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2006

## Privacy Issues Affecting Employers, Employees, and Labor Organizations

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### Recommended Citation

Charles B. Craver, Privacy Issues Affecting Employers, Employees, and Labor Organizations, 66 La. L. Rev. 1057 (2006).

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# **PRIVACY ISSUES AFFECTING EMPLOYERS, EMPLOYEES, AND LABOR ORGANIZATIONS\***

By Charles B. Craver\*\*

## **INTRODUCTION**

Thirty years ago, I wrote an article which dealt in part with privacy questions arising in employment environments.<sup>1</sup> I discussed the right of employers to search employees, their possessions, and their lockers. I explored employer monitoring of workers through direct supervisory observation and through the use of closed-circuit television cameras. I also examined the frequent administration of polygraph tests in employment settings. It is difficult to comprehend the employment environment changes and the technological developments that have occurred since the publication of that article.

Since private employers are not formally constrained by constitutional provisions due to the absence of state involvement, I discussed the ways in which labor arbitrators treated alleged privacy invasions under collective bargaining agreements. When I published that article in 1977, 22.6 percent of nonagricultural workers were labor union members.<sup>2</sup> This meant that almost one-quarter of private sector employees enjoyed contractual protection against disciplinary actions that did not constitute “just cause” or that were based upon improper employer privacy invasions. Nonunion firms often followed similar practices to discourage their own workers from contemplating unionization. Over the past thirty years, the union membership rate has declined from 22.6 percent to 7.8 percent.<sup>3</sup> Over ninety percent of private sector personnel no longer enjoy the privacy protections afforded by collective bargaining relationships. Under common law doctrines, they constitute “at-will” employees who can be terminated by their employers at any time for good cause, bad cause, or no cause.<sup>4</sup> As a result, they must rely entirely upon legislative

and judicial doctrines to provide them with protection against unreasonable employer activities.

Almost every contemporary employment setting provides employees with access to e-mail and the Internet. These developments allow workers to communicate with each other electronically, and to reach – and be reached by – parties from around the world. Employees can easily contact union organizers, and outside organizers can communicate directly with them. To what extent may firms limit such worker-to-worker or worker-to-organizer communications?

Workers can easily access millions of Internet sites. While most of these are benign, some are offensive to business firms concerned about their public images. May employers restrict non-business-related employee use of e-mail systems or limit their right to access Internet sites company officials find offensive? How can firms prevent the improper dissemination of trade secrets or other confidential information through these electronic media? Workers often wish to know whether they are being treated the same as other similarly situated employees, and they compare their compensation packages. May employers discipline individuals who share such personal and confidential information with others?

Years ago, employers could ask job applicants and current employees about their medical histories, and they could condition employment upon the satisfactory completion of pre-hire medical examinations. Although the Americans with Disabilities Act restricts some of these intrusive measures,<sup>5</sup> employers may still require individuals to submit to general medical examinations after they have been offered employment. If they discover latent conditions or genetic predispositions to possibly disabling maladies, may they refuse to employ such persons? Can they use other methods to determine which job applicants might be dishonest or may possess undesirable personality traits?

Once a majority of workers in appropriate bargaining units select labor organizations to be their exclusive bargaining agents under the National Labor Relations Act (N.L.R.A.), those unions have the right to negotiate on their behalf with respect to wages, hours, and working conditions. When union officials need confidential employer information to help them negotiate new agreements or to administer existing contracts, they may generally obtain access to that information. What if the employer declines to provide them with the requested information because it would divulge corporate secrets or would contravene the privacy rights of employees or third parties such as customers who have complained about poor employee service?

Privacy-related concerns arise regularly in employment settings. Employers assert private property rights to restrict the organizing activities of both employees and non-employee union organizers. They also assert privacy claims when representative labor organizations request access to confidential company financial records or similarly privileged information. On the other hand, employers frequently discount employee privacy claims when they monitor worker activities through closed-circuit television cameras and access to employee e-mail exchanges and Internet activities. Firms similarly ignore worker privacy interests when they conduct expansive pre-employment medical examinations and administer tests that purport to measure applicant honesty and other personality traits.

