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Corporate Vice Precedents: The California Constitution and San Francisco's Worker Privacy Ordinance

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Abstract

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KEYWORDS: privacy, worker, drug testing

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I. Introduction

San Francisco enacted a Worker Privacy Ordinance in 1985 to protect the human dignity and rights of its citizens in the workplace. It was the first legislation in the country to place specific limitations on drug testing of employees. It also restricted employer regulation on off-the-job conduct that does not affect performance. This article will examine San Francisco's landmark privacy legislation, the California Constitution's express right to privacy, and their impact on drug testing in the workplace.

II. The California Constitution

In 1972, the voters of California amended the California Constitution by adding an express right to privacy to the other "inalienable" rights already enumerated in its article I, section 1.¹

The principal objectives of the amendment were set forth in the statement drafted by the proponents of the provision and included in the state's election brochure. The statement provided in part:

At present there are no effective restraints on the information activities of government and business. This amendment creates a le-

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1. CAL. CONST. art. I, § 1 provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy."

gal and enforceable right to privacy for every Californian. . . . The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose.²

Based on this "legislative history" and on the express wording of the amendment, the California Supreme Court determined that the amendment was intended to be "self-executing" and that the constitutional provision, in itself, "creates a legal and enforceable right of privacy for every Californian."³ The court went on to hold that the amendment does not prohibit all incursions into individual privacy, but rather that any such intervention must be justified by a "compelling interest."⁴

In contrast to the protections contained in the federal Constitution, the California "right to privacy" is a personal right, *not* dependent on state action, and enforceable against any person or entity that wrongfully violates a protected zone of privacy.⁵

III. Drug Testing and the Common Law

Like a stone tossed into the middle of the common law pond, the enactment of this new and extensive right caused large ripples of change to emanate in all directions. Discovery in civil cases was profoundly affected. Financial, medical, sexual and other personal information is now protected from routine inquiry by adverse parties without a compelling need for the information.⁶ A new "privacy" objection has become commonplace in depositions and in interrogatory responses to protect all sorts of other personal information that had been routinely discoverable before the amendment. More pertinent to the issue

2. *White v. Davis*, 13 Cal. 3d 757, 774, 533 P.2d 222, 223, 120 Cal. Rptr. 94, 105 (1975).

3. *Id.* at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.

4. *Id.*

5. *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 842 (1976).

6. *Moskowitz v. Superior Ct.*, 137 Cal. App. 3d 313, 187 Cal. Rptr. 4 (1982) (financial information); *Gunn v. California Employment Dev. Dep't*, 94 Cal. App. 3d 658, 156 Cal. Rptr. 584 (1979) (medical information); *Fults v. Superior Ct.*, 88 Cal. App. 3d 899, 152 Cal. Rptr. 210 (1979) (sexual information); *Britt v. Superior Ct.*, 20 Cal. 3d 844, 143 Cal. Rptr. 695 (1978) (associations).

of drug testing has been the development of several new torts based on invasions of privacy.⁷ The two most significant of these new private causes of action involve claims for the public disclosure of true but embarrassing private facts⁸ and claims for "intrusion." An unreasonably intrusive investigation is a tort in California.⁹ Both of these causes of action would be available against an employer under appropriate circumstances.

IV. Invasion of Privacy

The California Constitution's "right to privacy" is applicable in both the public and private workplace.¹⁰ The California Supreme Court has recently held that "a public sector employee, like any other citizen, is born with a constitutional right of privacy" and cannot be said to have waived that right in return for the privilege of employment unless the government demonstrates a "compelling need."¹¹ In order to satisfy that condition the government must demonstrate that: (1) the condition reasonably relates to the purposes of the legislation; (2) the value accruing to the public from the conditions imposed manifestly outweighs any resulting impairment of the constitutional right; and (3) there are no available alternative means less offensive to the constitutional right.¹² A similar standard should apply in the private sector when the right to privacy is implicated.

7. Four different invasion of privacy torts have been recognized: false light, disclosure of embarrassing private facts, misappropriation, and intrusion. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979). See also Heinke, *Sorting Out The Four Invasion of Privacy Torts*, CAL. LAWYER, Mar. 1982, at 50.

