additionally, "mini-privacy acts" were enacted by various states in the 1970's to address the need for increased employment privacy. In acknowledging the right to "be let alone,"¹⁰⁶ these statutes regulate the collection, maintenance, use, and disclosure of information about individuals by state and local agencies.¹⁰⁷ Like the Federal Privacy Act of 1974, these state statutes give individuals the opportunity to discover what information the government collects, maintains, and discloses about them. Further, they permit individuals to correct or amend inaccurate government records, and regulate the collection, maintenance, use, and disclosure of information by government.¹⁰⁸

Responses by state legislators have been concerned with privacy issues ranging from the disclosure of credit information,¹⁰⁹ to protec-

104. *Id.* § 552a(b)(1)-(12); see *Zeller v. United States*, 467 F. Supp. 487, 500-01 (E.D.N.Y. 1979); *Local 2407, Am. Fed'n of Gov't Employees v. Defense Gen. Supply Center*, 423 F. Supp. 481, 483 (E.D. Va. 1976), *aff'd*, 573 F.2d 184 (4th Cir. 1978).

105. These include: certain sections of the Hatch Act, 5 U.S.C. §§ 1501(4), 2302(b)(8) 7324, 7325 (1982) (discussing the political association rights of federal employees and providing for whistleblowing protection); Bankruptcy Act, 11 U.S.C. § 525 (1982 & Supp. IV 1986) (prohibiting a governmental unit from denying employment to a person who was a debtor within the bankruptcy provisions); Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1982 & Supp. IV 1986) (discussing the collection of non-job-related credit information); Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520 (1982 & Supp. IV 1986) (discussing employer monitoring or eavesdropping upon employees); NLRA, 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985) (discussing union associational interests); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982 & Supp. III 1985) (discussing the collection of non-job-related information); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982) (discussing the collecting of non-job-related information regarding disabilities); OSHA, 29 U.S.C. §§ 651-678 (1982 & Supp. III 1985) (discussing the associational interests in maintaining a safe workplace); 31 U.S.C. § 3730(h) (1982) (discussing speech interests by an employee disclosing illegal activities); certain sections of the Civil Rights Act, 42 U.S.C. §§ 1981, 1983, 1985, 1986 (1982) (affecting the associational rights of minorities); Title VII, 42 U.S.C. § 2000e-1 to -17 (1982) (discussing the collection of non-job-related information).

106. Warren & Brandeis, *supra* note 43, at 205.

107. See, e.g., ARK. STAT. ANN. §§ 16-801 to -810 (1979); CAL. CIV. CODE §§ 1798-1798.78 (West 1985 & Supp. 1988); CONN. GEN. STAT. ANN. §§ 4-190 to -197 (West Supp. 1988); IND. CODE ANN. §§ 4-1-6-1 to -9 (Burns 1986 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 66A (West Supp. 1987); MINN. STAT. ANN. §§ 13.01 to .90 (West Supp. 1987); UTAH CODE ANN. §§ 63-2-59 to -89 (1986 & Supp. 1987); VA. CODE ANN. §§ 2.1-377 to -386 (1987); see also COLO. REV. STAT. § 24-72-204 (1982 & Supp. 1986) (restrictions on access to state agency records); N.Y. PUB. OFF. LAW § 89 (McKinney Supp. 1988).

108. *Id.*

109. See, e.g., ARIZ. REV. STAT. ANN. §§ 44-1691 to -1696 (West 1987); CAL. CIV. CODE §§ 1785-1786.56 (West 1985); CONN. GEN. STAT. ANN. §§ 36-431 to -435 (West Supp. 1988); FLA. STAT. ANN. §§ 559.55 to .78 (West Supp. 1987); KAN. STAT. ANN. §§ 50-701 to -722 (1983); KY. REV. STAT. ANN. §§ 367.390 to .990 (Michie/Bobbs-Merrill 1987); ME. REV. STAT. ANN. tit. 10, §§ 1311-1329 (1964 & Supp. 1987); MD. COM. LAW CODE ANN. §§ 14-201 to -204 (1983); MASS. GEN. LAWS ANN. ch. 93, §§ 50-68 (West 1984 & Supp. 1987); MONT. CODE ANN. §§ 31-3-101 to -123 (1987); N.H. REV. STAT. ANN. §§ 359-B:1 to :21 (1984 & Supp. 1987); N.M. STAT. ANN. §§ 56-3-1 to -8 (1986); N.Y. GEN.

tion for whistleblowing,¹¹⁰ to employee access to personnel files.¹¹¹ Other statutes are concerned with prohibiting an employer from inquiring into an employee or a prospective employee's past arrests and convictions,¹¹² psychological matters,¹¹³ communicable diseases,¹¹⁴ smoking,¹¹⁵ and the employee's voting preferences.¹¹⁶ Furthermore, some states have enacted little "Hatch Acts"¹¹⁷ and other statutes

BUS. LAW §§ 380-380-s (McKinney 1984 & Supp. 1988); OKLA. STAT. ANN. tit. 24, §§ 81-85 (West 1987); TEX. REV. CIV. STAT. ANN. art. 9016 (Vernon Supp. 1987).