This article will explore these interesting privacy issues in twenty-first century employment settings. Part I will consider employer reliance upon privacy interests to restrict employee and union organizing activities. To what extent may companies limit these rights? Although representative unions possess the statutory right to seek access to confidential firm data or private employee information that is relevant to the negotiation of bargaining agreements and

the administration of those contracts, employers often counter union requests with claims of confidentiality. When are firm or employee privacy rights likely to outweigh labor organization bargaining interests?

In Part II, we will consider the degree to which employers may disregard worker privacy interests when they wish to obtain information of a confidential nature. How can managers visually or electronically monitor worker job performance or their protected concerted activities? When can companies access employee e-mail exchanges or Internet activities? When may employers require job applicants or current employees to submit to medical examinations, answer personal medical questions, or take polygraph or paper-and-pencil tests that purport to measure individual honesty or personality traits?

## **I. EMPLOYER RELIANCE UPON ITS OWN PRIVACY INTERESTS**

Section 7 of the National Labor Relations Act (N.L.R.A.),<sup>6</sup> guarantees employees the right to form, join, and assist labor organizations, to engage in concerted activity for mutual aid or protection, and to select exclusive bargaining agents to negotiate on their behalf with respect to wages, hours, and employment conditions.<sup>7</sup> Unrepresented workers who contemplate unionization must generally communicate with union organizers and among themselves. Individuals supporting collectivization distribute literature explaining the benefits of unionization, and they solicit employee signatures on authorization cards empowering the named labor organizations to bargain on their behalf. If a majority of workers in appropriate units of employees sharing communities of interest execute authorization cards, the designated unions may request voluntary recognition and exclusive bargaining rights from the relevant employers. Employers generally reject such requests, requiring the labor organizations to petition the

National Labor Relations Board (“Labor Board”) for representation elections.<sup>8</sup>

*A. Traditional No-Solicitation/No-Distribution Restrictions*

Employees may not spend their work days handing out union literature or soliciting authorization card signatures. Employers have the right to restrict these activities to enable workers to perform their expected job tasks. The Labor Board and the courts have sought to balance the reasonable expectations of employers against the concerted activity rights of individuals expected to fulfill their job duties. Firms may thus prohibit all employee literature distribution and authorization card solicitation during work time, but not during non-work time.<sup>9</sup> To avoid litter problems, companies may also limit non-work time literature distribution to non-work areas of their facilities.<sup>10</sup>

Retail stores are permitted to impose additional restrictions banning all employee solicitation and literature distribution at any time in the selling areas to preclude interference with customers.<sup>11</sup> The interest stores have in maintaining beneficial relationships with customers outweighs the right of workers to engage in concerted activity during their non-work time in the areas open to prospective buyers. Different considerations have been relied upon to allow health care institutions to restrict non-work time distribution and solicitation in areas of immediate patient care, including areas in which such individuals receive treatment.<sup>12</sup> This privileged extension of no-solicitation/no-distribution rules is based upon the privacy interests of patients who might be adversely affected by worker organizing activities in patient care areas. When retail stores and health care providers take advantage of their right to establish privileged no-solicitation/no-distribution rules to protect customer relationships or patient privacy, they must comply with their own privileged rules. If they fail to do so, the Labor Board generally finds it

impermissible to enforce such privileged prohibitions against employees while the employers ignore their own rules and undermine their professed need for such special rules.<sup>13</sup>

Must employers that establish conventional rules banning employee solicitation and distribution during work time comply with their own rules and refrain from anti-union proselytizing during these same periods? Since the workers are on company premises and are being paid to do what their employers tell them to do, it is permissible for firms to contravene their own employee rules and engage in their own solicitation during work time.<sup>14</sup> Only where there is a significant imbalance in communication opportunities by workers might employers proselytizing during work time be required to open other communication channels to their employees.