8. See, e.g., *Payton v. City of Santa Clara*, 132 Cal. App. 3d 152, 183 Cal. Rptr. 17 (1982), upholding claim for invasion of privacy where city posted a notice of employee's termination and reasons therefore in city employee workroom. See also *Sipple v. Chronicle Pub. Co.*, 154 Cal. App. 3d 1040, 201 Cal. Rptr. 665 (1984).

9. *Noble v. Sears Roebuck & Co.*, 33 Cal. App. 3d 645, 109 Cal. Rptr. 269 (1973).

10. See *Long Beach City Employees Ass'n v. City of Long Beach*, 41 Cal. 2d 937, 719 P.2d 660, 227 Cal. Rptr. 90 (1986); *Rulon-Miller v. I.B.M.*, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984).

11. *Long Beach City Employees Ass'n*, 41 Cal. 3d at 937, 719 P.2d at 660, 227 Cal. Rptr. at 90.

12. *Id.* (Bird, J., concurring); *Robbins v. Superior Ct.*, 38 Cal. 3d 199, 213, 695 P.2d 695, 704, 211 Cal. Rptr. 398, 407 (1985); *Bagley v. Washington Township Hosp. Dist.*, 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966).

The requirement of no "less intrusive means" may be considered as one component of the test to determine whether a "compelling interest" exists, or may be viewed as a separate standard altogether. Regardless, this requirement presents an almost insurmountable obstacle to body fluid sampling in most instances where the purpose is to determine whether workers can perform their job safely.

Three of the most obvious problems with drug testing, aside from very serious and legitimate concerns about accuracy,¹³ are that: (1) it does not distinguish between drug use during work hours and drug use on an employee's private time; (2) the tests reveal much more personal, medical and biological information about the employee than the employer has any conceivable right to know; and (3) the tests do not indicate impairment but simply past drug use.¹⁴ Any of these three considerations should be fatal to a proper legal analysis of urine testing because of the availability of more specific, more accurate and less intrusive tests to discern impairment. Urine testing, moreover, is an extraordinarily inefficient way to prevent accidents, if that is truly the concern, because you must wait several days or weeks for results.

Any employer genuinely interested in determining whether an employee is impaired or incapable of performing a specific task can administer a reflex or response time test, a short-term memory test, a test of hand-eye coordination or any other physical or mechanical test which simulates the actual job or specifically evaluates those skills necessary to perform the job safely. A variety of video arcade games are probably better suited to test for impairment than a urine test. The true benefit of these contemporaneous and more exact tests is that they allow the employer to take action before the accident happens.

Many employers justify drug tests based on their alleged deterrent effect. Despite the honorable intentions, deterring conduct which they have no reason to believe will occur or desiring to enforce a certain morality on their employees' off-the-job conduct can never constitute the "compelling interest" necessary to justify such a gross violation of the bodies of employees who are not even suspected of using drugs.

Other employers cite the illegality of certain substances to justify

13. See Hansen, Caudill, & Boone, *Crisis in Drug Testing*, 253 J. A.M.A. 2382 (1985); Morgan, *Problems of Mass Urine Screening for Misused Drugs*, J. OF PSYCHOACTIVE DRUGS, Oct-Dec. 1984, at 305.

14. In his article, Dr. John P. Morgan states: "[U]rine screening is a probe to identify deviance, not dysfunction — a technique to investigate humans, not accidents." See Morgan, *supra* note 13, at 306.

drug tests. Safety is a legitimate interest of an employer; enforcing the penal code against employees' off-the-job activities is not. In the United States, the penal code is enforced by the state pursuant to the constitutional guarantees which distinguish our society from a totalitarian state. Corporate vigilantes are no less repugnant to our system than are lynch mobs.

V. Other Common Law Remedies

California employees have a variety of additional possible remedies for unlawful invasions of their privacy by their employers.