110. See, e.g., ARIZ. REV. STAT. ANN. § 38-535 (1985); CAL. LAB. CODE § 1102.5 (West Supp. 1988); DEL. CODE ANN. tit. 29, § 5115 (1983); ILL. REV. STAT. ANN. ch. 127, para. 63B119c.1 (Smith-Hurd Supp. 1987); IND. CODE ANN. §§ 4-15-10-1 to -6 (Burns 1986 & Supp. 1987); IOWA CODE ANN. § 19A.19 (West 1978 & Supp. 1987); KAN. STAT. ANN. § 75-2973 (1986); KY. REV. STAT. ANN. §§ 61.101, .102, .103, .990 (Michie/Bobbs-Merrill 1986); LA. REV. STAT. ANN. § 30:1074.1 (West Supp. 1988); ME. REV. STAT. ANN. tit. 26, §§ 831-840 (1986 & Supp. 1987); MD. ANN. CODE art. 64A, § 12G (1986); MICH. STAT. ANN. §§ 17.428.1 to .9 (Callaghan Supp. 1987); N.H. REV. STAT. ANN. § 98-E (Supp. 1987); N.J. STAT. ANN. §§ 34:19-1 to -8 (West Supp. 1987); N.Y. LAB. LAW § 740 (McKinney Supp. 1988); OR. REV. STAT. §§ 240.316(5), 240.740 (1986); PA. STAT. ANN. tit. 43, §§ 1421-1427 (Purdon Supp. 1987); R.I. GEN. LAWS §§ 36-15-1 to -9 (1986 & Supp. 1987); TEX. REV. CIV. STAT. ANN. art. 6252-16a (Vernon 1986); UTAH CODE ANN. §§ 67-21-1 to -9 (1986); WASH. REV. CODE §§ 42.40.010, .020, .030, .050, .070 (1981); WIS. STAT. ANN. §§ 230.80, .81, .83, .85, .88 (West Supp. 1987).

111. See, e.g., CAL. LAB. CODE § 1198.5 (West Supp. 1988); CONN. GEN. STAT. ANN. §§ 31-128a to -128h (West Supp. 1988); ME. REV. STAT. ANN. tit. 26, § 631, tit. 30, §§ 664, 2257 (Supp. 1987); MICH. COMP. LAWS §§ 423.501-512 (Supp. 1987); OR. REV. STAT. § 652.750 (1987); PA. STAT. ANN. tit. 43, §§ 1321-1324 (Purdon Supp. 1987); S.D. CODIFIED LAWS ANN. § 3-6A-31 (Supp. 1986); UTAH CODE ANN. §§ 67-18-1, -18-5 (1986); VT. STAT. ANN. tit. 1, § 317(b)(1) (1985 & Supp. 1987); WIS. STAT. ANN. §§ 103.13(7)-(8) (West Supp. 1987).

112. See, e.g., CAL. LAB. CODE § 432.7(a)-(b) (West Supp. 1988); GA. CODE ANN. § 35-3-34 (1987); HAW. REV. STAT. § 831-3.1(a)-(c) (1985 & Supp. 1987); PA. STAT. ANN. tit. 18, § 9125, tit. 43, §§ 1321-1324 (Purdon 1983 & Supp. 1987); WIS. STAT. ANN. § 111.31 (West 1984 & Supp. 1987).

113. See, e.g., MD. ANN. CODE art. 100, § 95A (1985).

114. See, e.g., FLA. STAT. ANN. § 381.606 (West 1986); WIS. STAT. ANN. § 103.15 (West 1985 & Supp. 1987) (AIDS).

115. See, e.g., ALASKA STAT. §§ 18.35.300, .310, .330, .340, .342, .343 (1986); FLA. STAT. § 386.201-109 (West Supp. 1987); ME. REV. STAT. ANN. tit. 22, § 1580-A(1)-(7) (Supp. 1987); MINN. STAT. ANN. §§ 144.413-417 (West Supp. 1987); MONT. CODE ANN. §§ 50-40-103 to -107 (1987); NEB. REV. STAT. §§ 71-5703 to -5713 (1986); N.H. REV. STAT. ANN. §§ 155:51-53 (1986 & Supp. 1987); N.J. STAT. ANN. §§ 26:3D-24 to -30 (West 1987); R.I. GEN. LAWS §§ 23-20.7-2 to -7 (1986 & Supp. 1987); UTAH CODE ANN. §§ 76-10-101 to -110 (1986 & Supp. 1987); WIS. STAT. ANN. § 101.123 (West Supp. 1987).