Employers may also call workers together in massed assemblages during work time and make “captive audience” speeches expressing their anti-union sentiments. The workers must listen to these presentations, and firms are not obliged to allow union supporters to respond unless they have overly broad no-solicitation/no-distribution rules that unfairly – and unlawfully – create significant communication imbalances.<sup>15</sup> The Labor Board may similarly require employers to provide union supporters with additional communication opportunities when they engage in anti-union activities during work time in facilities in which they have established privileged no-solicitation/no-distribution rules pertaining to selling areas of retail stores or patient care areas of health care facilities, even when the employer activities take place away from the selling areas or patient care locations, based upon the communication imbalances created by these extra broad rules.<sup>16</sup>

When non-employee union organizers attempt to contact employees at work, companies

assert private property interests to limit their access. In *NLRB v. Babcock & Wilcox Co.*,<sup>17</sup> the Supreme Court acknowledged the sacrosanct nature of private property rights when it severely limited the ability of non-employee organizers to obtain access to employer premises. The private property interests of firms would only have to yield to the Section 7 collective action rights of workers where there were no external communication channels through which organizers could contact target employees. Since union organizers can use external organizational meetings, home visits, telephone calls, and direct mailings to reach most workers, rarely do the concerted rights of employees outweigh the private property rights of employers.

In *Jean Country*,<sup>18</sup> the Labor Board recognized that the traditional *Babcock & Wilcox* approach, which was developed for private production facilities not open to the general public, should not be automatically extended to retail establishments open to prospective customers. The Board thus decided to establish a three-part balancing test:

[I]n all access cases out essential concern will be [1] the degree of impairment of the § 7 right if access should be denied, as it balances against [2] the degree of impairment of the private property right if access should be granted. We view the consideration of [3] the availability of reasonably effective alternative means [of communication] as especially significant in this balancing process.<sup>19</sup>

Under *Jean Country*, the Board would first balance the asserted private property interests of the employer against the significance of the Section 7 right being sought to be advanced by union organizers. Where such areas as store parking lots were open to the general public and fundamental organizing efforts were involved, the balance would favor limited non-employee organizer access to parking lot premises – despite the fact there might be external communication channels through which union agents could contact target employees. The Labor Board believed that businesses that had public parking lots did not have the same privacy interests as firms that



did not allow non-company personnel to enter their premises.

The Labor Board's *Jean Country* decision constituted a modest modification of the traditional *Babcock & Wilcox* test and reasonably reflected the transformation of the American economy from mass production to retail and service. It also recognized the critical fact that the premises firms sought to protect involved parking lots open to the general public. Despite the fact this statutory interpretation seemed to constitute a reasonable interpretation of Section 7, a conservative Supreme Court majority decided not to provide the Labor Board with the traditional judicial deference given to administrative agencies<sup>20</sup> In *Lechmere, Inc. v. NLRB*,<sup>21</sup> the Court held that the Labor Board was not authorized to alter the standard it had previously articulated in *Babcock & Wilcox*. The Justices implicitly recognized that the limited private property rights associated with parking lots open to the general public outweighed the statutorily protected organizational rights of employees.

#### B. *Employer Restrictions on Other Forms of Employee Communication*

Businesses cite privacy concerns to limit other forms of employee-to-employee communication. They frequently try to prevent workers from exchanging organizing messages with coworkers or outside organizers via e-mail systems or through Internet sites. They maintain that these restrictions are necessary to preserve the privacy of employer-provided computers. If they limit the use of e-mail and Internet access to firm business, they would probably be safe. On the other hand, if they allow workers to use e-mail systems for personal use – such as communicating with friends and family members – they may not discriminatorily preclude employee communications with other workers or union organizers pertaining to concerted activities.<sup>22</sup> Nonetheless, a number of employees have told me they are forbidden by their

employers to use company e-mail systems to communicate with each other or with outside organizations concerning union issues.