A violation of an employee's right to privacy can make an employer liable for intentional infliction of emotional distress. In *Rulon-Miller v. I.B.M.*,¹⁵ a judgment for intentional infliction of emotional distress was affirmed where I.B.M. terminated a successful female manager for dating a competitor. The *Rulon-Miller* court made it clear that California citizens do not surrender their right to privacy in the workplace:

As we earlier noted the right of privacy is unquestionably a fundamental interest of our society. . . . It is guaranteed to all people by article 1, section 1 of the State constitution. So the question is whether the invasion of plaintiff's privacy rights by her employer in the setting of this case constitutes extreme and outrageous conduct.¹⁶

The right to privacy has also been held to be a proper "factor" for the jury to consider when determining whether the employer has tortiously breached the implied covenant of good faith and fair dealing which exists in every employment contract.¹⁷

The express recognition of privacy as a "fundamental interest of our society" should also permit the right to privacy to serve as the public policy necessary to support a classic wrongful termination action.¹⁸

15. 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984).

16. *Id.* at 255.

17. *Id.* at 252 n.6.

18. California courts have begun distinguishing between the various causes of action once collectively referred to as "wrongful termination." The classic "wrongful termination" tort is premised on a discharge in violation of public policy. See *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1220, 164 Cal. Rptr. 839 (1980); *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982).

Under proper factual settings employees could bring actions for negligence against those entities involved in the specimen collection or testing. Defamation actions would also be available for the publication of inaccurate results in certain situations.

VI. The San Francisco Ordinance

On November 19, 1985, the San Francisco Board of Supervisors became the first legislative body in the country to enact legislation expressly extending the right of privacy to the workplace.¹⁹ The stated purpose of the ordinance was "to protect employees against unreasonable inquiry and investigation into the off-the-job conduct, associations, and activities not directly related to the actual performance of job responsibilities."

The sponsor of the legislation, Supervisor Bill Maher, cited escalating "incidents of invasion of privacy and firings in the private workforce" as the motivation for the legislation.²⁰ Maher specifically referred to the cases of a female executive at I.B.M. being fired for socializing with a competitor²¹ and of a pregnant employee of the Southern Pacific Transportation Company being fired for refusing to give a urine sample without notice or cause²² as the types of employer abuses creating the need for such legislation. In his press release announcing the new Worker Privacy Ordinance, Maher said:

The kinds of incidents we are seeing all over the country remind me more of the Soviet Union than the United States. . . . What we want to say is that businesses which operate in San Francisco should treat their employees as adults, who are free to conduct their personal lives without interference from the company so long as it does not interfere with productivity.²³

19. The entire ordinance is set forth in the Appendix to this article.

20. Bill Maher, *Maher Introduces Ordinances To Protect Workers' Privacy* (press release of Board of Supervisors, City and County of San Francisco, Sept. 30, 1985).

21. *Rulon-Miller*, 162 Cal. App. 3d at 241, 208 Cal. Rptr. at 524.

22. *Luck v. Southern Pac. Transp. Co.*, Case No. C84-3-230 (Cal. Super Ct., San Francisco, filed 1984).

23. Maher, *supra* note 20.

A. *Public Policy*

The ordinance begins with a bold pronouncement of "public policy":

It is the public policy of the City and County of San Francisco that all citizens enjoy the full benefit of the right to privacy in the workplace guaranteed to them by Article 1, Section 1 of the California Constitution. It is the purpose of this Article to protect employees against unreasonable inquiry and investigation into off-the-job conduct, associations and activities not directly related to the actual performance of job responsibilities.²⁴

The obvious significance of this pronouncement is that it states a "public policy" which can be relied on by employees in wrongful termination actions if they have been victims of invasions of privacy not specifically addressed in the two substantive sections of the ordinance.

B. *Interference in Off-The-Job Conduct*

The first substantive section of the ordinance deals with the broad issue of employer regulation of off-the-job conduct. It prohibits employers from limiting their employees' right to engage in personal relationships, organizations, activities or otherwise restricting their freedom of association unless the activities have a "direct and actual" impact on the employees' ability to perform assigned responsibilities.²⁵ Employers must be capable of demonstrating an actual impact on performance, rather than rely on what might occur, before they can take action.