116. See, e.g., ALASKA STAT. §§ 15.25.090, 15.56.100 (1982); ARK. STAT. ANN. § 3-1306 (1976); CAL. ELEC. CODE § 14350 (West 1977); COLO. REV. STAT. § 1-7-102 (1980); GA. CODE ANN. § 21-2-404 (1987); HAW. REV. STAT. § 11-95 (1985); WIS. STAT. ANN. § 6.76 (West 1986); WYO. STAT. § 22-2-111 (1977).

117. See, e.g., ALASKA STAT. § 39.25.160 (1987); ARK. STAT. ANN. § 83-119 (1976); CONN. GEN. STAT. ANN. § 5-266a (West Supp. 1988); HAW. REV. STAT. §§ 76-1, to -91 (1985); IDAHO CODE § 67-5311 (1980 & Supp. 1987); ILL. ANN. STAT. ch. 24 1/2, para. 38t (Smith-Hurd Supp. 1987); IOWA CODE ANN. § 19A.18 (West 1978 & Supp. 1987); KAN.

regulating the practice of fingerprinting¹¹⁸ and polygraph testing.¹¹⁹

C. *Judicial Responses*

Judicial protection of employment privacy is generally premised on constitutional, tort, or contract theories. The federal government and some states recognize a limited constitutional right to personal privacy or a right to be free from intrusion into one's private affairs.¹²⁰ Unlike the federal constitution, the states' constitutions recognize a specific privacy right.¹²¹

Tort causes of action such as invasion of privacy, defamation, false imprisonment, intentional infliction of emotional distress, negligent maintenance or disclosure of employment records, fraudulent misrepresentation, and intentional interference with contractual relations may provide employment privacy protection.

Invasion of privacy is recognized in four forms: intrusion upon one's physical solitude or seclusion,¹²² public disclosure of private facts about an individual,¹²³ publicity placing an individual in a false light before the public,¹²⁴ and appropriation of one's name or likeness.¹²⁵

STAT. ANN. § 75-2953 (1984 & Supp. 1987); KY. REV. STAT. ANN. §§ 18A.140, -145 (MichieBobbs-Merrill 1985 & Supp. 1987); ME. REV. STAT. ANN. tit. 5, § 7056 (Supp. 1987); MO. ANN. STAT. § 36.150 (Vernon Supp. 1988); N.H. REV. STAT. ANN. §§ 98:18-19 (1977); N.Y. CIV. SERV. LAW § 106 (Consol. 1982 & Supp. 1987); N.C. GEN. STAT. §§ 126-13 to -15 (1986); OR. REV. STAT. § 260.432 (1983); PA. STAT. ANN. tit. 71, § 741.904 (Purdon Supp. 1987); R.I. GEN. LAWS §§ 36-4-51 to -53 (1984); UTAH CODE ANN. § 67-19-19 (1986); W. VA. CODE § 29-6-20 (1986).

118. *See, e.g.*, CAL. LAB. CODE § 1051 (West 1971); N.Y. LAB. LAW § 201-a (McKinney 1986).

119. *See, e.g.*, ALASKA STAT. § 23.10.037 (1984); CAL. LAB. CODE § 432.2 (West Supp. 1988); CONN. GEN. STAT. § 31-51g (1987); DEL. CODE ANN. tit. 19, § 704 (1985); D.C. CODE ANN. §§ 36-801 to -803 (1981); IDAHO CODE §§ 44-903 to -904 (1977); ME. REV. STAT. ANN. tit. 32, § 7166 (Supp. 1987); MD. ANN. CODE art. 100, § 95 (1985 & Supp. 1987); MICH. COMP. LAWS ANN. §§ 37.201-208 (West 1985); MINN. STAT. ANN. §§ 181.75-.76 (West Supp. 1987); MONT. CODE ANN. §§ 39-2-303 to -304 (1987); OR. REV. STAT. §§ 659.225-227 (1983); PA. CONS. STAT. ANN. § 7321 (Purdon 1982); R.I. GEN. LAWS §§ 28-6.1-1 to -2 (1986 & Supp. 1987); VT. STAT. ANN. tit. 26, § 2901 (Supp. 1987); WASH. REV. CODE ANN. §§ 49.44.120-.130 (Supp. 1987); W. VA. CODE § 21-5-50 (1985); WIS. STAT. ANN. § 111.37 (West. Supp. 1987).