Some labor unions have begun to appreciate the organizing potential represented by e-mail transmissions and Internet sites.<sup>23</sup> They can use mass mailings to reach all of the employees of target firms, and they can encourage the workers at those companies to communicate among themselves with respect to union organizing issues. They can establish Internet sites that explain the legal rights of employees and the potential benefits of union representation. If firms allow employees access to Internet sites for personal reasons, they cannot forbid them access to union-established sites. Such discriminatory policies would contravene the N.L.R.A.

Businesses cite privacy interests to limit employee discussions of other issues that do not directly involve organizational activities. For example, many prohibit workers from sharing information pertaining to compensation levels, and they discipline employees who discuss such “confidential” information. The Labor Board has recognized that workers have the statutorily protected right to exchange such information for mutual aid and protection.<sup>24</sup> Workers may understandably wish to be sure they are being treated fairly compared to their similarly situated colleagues, and they may ask each other about their respective salaries and pay increases.<sup>25</sup>

Employees may also be concerned about possible discrimination prohibited by state and federal civil rights laws. Employers that fail to provide female employees with compensation equal to that paid to male employees performing substantially equal work would violate the Equal Pay Act.<sup>26</sup> Intentional pay differentials based upon race, color, religion, sex, or national origin would also contravene Section 703 of Title VII of the Civil Rights Act of 1964.<sup>27</sup>

Businesses may not rely upon alleged privacy interests to prevent employees from ascertaining

whether they are being discriminatorily underpaid.

Section 704(a) of Title VII<sup>28</sup> makes it unlawful for employers to discriminate against individuals who oppose what they reasonably think may be discriminatory employment practices. If workers are disciplined because they share private compensation information with each other to be sure they are not being treated discriminatorily, they would probably enjoy protection under that provision. Similar protection would probably be available under Section 15(a)(3) of the Fair Labor Standards Act (F.L.S.A.)<sup>29</sup> for workers who exchange information to see if they are being denied equal pay for equal work in violation of the Equal Pay Act portion of the F.L.S.A. Although that provision is expressly limited to discrimination against individuals who have filed charges or participated in enforcement proceedings, most courts have appropriately held that protection should be afforded to persons who have not engaged in such formal actions but who have otherwise protested what they thought were Equal Pay Act violations.<sup>30</sup>

### *C. Employer Compliance with Union Requests for Company Information*

When a majority of employees in appropriate units select exclusive bargaining agents, those unions are authorized to negotiate on their behalf with respect to their wages, hours, and working conditions. Once collective contracts have been achieved, those representatives have the right to process grievances that question the manner in which employers have applied particular contractual provisions. During both the general collective bargaining process and the contract administration process, union representatives frequently request access to information possessed by corporate officials. The failure to comply with requests for such information may contravene Section 8(a)(5),<sup>31</sup> constituting breaches of the duty to bargain in good faith.

Employers regularly object to union requests for company records on the ground they

pertain to information of a private nature. During the actual bargaining process, firms must provide data relating to wages, job classifications, hours, and working conditions to enable representative unions to decide what to discuss.<sup>32</sup> Although they generally do not have to disclose confidential financial records, if company bargainers use an inability-to-pay assertion to counter union demands for wage or benefit increases, they may be obliged to comply with union requests for sufficient disclosure to support these financial incapacity claims.

Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim.<sup>33</sup>

During the life of existing agreements, union representatives may request company information to enable them to decide whether and how to process employee grievances.<sup>34</sup> Although they may not have to provide this information in the exact form requested, they do have to give the union sufficient information to satisfy their representational needs.<sup>35</sup> If significant confidentiality issues are involved, employers may demand that union representatives execute appropriate confidentiality pledges.<sup>36</sup>

On other occasions, firms resist union requests for information based upon other privacy considerations. For example, *Detroit Edison Co. v. NLRB*,<sup>37</sup> involved an employer that used psychological aptitude tests to determine individual job capabilities. After workers filed grievances challenging certain promotional decisions, the union sought both the test questions and answers and the test scores of individual employees. Detroit Edison refused to disclose the test questions and answers except to a qualified psychologist who would be ethically obligated to

preserve their confidentiality. Since this approach would have provided the union with the information it needed while also protecting reasonable company interests, this was found to constitute an appropriate response to the union's request.<sup>38</sup> The company also refused to release the test scores of individual employees without their express consent to preserve their privacy expectations, and the Court found this condition to be appropriate.<sup>39</sup> It is interesting to note that while Detroit Edison did not hesitate to administer psychological tests that invaded the individual privacy interests of its employees, it relied upon the same employee privacy interests to restrict union access to the resulting test scores.