Requiring an actual impact on performance serves several purposes. The first and most important is that it sets a concrete standard on which both employers and employees can rely. If employers know in advance that they can act only if performance is impaired, it should prevent them from taking improper and irreparable actions that can never be adequately remedied years later in the courts. Second, it is a standard which can be "objectively" evaluated, as opposed to trying to evaluate such amorphous complaints as "an appearance of a conflict," where no actual conflict exists,²⁶ or the mere "potential" future impact

24. See appendix at § 3300 A.1.

25. The ordinance does not prohibit employers from enforcing rules against actual financial "conflicts of interest."

26. This has been discussed and rejected in *Rulon-Miller*, 162 Cal. App. 3d at

on performance, when the employee is presently fully performing the requirements of the job.

Finally, the requirement of a direct and actual impact on performance is the only logical standard if any consideration is to be given to the privacy rights of the employees. A standard that permits employers to control employees' off-the-job conduct based on the mere potential of harm to performance eviscerates the "right to privacy" and leads to absurd and undesirable results. No one can question the potential effect of fatigue on the ability to perform certain functions. Should employers be able to monitor the times that their employees go to sleep? Recent studies show that marital stress has a negative impact on the immune system. It certainly cannot be disputed that serious personal problems can preoccupy employees and distract them from paying full attention to their tasks. Should that potential permit an employer to investigate and control an employee's marriage? Of course not. The ordinance eliminates these problems by establishing that an employer is entitled only to performance, and that the payment of eight hours worth of wages does not buy heart, soul and twenty-four hours worth of control.

C. *Drug Testing*

The drug testing section of the ordinance attempts to balance the interests of the employer, the employee, and the public. It converts the general protections of the California Constitution into specific guidelines for the workplace. The Constitution, as discussed earlier, prohibits the involuntary invasion of employees' bodies without a compelling interest. The ordinance makes a partly legal, partly policy determination by establishing "physical safety" as the only circumstance considered compelling enough to justify violating the integrity of an employee's body. The ability of an individual to protect the integrity of his or her body against violations by others is more than a constitutional or civil right — it is a fundamental human right. The ordinance only prohibits exceptionally invasive "methods" — blood, urine and encephalographic testing. It does not limit "field sobriety" tests or other non-invasive tests or inquiries.

Once an employee has joined a company, the employer may test body fluids or brainwaves only if:

251 n.5, 208 Cal. Rptr. at 531 n.5. As the court there properly recognized, "[i]ndeed, the import of the argument is that rumor or an unfounded allegation, could serve as a basis for the termination of the employee."

- (1) the employer has reasonable grounds to believe that an employee's faculties are impaired on the job; and
- (2) the employee is in a position where such impairment presents a clear and present danger to the physical safety of the employee, another employee or to a member of the public; and
- (3) the employer provides the employee, at the employer's expense, the opportunity to have the sample tested at an independent laboratory and provides the employee with a reasonable opportunity to rebut or explain the results.²⁷

Thus, under the ordinance, the only employees who would ever be subjected to drug testing are those involved in jobs where safety is a true concern. The requirement of a "clear and present danger to physical safety" was included to require a certain immediacy to the danger, and to avoid attenuated, Rube Goldberg-inspired arguments, such as speculation on the possible dire consequences of a typographical error, or other essentially clerical tasks.

The requirement that the employer have reason to believe that the person is impaired on the job, aside from providing the constitutionally required "reasonable suspicion,"²⁸ serves to establish the employer's legitimate interest in testing. Although off-the-job drug use may indicate an underlying abuse problem and may lead to future problems with performance, those concerns are speculative. As discussed earlier, it would be absurd to permit employers to regulate any aspect of an individual's off-the-job conduct which merely had the potential to affect performance.

The ordinance specifically prohibits random or company-wide testing. Random testing, or testing without a reasonable suspicion, has already been held to be unconstitutional in most settings by those courts that have considered the matter.²⁹ Random testing of American citizens, without cause, is repugnant to the fundamental precepts of our

27. The greatest protection an employee can have against inaccurate results is to have part of the original sample preserved for testing by a reputable laboratory.

28. See, e.g., *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986); *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985), *modified*, 809 F.2d 1302 (8th Cir. 1987); *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380 (E.D. La. 1986).

29. See, e.g., *Jones*, 628 F. Supp. at 1500; *McDonell*, 612 F. Supp. at 1122; *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985); *Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976). *Contra*, *Shoemaker v. Handel*, 608 F. Supp. 1151 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 577 (1986).

constitutional system. It reverses the "presumption of innocence" and requires the majority of workers, who are not impaired at work and who do not use drugs, to humiliate themselves and play Russian roulette with their lives and careers.