The following state statutes require licensing of polygraph examiners: ARIZ. REV. STAT. ANN. § 32-2702(A) (1986); ME. REV. STAT. ANN. tit. 32, § 7154 (Supp. 1986); MICH. COMP. LAWS § 338.1708 (1976); NEV. REV. STAT. ANN. § 648.060 (Michie 1986); N.M. STAT. ANN. § 61-26-4 (1978); TENN. CODE ANN. § 62-27-106 (1986).

120. *See, e.g.*, ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; ILL. CONST. art. I, §§ 6, 12; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

121. *Id.*

122. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 807-09 (4th ed. 1971).

123. *Id.* at 809-12.

124. *Id.* at 812-14.

125. *Id.* at 804-07.

Only public disclosure of private facts has been generally used in the employment privacy context.¹²⁶ One of the elements of this tort is a "public disclosure." This has been defined as the communication to a large number of persons of true, but embarrassing, private facts.¹²⁷ Information contained in personnel files involving performance evaluations, test scores, salary histories, and medical information constitutes such "private facts" which, if disclosed by an employer, may give rise to an action in tort.¹²⁸ Usually, an employer's communication of private facts about an employee is made to a sufficiently limited number of persons that the disclosure cannot be said to be "public."¹²⁹ However, there are indications that as employment privacy becomes more significant this tort will take on greater importance as the courts balance their willingness to expand an established cause of action with their reluctance to create a new right.¹³⁰

Defamation consists of the publication of an untrue statement that subjects a person to ridicule, hatred, or contempt.¹³¹ In the employment relationship, defamation may arise when an employer communicates false and/or malicious information about an employee. In addition, the communication of negative performance evaluations or reasons for termination may give rise to a claim for defamation.¹³² Employers are protected by a qualified privilege¹³³ which absolves them of liability when the communication is made in good faith, in response to a legitimate inquiry, and within the employment relationship's information channels.

126. See, e.g., *Quinones v. United States*, 492 F.2d 1269 (3d Cir. 1974) (release of inaccurate personnel file); *Bulkin v. Western Kraft East, Inc.*, 422 F. Supp. 437 (E.D. Pa. 1976) (negligent maintenance of employment records).

127. W. PROSSER, *supra* note 122, at 809-10.

128. See sources cited *supra* note 126.

129. See *Kobeck v. Nabisco, Inc.*, 166 Ga. App. 652, 305 S.E.2d 183 (1983) (employer's disclosure of employee's attendance record to her spouse held insufficient to establish a tort cause of action because of lack of physical intrusion).

130. See, e.g., *O'Brien v. Papa Gino's of Am.*, 780 F.2d 1067 (1st Cir. 1986) (employee's privacy rights invaded by a polygraph test). Creation of new employee privacy rights surround the debate over the abrogation of the at-will employment relationship. See generally H. PERRITT, JR., *supra* note 4.

131. W. PROSSER, *supra* note 122, at 739.

132. *But cf. Biggins v. Hanson*, 252 Cal. App. 2d 16, 59 Cal. Rptr. 897 (1967) (inter-office memo discharging employee which referred to his disloyalty, insubordination, and threat to sabotage equipment was conditionally privileged, but privilege could be lost if abused); *Wendler v. DePaul*, 346 Pa. Super. 479, 499 A.2d 1101 (1985) (negative employee performance evaluation disseminated only to employee's relation manager is not defamatory as a matter of law).

133. W. PROSSER, *supra* note 122, at 785-96.

False imprisonment protects the individual's interest in freedom from restraint of movement.¹³⁴ It may occur in the employment context when an employer or its agent restrains an employee in some way, usually to search or interrogate the employee regarding theft at the workplace.¹³⁵

Intentional infliction of emotional distress may arise in the employment context if there is an intrusion into an employee's privacy that is extremely outrageous.¹³⁶ Hence, this tort is only useful for redressing the most extreme employment privacy invasions.¹³⁷ Such a claim may arise, for example, where an employee is terminated for continuing a social relationship with another employee outside the workplace where no adverse job performance results or where there is no negative effect on the employer's business.¹³⁸