If employers are able to establish other substantial concerns with respect to union requests for confidential information, company refusals to disclose such information may be excused. For example, if firms have been using confidential informants to discover unlawful worker drug usage, they may refuse to divulge the identities of the under cover operatives.<sup>40</sup> The need for employers to protect the identities of its informants outweighs the union desire to obtain that information. Similarly, when labor organizations seek the names of individuals being employed as strider replacements during labor disputes, employers can refuse to supply that information if they reasonably fear for the safety of the replacement personnel.<sup>41</sup>

## **II. EMPLOYER DISCOUNTING OF WORKER PRIVACY INTERESTS**

### *A. Monitoring Employee Work, E-Mail Communications, and Internet Activities*

Company managers have the right to watch regular employees to be sure they are performing their assigned job tasks and are not engaging in impermissible conduct during their work time. On the other hand, if managers engage in surveillance of protected concerted activities during the non-work time of employees, their employers will be subject to unfair labor

practice liability.<sup>42</sup> Firms will similarly be found in violation of the N.L.R.A. if they induce or encourage rank-and-file employees to spy upon the protected activities of their coworkers.

Businesses appreciate the fact that supervisors cannot personally monitor the activities of their workers at all times, and they often use electronic devices to facilitate this process. Many companies have installed closed-circuit television cameras to enable managers to observe different areas simultaneously. These may cover work areas and non-work areas that are open to public scrutiny such as general production and service spaces, corridors, and parking lots. Since employees do not have any reasonable expectation of privacy while they are working or walking in these public areas, these monitoring activities do not contravene their basic rights. Only when such cameras are surreptitiously placed in areas like locker rooms or lavatories without employee notification are courts likely to find impermissible invasions of individual privacy interests. In addition, if cameras or microphones are used to spy upon the protected organizational activities of employees during their non-work time, unfair practice liability is likely to attach.<sup>43</sup>

When firms use cameras to monitor open areas of their facilities, they should notify workers of the fact they are subject to electronic observation. Such disclosures would be unlikely to undermine company use of this practice to keep track of personnel work habits and to look for rule violations, and they would serve two important functions. First, they would minimize the possibility of privacy invasion claims, because workers would know that they are subject to monitoring in open areas. Second, such notices would deter misconduct such as theft or use of contraband by individuals who would recognize that such actions could be electronically recorded.

Software programs make it easy for businesses to monitor every keystroke made by

employees on their computers.<sup>44</sup> Despite the fact that most employees think they enjoy certain privacy protections when they are at work, they do not.<sup>45</sup> As a result, companies can lawfully keep track of everything they type on their computers. To avoid the aberrational court decision extending privacy rights to individuals typing on their computers, employers would be wise to notify personnel of the fact their keystrokes may be monitored.

Although most people believe that employers do not have the right to monitor worker phone calls,<sup>46</sup> many companies monitor telephone calls made by employees or use hidden microphones to listen to oral conversations involving their workers.<sup>47</sup> If they use either of these practices to spy upon the statutorily protected organizing activities of these individuals, they would be in violation of the N.L.R.A. They may face additional liability under other federal and state laws. Title III of the Omnibus Crime Control and Safe Streets Act makes it illegal for third parties to intercept or disclose the telephonic or oral communications made by other persons.<sup>48</sup> Such interceptions are not covered, however, if one of the parties to the telephonic or oral conversation has consented to the interceptions<sup>49</sup> or the monitoring firms maintain the communication systems and the monitoring is carried out in “the normal course of [business].”<sup>50</sup> Furthermore, oral communications are not protected when they include statements uttered by persons who have no reasonable expectation that their conversations will not be overheard or intercepted by others.<sup>51</sup> As a result, if employers notify workers that microphones will be used to monitor employee communications in the work areas, Title III would probably not apply to those activities. Most states have laws restricting the secret monitoring of telephonic and oral communications.<sup>52</sup> Some are similar to the prohibitions set forth in the Omnibus Crime Control Act, while others provide more expansive privacy protections. Employers that violate these laws