There are several exemptions from the ordinances. First, members of the city's uniformed emergency services, such as police, firefighters and emergency service vehicle operators are exempt from the ordinance. However, the California Supreme Court, in a strongly worded privacy decision, found that the use of lie detectors on public employees "intruded upon the employee's constitutionally protected zone of privacy," and definitively held that the mere status of being employed by the government should not compel a citizen to forfeit his or her fundamental right of privacy; a compelling interest, the court ruled, is required before such testing can be done on public employees.³⁰ Moreover, their status as public employees confers upon these individuals the privacy and due process protections of the federal Constitution as well. Thus, the exemption of these categories of employees from the protections of the ordinance is relatively insignificant.

An additional exemption from the ordinance applies to employees who are covered by collective bargaining agreements that contain drug testing programs. The ordinance does not supercede any bargained for testing program.³¹

Finally, for reasons more political than legal, the ordinance does not expressly prohibit pre-employment drug screening. The prior sections of the ordinance and the California Constitution, however, certainly provide some protection in those situations since employers hardly have a "compelling" interest in knowing about an applicant's activities, not only off-the-job, but before the job even begins. Nevertheless, the legal analysis of a job applicant's case does present differ-

30. *Long Beach City Employees Ass'n*, 41 Cal. 3d at 937, 719 P.2d at 660, 227 Cal. Rptr. at 90.

31. A question arose as to the applicability of the ordinance to San Francisco's professional baseball and football teams. The City Attorney issued an opinion concluding that the ordinance did not apply to the San Francisco 49ers Football Club because the collective bargaining agreement between the league and players contained a drug testing program. The ordinance was held applicable to the San Francisco Giants Baseball Club, however, because that collective bargaining agreement did not contain any such program. The ruling effectively invalidated the "drug testing" clauses the team inserted into individually negotiated contracts as part of Commissioner Ueberroth's unsuccessful attempt to circumvent the union. City Attorney Opinion No. 86-04, March 18, 1986.

ent considerations, since it is more susceptible to a voluntary waiver argument than is the case of an employee being threatened with the loss of a job and career.

The ordinance expressly permits employers to conduct medical screening, with the employee's consent, for exposure to toxic or other unhealthful substances. It also expressly reaffirms an employer's right to prohibit the use of intoxicating substances during work hours and to discipline employees for being under the influence of intoxicating substances during work hours.

D. Enforcement

The ordinance contains meaningful enforcement provisions. It permits any aggrieved person to bring a civil action for special and general damages together with attorney's fees and costs. The ordinance also permits the City Attorney or any other person or entity who will fairly and adequately represent the interests of a protected class to bring an action for injunctive relief.

VII. Conclusion

In 1928, Justice Brandeis described privacy as the "right most valued by civilized men."³² In 1986, the President of the United States advocated the compelled relinquishment of that right as a condition of employment in the "land of opportunity."

Despite numerous court rulings explicitly holding that testing without cause is unconstitutional and essentially un-American, politicians concerned primarily with public opinion and employers concerned only with profit continue to use economic coercion to compel hard working and law abiding Americans to surrender dominion over their bodies.

It has become evident that the business community cannot be relied upon to respect the privacy rights of their employees in the absence of definitive case law or statutory prohibitions.

The San Francisco ordinance represents a balanced approach to the issue. It protects the legitimate privacy rights of workers by requiring that employers have a "compelling interest" before body fluid sam-

32. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In 1967, *Olmstead* was overruled by *Katz v. United States*, 389 U.S. 347 (1967), which relied significantly on Justice Brandeis' dissent in *Olmstead*.

ples can be compelled. More importantly, it requires individualized suspicion and a real concern for safety. Finally, it makes clear that employers have no legitimate interest in regulating the off-the-job conduct of employees that does not impact performance.

The San Francisco ordinance has received widespread popular support and has served as the catalyst for proposed legislation in other jurisdictions as human beings are forced to resort to the political process to reclaim dominion over their personal lives and bodies.