The negligent maintenance of employment records may also be important in the employment privacy context. The employer has a duty to act carefully in maintaining employment records and providing employment references, and some employees have been able to recover damages against employers who negligently disclosed inaccurate employment information to third parties.¹³⁹

The tort of fraudulent misrepresentation may arise when an employer induces an employee to act or to refrain from acting. Here, an employer could, for example, misrepresent its reasons for collecting, maintaining, using, or disclosing employment information.¹⁴⁰

Intentional interference with contractual relations may arise when the employer interferes with an employee's prospective contractual relationship. Privacy interests are affected by employer interference in matters where it has no right or interests. This has occurred, for example, when a medical staff requested a hospital board to terminate a doctor's privileges.¹⁴¹

Furthermore, public policy violations may also protect privacy interests in employment. Causes of action have been permitted for vio-

134. *Id.* at 42.

135. *See, e.g.,* Faniel v. Chesapeake & Potomac Tel. Co., 404 A.2d 147 (D.C. 1979).

136. W. PROSSER, *supra* note 122, at 55.

137. *See* Patton v. J.C. Penney Co., 75 Or. App. 638, 707 P.2d 1256 (1985), *rev'd in part*, 719 P.2d 854 (1986).

138. *But cf. id.* (employer's conduct in firing male employee for maintaining a relationship with female employee, while rude, was not "outrageous in the extreme" so as to support a claim for intentional infliction of emotional distress).

139. *See* sources cited *supra* note 126.

140. *See* Mueller v. Union Pac. R.R., 220 Neb. 742, 371 N.W.2d 732 (1985) (employee, fired after aiding railroad investigation in uncovering fraud by his supervisor, had cause of action when he relied on vice president's promise that employees would not lose their jobs if they cooperated with the investigation).

141. *See* Gordon v. Lancaster Osteopathic Hosp. Ass'n, 340 Pa. Super. 253, 260, 489 A.2d 1364, 1370 (1985).

lating a clear statutorily declared policy,¹⁴² for reporting information of unlawful or improper conduct of fellow employees,¹⁴³ and for refusing to accede to improper employer demands.¹⁴⁴

Finally, contract law may provide another arena in which to raise employment privacy concerns. These concerns may arise out of oral and written employment contracts, restrictive covenants, employment handbooks and policies, or collective bargaining agreements.

IV. AREAS OF CONCERN

A. *Employment Information Collection*

We live, inescapably, in an "information society."¹⁴⁵ Increasingly, government agencies, record-keeping organizations, and employers must join together to collect employment information.¹⁴⁶ As stated, concerns can arise in the initial collection over the accuracy of the information, in restricting the use of the collected information, and to what extent and to whom it should be disclosed.

When applying for a job, an individual must provide fairly basic personal information through the application form to assist the employer in making the hiring decision. This information may be supplemented and verified by testing, interviews, medical screening, references, and credit reviews along with a background investigation. If the individual is subsequently hired, this information is expanded to accommodate records for wages, benefits, performance evaluations, promotions, and attendance. In addition, the employer may use more sophisticated methods to collect information about the employee, in-

142. See *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979) (refusing to take a polygraph examination in state prohibiting its employment use).

143. See *Palmateer v. Int'l Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee fired for helping police investigate another employee's criminal conduct).

144. See *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (female employee fired for refusing to date her supervisor).

145. PRIVACY PROTECTION, *supra* note 69, at 5. For an in-depth discussion on the "information society," see Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089 (1969); *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971 (1975); Comment, *The Use and Abuse of Computerized Information: Striking a Balance Between Personal Privacy Interests and Organizational Information Needs*, 44 ALB. L. REV. 589 (1980).

146. PRIVACY PROTECTION, *supra* note 69, at 13-15. For example, Form EEO-1 is used by the Equal Employment Opportunities Commission (EEOC) and the Office of Federal Contract Compliance (OFCC) to obtain affirmative action information about the hiring of minorities and women. 29 C.F.R. § 1602.7 (1987).

cluding personality tests¹⁴⁷ and polygraph examinations.¹⁴⁸ Such collection methods should not be allowed to violate an employee's privacy, especially where the information received is irrelevant, confidential, or likely to be used unfairly in decision-making.