may be subject to significant monetary consequences.

More significant legal issues are likely to arise when firms monitor e-mail exchanges and Internet access. If the evidence were to suggest that employers have entered these systems to look for employee organizing activities, there would be clear violations of the N.L.R.A. – unless the companies prohibited employee use of these systems for all non-business related purposes. The Labor Board would not require direct proof of such an impermissible motivation, because managers would rarely confess to such considerations. The impermissible purpose would usually be inferred from such factors as the initiation of monitoring activity shortly after union organizing campaigns have commenced. The monetary cost to firms engaged in unlawful surveillance of protected activities would be minimal, however. The only remedy under the N.L.R.A. would be a cease and desist order. The only cost to the employers would involve the attorney fees incurred in defense of their unfair labor practice activities.

The greater monetary risk to employers from access to e-mail and Internet activities by employees would involve claims of tortious privacy invasions. Most courts have held that workers do not have a reasonable expectation of privacy when they use computers provided by their employers.<sup>53</sup> Firms could further minimize this problem by explicitly notifying workers that their e-mail transmissions and Internet accessing are subject to company monitoring. Managers should promulgate rules explaining which activities are improper and subject to discipline. For example, use of e-mail communications to sexually harass coworkers, to solicit sex with others, or to reveal corporate secrets could reasonably be proscribed. Any mention to outside parties of trade secrets or confidential client information would subject the communicators to discharge.

Company monitoring policies should explicitly preclude the imposition of discipline upon



employees who engage in statutorily protected activities. For example, if e-mail systems may be used for non-business related purposes, no individuals should be punished for communicating with coworkers or outsiders about union organizing. Since firms may lawfully limit worker discussions of union issues to non-work time, they could do so the same thing with respect to e-mail communications – so long as all non-business use is restricted to non-work times such as coffee or meal breaks. Since firms tend to be lax in enforcing such limitations and allow workers to send personal e-mails during their work time, they could not discriminatorily deny them the same privilege with respect to union organizing exchanges.

Firms monitoring employee Internet access must follow similar procedures. Workers should be expressly notified by company officials that their Internet activities are subject to management scrutiny. Appropriate use policies should be articulated to indicate what behavior will not be tolerated. Disciplinary action should be reserved to clearly improper conduct. If employees are permitted to enter non-business related Internet sites, they have the right to go into union organizing sites. If they were punished for doing so, unfair labor practice liability would result.

#### *B. Medical and Personal Capability Testing*

Similar legal issues could arise when corporations administer pre-employment medical examinations or other tests designed to determine applicant fitness. The Americans with Disabilities Act (A.D.A.) limits the degree to which firms may expose workers to mandatory medical examinations or require them to answer general medical questions. Despite these statutory restrictions – and the obvious invasion of individual privacy involved – many companies still endeavor to obtain such information.

Section 12,112(d)(2) of the A.D.A.<sup>54</sup> explicitly bans pre-employment medical examinations and medical inquiries subject to limited exceptions. Employers may describe the job tasks to be performed and ask each applicant about their ability to perform those tasks.<sup>55</sup> Once offers of employment have been extended, firms may require new hires to undergo general medical examinations – so long as strict protections are followed. All new workers must be subject to such exams, and the information obtained must be kept in separate and confidential medical files. Managers may only be informed of specific conditions that may necessitate special job restrictions, and first aid personnel may be told of conditions that may require emergency treatment. In no case may the results of such general tests or inquiries be used to discriminate against otherwise qualified individuals with disabilities who could perform the essential job functions with or without reasonable accommodations that could be provided without undue hardship on the employers.<sup>56</sup>