Other employment information collection tests include fingerprinting, blood tests, physical examinations, and work area surveillance. These methods can be distinguished from polygraph and personality tests in that they have generally been considered valid collection methods because their scope of inquiry is not as intrusive.¹⁴⁹ Furthermore, these methods are more concerned with collecting evidence than with compulsorily extracting incriminating facts.¹⁵⁰ For example, fingerprinting is "only a means of verifying the required information . . . [and] involves no additional intrusion into the personal lives of employees."¹⁵¹ A routine physical examination or blood test is likewise not an offensive prying.¹⁵² Photographing employees in work areas can be a reasonable employer method to improve efficiency when recording what is already public.¹⁵³

Even if the applicant is not hired, information is still created about applicants, as well as about those who become employees. Because of

147. The personality test is a broad review of an employee's personal life that measures emotional adjustment, social relations, motivation, and interests. There are two types of personality tests: the inventory measures test and the projective test. The inventory test provides an objective measure of the subject's interest in certain types of activities or of particular personality traits. It is used to predict job performance. The Minnesota Multiphasic Personality Inventory (MMPI) is a familiar example of this test. The projective test is illustrated by the Rorschach ink blot test. Comment, *supra* note 8, at 190 & n.235.

148. The polygraph examination is intended to be a truth-verification collection device. For a discussion of its operation, see *id.* at 188 n.220. While the intrusive nature and accuracy of the polygraph have been challenged, it is clear that it affronts the mental and physical dignity of employees. *Id.* As a result, it is frequently regulated or prohibited by statute. See *supra* note 119.

149. Comment, *supra* note 8, at 191 n.241 (citing Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976) (rule requiring blood and urine tests for public bus drivers after any serious accident or suspicion of intoxication is not a violation of the fourth amendment because the state had a reasonable objective in furthering public safety, and the actual conditions and the manner of the intrusion were not unreasonable); Thom v. New York Stock Exch., 306 F. Supp. 1002 (S.D.N.Y. 1969), *aff'd per curiam sub nom.* Miller v. New York Stock Exch., 427 F.2d 1074 (2d Cir.), *cert. denied*, 398 U.S. 905 (1970) (statute requiring fingerprinting of stock exchange workers held constitutional as valid exercise of police power in combatting theft in the securities industry); Thomas v. General Elec. Co., 207 F. Supp. 792 (W.D. Ky. 1962) (taking motion pictures of employees by an employer does not violate the employee's right to privacy when the purpose was to study manufacturing methods and processes); Pitcher v. Iberia Parish School Bd., 280 So. 2d 603 (La. Ct. App. 1973), *cert. denied*, 416 U.S. 904 (1974) (requirement that public schoolteachers submit to annual physical examination is reasonable)).

150. *Id.* (citing Schmerber v. California, 384 U.S. 757, 764 (1966)).

151. *Id.* (citing Thom, 306 F. Supp. at 1009).

152. *Id.* at 191-92.

153. *Id.* at 192 (citing Thomas, 207 F. Supp. at 799).

the extent of the information, entities unrelated to the employment relationship, such as governmental agencies, often consider employment records to be a valuable resource to be tapped. Confidentiality in information use and disclosure is a legitimate concern of both the applicant and employee. As a result, the employer's inquiries about applicants and employees should not become overly intrusive.

It is imperative that information be collected through reliable methods that seek to discover only employment-related facts. In providing this information, employees should be able to preserve dignity, prevent personal embarrassment, and foreclose economic harm.¹⁵⁴ They should not be required to submit to collection methods causing anxiety and humiliation similar to a criminal interrogation. Employers conducting background investigations should not interview third parties without the employee's knowledge. Requiring that the employee at least be informed of the fact of the investigation would not be a burden on the employer.¹⁵⁵ Responsibility in providing employment information, however, must be balanced with the employer's need for efficient decision-making. Statutory or court protection should safeguard employees from collection processes that are overly inquisitive and that obtain information unrelated to the employer's need for efficient decision-making.

B. Employment Information Maintenance and Internal Use

After collecting the information, the employer obviously wants to put it to use. This may involve disclosing information to supervisors who will use it in decisions concerning selection and placement, transfer, promotion, demotion, training, discipline, administration of employee benefits, and separation by involuntary or voluntary termination. In addition, employment information may need to be disclosed to the human resources department, the payroll department, or supervisory personnel. This information is a vital component in deciding what person is hired, terminated, placed, transferred, promoted, demoted, trained, or disciplined, along with what compensation and benefits are to be paid.

However, all decisionmakers do not need to review or have access to unnecessary information that is simply not essential for the particular decision they are making. It is unnecessary, for example, for a supervisor preparing a performance evaluation to review an em-

154. Reinert, Jr., *supra* note 84, at 210-11.

155. Comment, *supra* note 8, at 192.

ployee's medical and financial history.¹⁵⁶

Employees have a legitimate interest in restricting the use of information to the purpose for which the employer originally collected it. The employee normally has no right to prevent improper disclosures; in fact, the employee is usually not even aware that this might occur. Improper internal use can be minimized by requiring disclosures for "routine uses" only which should be established by the employer.¹⁵⁷ Each routine use should be evaluated depending on whether it is consistent with the purpose for which the information was collected and the decision for which it is applicable.¹⁵⁸ For example, a performance evaluation's routine use would include decisions about promotions, wages, or discipline; routine uses for medical information would include decisions about employee medical and life insurance plans.¹⁵⁹

Information access should be granted by the employer to designated personnel strictly on a need-to-know basis.¹⁶⁰ Limiting access in this way would not hinder an employer's operational efficiency. It minimizes potential employment information misuse and protects the employee.

C. *Employment Information Access*

The employee should have access to employment information. The rationale is simply stated: this personal information was first in the employee's exclusive possession. It may reveal personal details affecting the employee's potential security, dignity, and reputation. This information was generally obtained by the employer as a result of the employee's economic need to obtain employment to support himself and family.

Computer technology enables the employer to administer large volumes of employment information. Through this, employers can transfer and assemble employment information almost anywhere within microseconds.¹⁶¹ Storage capabilities prolong employment information longevity, making improper disclosure and misuse almost as permanent as the information itself.¹⁶²

To safeguard employment privacy, employers should regularly purge their records of unnecessary and out-dated employment infor-

156. *Id.* at 195. The Privacy Commission observed that "so long as there are no absolute barriers to an employer's use of its employee medical and insurance claims records . . . a privacy problem of potentially major proportions exists." PRIVACY PROTECTION, *supra* note 69, at 229.

157. Comment, *supra* note 8, at 195.

158. *Id.*

159. *Id.*

160. *Id.*

161. See Miller, *supra* note 145, at 1093-99.

162. Gerety, *supra* note 82, at 288.

mation. Likewise, employees should be granted access to the information so that they can correct and supplement it, thereby ensuring that information kept in their employment files that may be disclosed to others is accurate.¹⁶³ It would be the employee's responsibility to exercise this privilege.

The employee's concern over the accuracy or relevancy of employment information needs to be balanced against the employer's needs. The employee cannot be permitted to perpetuate fraud on an employer by failing to disclose discreditable personal information that would affect the employee's job performance or harm the employer's business. To the extent that an employee conceals personal information to mislead, the justification for according protection to this information is no better than that for permitting fraud in the sale of goods.¹⁶⁴ The employee should be required to disclose *all* information that is directly related to job performance.

D. Employment Information Disclosure to Third Parties

Internal use of employment information is a necessary function. It relates to employee wage rates, promotions, reassignments, and work performance. Disclosures to third parties are ordinarily discretionary. They primarily affect the employee's life outside of the workplace. Frequently, they involve employment references for a new job or disclosures to credit agencies. The adverse effect of negative disclosures may continue for years.¹⁶⁵ Mandatory employer disclosures to third parties include responses to subpoenas and reports required by government regulations.¹⁶⁶

While employer policy and practice has been to provide some confidentiality to employment information, whatever confidentiality exists is generally the result of employer voluntary action. Only limited statutory controls exist to preserve employment information confidentiality.¹⁶⁷ Employment information disclosure to third parties involves the unpredictability or uncertainty of the employer's goodwill and personal value system in handling the sensitive

163. Comment, *supra* note 8, at 194.

164. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 399-400 (1978).

165. The Privacy Commission summarized privacy law with respect to employment information disclosure when it stated that "[t]he confidentiality of [employee] records is maintained today solely at the discretion of the employer and can be transgressed at any time" PRIVACY PROTECTION, *supra* note 69, at 269.

166. See Murg & Maledon, *Privacy Legislation—Implications for Employers*, 3 EMPLOYEE REL. L.J. 168, 169-170 (1977).

167. See *supra* notes 94-119 and accompanying text.

information.¹⁶⁸

The employee's ability to disclose knowledge and personal information is the linchpin of privacy. This corresponds with the employee's opportunities to limit or monitor employer information disclosures about him.¹⁶⁹ Random employment information disclosures, absent an employee's knowledge or consent, should be curtailed. Employees should be granted a remedy if certain information is disclosed without their prior consent.¹⁷⁰ This could include damages, back pay, and reinstatement.¹⁷¹