Once individuals have begun to work for firms, they may not be subjected to mandatory medical exams of a general nature.<sup>57</sup> Employers may only conduct medical tests or ask medical inquiries that are job-related and consistent with business necessity. This means that they must restrict their medical examinations to matters that directly relate to the ability of workers to perform their particular job functions proficiently and safely. Nonetheless, the A.D.A. does have an exception for drug tests pertaining to unlawful drug usage.<sup>58</sup>

Now that medical specialists have developed tests to examine the human genome, employers have the capacity during general medical examinations to look for genetic predispositions to conditions that might someday affect particular individuals.<sup>59</sup> If firms refused to hire these persons – or used such information from subsequent drug tests to terminate current

employees – would it violate the A.D.A.? These individuals would not be presently disabled, because they would not have a medical condition that substantially limits a major life activity, nor would they have “a record of such impairment.”<sup>60</sup> They could argue that their employers “regard them” as being disabled – as demonstrated by their refusal to hire them or to continue them in employment. Nonetheless, the Supreme Court has held that people are only “regarded as” disabled within the meaning of the A.D.A. if employers think they have conditions which, if they actually had them, would substantially limit major life activities or they have non-disabling conditions employers erroneously believe are substantially limiting.<sup>61</sup> The mere fact that persons have predispositions to possible future conditions would most likely not fall within either prongs of this narrow “regarded as” definition.

Courts should acknowledge that the severe limitations imposed on pre- and post-employment medical tests demonstrate a congressional desire to preclude the use of such information to disadvantage workers based upon unfair employer beliefs. The results of pre-employment examinations must be kept in separate and confidential files and many not be used to discriminate against disabled individuals. Mandating tests of present employees must be limited to job-related conditions<sup>62</sup> or efforts to discover employee use of proscribed drugs.<sup>63</sup> These narrow exceptions would suggest that Congress did not intend to allow employers to use information obtained from such pre- or post-employment medical tests to deprive qualified people of job opportunities.

Although many employers previously subjected job applicants to polygraph exams, this practice was prohibited by the Employee Polygraph Protection Act of 1988.<sup>64</sup> Polygraph exams may now be required only in exceptional situations.<sup>65</sup> Some firms try to circumvent this

restriction through the use of paper and pencil tests that purportedly measure test-taker honesty. Companies often employ other paper and pencil tests to measure verbal and/or math skills, applicant knowledge about their areas of specialization, or personality traits. Even though these practices invade the privacy interests of those being required to participate, employers do not seem concerned about this issue. Since applicants who do not wish to take such tests can simply look for work elsewhere, courts would be unlikely to find that these testing practices violate basic privacy rights.

The use of pre-employment screening mechanisms may contravene Title VII. If such factors disproportionately disqualify applicants by race, color, religion, sex, or national origin, adversely affected persons could challenge them under the disparate impact proof construct set forth in Section 703(k)(1)(A).<sup>66</sup> Once a disparate impact is established – often using the four-fifths rule under which the pass rate for the disadvantaged group is less than four-fifths the pass rate for the preferred group<sup>67</sup> – the burden of proof shifts to the employer to show that the challenged factor is reasonably related to successful job performance. Companies usually have experts establish statistically significant correlations between the challenged criteria and job performance. If they are unable to accomplish this, they would have to eliminate those factors. Even if they can establish reasonable correlations, the claimants can still prevail if they can demonstrate the availability of equally predictive criteria having a less discriminatory impact.