E. Employee Lifestyles Inside and Outside the Workplace

Generally, an employee's private activities inside and outside the workplace are not open to employer scrutiny or regulation. The activities outside the workplace are usually within the employee's exclusive purview. The employment relationship does not make the employer guardian of the employee's personal actions. Yet, in certain areas directly affecting the employer's business affairs, the employer may attempt to regulate the employee's lifestyle.¹⁷² This may result

168. Mironi, *Confidentiality of Personnel Records: A Legal and Ethical View*, 25 LAB. L.J. 270, 275 (1974).

169. One commentator has stated:

In developed societies, the only way a person may be given the complete measure of both the sense and the fact of control is through a legal title to control Privacy is more than an absence of information abroad about ourselves; it encompasses a feeling of security in being able to control that information. By using the impersonal, public and ultimate institution of law to grant persons this control, at once the right to control is put far beyond question and at the same time indicates how seriously that right is taken.

Pipe, *Privacy: Establishing Restrictions on Government Inquiry*, 18 AM. U.L. REV. 516, 519 (1969).

170. Limitations on the employer's right to communicate truthful information about an employee to third parties might be challenged as a violation of the employer's right of free speech.

171. For example, § 158(a)(3) of the NLRA provides that an employer may not discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1982). Under the NLRA's § 160(c), the NLRB may issue a cease and desist order to the employer and may order reinstatement of employees "with or without back pay." *Id.* § 160(c). The NLRB's findings are usually accorded great weight and will be set aside only if unsupported by substantial evidence. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). A finding of reinstatement may be overturned if an employee commits criminal acts, threatens the safety of persons or property, or disrupts the operation of a business. *See, e.g., NLRB v. Apico Inns of Cal., Inc.*, 512 F.2d 1171 (9th Cir. 1975) (prior to termination, the employee, a bartender, drank while on duty, made profane remarks and lewd comments to waitresses and customers); *NLRB v. Big Three Indus. Gas & Equip. Co.*, 405 F.2d 1140 (5th Cir. 1969) (employee, a truck driver, was a habitual violator of traffic laws). Title VII of the Civil Rights Act of 1964 also contains a provision that outlaws discrimination against employees who oppose unlawful employment practices. 42 U.S.C. § 2000e-3(a) (1982).

172. *See Berger v. Battaglia*, 779 F.2d 992 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986) (police department's attempt to regulate white police officer's off-duty conduct performing as a "blackface" was offensive to the black community).

in employee disciplinary actions, including termination.

Lifestyle regulation at the workplace may concern dress and grooming standards, spousal employment, consumption of alcohol, smoking, and drug use. Outside the workplace, limits on an employee's lifestyle may be placed on the employee's social contacts, other employment opportunities that may directly conflict with the employer's business, and the type of image the employee maintains in the community.

When employee lifestyle regulation inside and outside the workplace occurs, it should be reasonable and directly related to the employee's position.¹⁷³ Regulation should occur only when the employee's lifestyle will have a definitive adverse effect on the employer's business affairs. Every limit on an employee's lifestyle inside and outside the workplace should be evaluated on its own merit.¹⁷⁴

Any attempt to regulate the employee's lifestyle should be readily justified: the reason should be easily discernible to a third party as being in the employer's business interest.¹⁷⁵ It should be harmful in that the employer will sustain financial loss absent the regulation. Mere speculation regarding impact on the employer's affairs should not suffice to permit a constraint to be placed on the employee's lifestyle.¹⁷⁶

V. CONCLUSION

The foregoing examination of employment privacy interests in hiring, at the workplace, and outside the workplace has not purported to offer the only, or necessarily the preferable, method of dealing with this increasingly important subject for the 1990's. Voluntary employer compliance is only an intermediate measure. Statutory regulation at the federal and state level will increasingly prove to be the most substantive means to confront this.

The need for thoughtful study is clear. Until the impact or viability of statutorily regulating employment privacy concerns is assessed, courts may develop case law that overburdens the judicial system by

173. See J. REDEKER, *DISCIPLINE: POLICIES AND PROCEDURES* 214-19 (1983).

174. *Id.*

175. See *Rulon-Miller v. IBM Corp.*, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (privacy invaded where no legitimate conflict of interest existed in dating employer's competitor for which employee was terminated).

176. See *Movielab, Inc.*, 50 Lab. Arb. (BNA) 632, 633 (1968) (McMahon, Arb.) (employee disciplinary action, based upon his conviction for conduct outside the employment relationship, is not a proper basis in all instances).

failing to set forth specific guidelines. This will be costly for employees, employers, and an already overtaxed judicial system.

The time is ripe for all interested parties to begin a realistic examination. Employers should no longer ignore the warning signals that forbode increased employer liability in the 1990's.