A similar proof construct is applicable to disabled individuals under the A.D.A. if they can demonstrate either that they were not given a fair opportunity to demonstrate their true capabilities<sup>68</sup> or that the challenged factors have a disproportionate impact upon disabled people, unless the employer can show that the factors are reasonably predictive of job performance.<sup>69</sup>

The Supreme Court recently held that the same disparate impact proof construct is available under the Age Discrimination in Employment Act<sup>70</sup> with respect to hiring criteria that disproportionately disqualify applicants who are forty or older.<sup>71</sup> In the same decision, however, the Court indicated that if employers can articulate rational bases for using such tests, they will be exempt from liability under the provision allowing employers to make differentiations among candidates that are “based on reasonable factors other than age . . .”<sup>72</sup> It would thus be difficult for older workers to successfully challenge facially-neutral practices that disproportionately disqualify older applicants, so long as those criteria appear to be based on reasonable factors other than age.

When the disparate impact proof construct was initially recognized in *Griggs v. Duke Power Co.*,<sup>73</sup> the Court indicated that employers could only sustain factors causing a disproportionate impact upon protected groups if they could establish that those factors were job related. The Justices stated that the “touchstone is business necessity,” with firms being required to show that challenged criteria “have a manifest relationship to the employment in question.”<sup>74</sup> When Congress codified this standard in the 1991 Civil Rights Act amendments to Title VII, it used the identical “business necessity” language.<sup>75</sup> Nonetheless, lower courts have not applied this standard literally, because judges realize that a strict “business necessity” approach would cause the elimination of many hiring standards that are reasonably predictive of actual job performance.<sup>76</sup> Judges have thus interpreted the “business necessity” standard to be satisfied if employers can actually demonstrate “business convenience.” It is thus quite difficult for persons challenging facially neutral hiring standards to prevail under the disparate impact construct, so long as the factors in question are meaningfully predictive of job performance – even if the actual

correlation coefficient is relatively modest.

### **III. NEED FOR MORE EQUITABLE BALANCING OF EMPLOYER AND EMPLOYEE**

#### **PRIVACY INTERESTS**

It should be apparent that employers often cite privacy interests to restrict employee and non-employee organizer rights. They understandably limit union organizing by employees to non-work time, to ensure maximum productivity. So long as they do not discriminate in this regard by allowing employees to solicit and distribute literature on behalf of other non-labor organizations during their work time, these limitations seem reasonable.

The denial to non-employee organizers of access to company premises also seems appropriate, where no outside persons are given such access. On the other hand, when members of the general public are invited onto firm premises by retail establishments, it seems unfair to deny non-employee organizers any access to these open areas. The Labor Board's *Jean Country* balancing test which was rejected by the Supreme Court in *Lechmere* constituted an appropriate way to balance employer privacy interests against the statutorily protected right of organizers to communicate with store employees. In most cases, access would be limited to public parking lots. Non-employee organizers would not be allowed to enter the store premises to enable firms to limit non-business activities in selling areas.

The one area in which Labor Board and court decisions have reasonably sought to balance employer and worker interests concerns access by representative unions to company information they need to negotiate new agreements and to administer existing contracts. Employers must generally comply with union requests for relevant information. When highly sensitive data are involved, employers may require labor officials to execute confidentiality

pledges. When confidential employee information is being sought, union leaders may be required to obtain the consent of individual workers before they can obtain access to their personal information.

When employers decide to monitor the work and personal activities of employees while they are on firm premises, managers tend to discount the privacy interest of their workers. Companies think that they can visually or electronically observe every aspect of each worker's day. The use of closed-circuit cameras is not especially intrusive, so long as two requirements are satisfied. First, the cameras should only focus on work areas and public areas in which workers have no reasonable expectation of privacy. They should not be permitted in lavatories, locker rooms, or similar areas in which employee privacy interests are paramount – except where employers can demonstrate extraordinary reasons for such intrusions. Second, companies should be required to notify employees of the specific areas being monitored and to clearly indicate the types of conduct that will not be tolerated.

Telephone, e-mail, and Internet monitoring present more complex privacy issues. On the one hand, firms want to be sure employees are performing their assigned job tasks during work hours, and they wish to preclude worker use of these media for improper purposes such as the harassment of coworkers, access to pornographic sites, or the disclosure of confidential corporate information. On the other hand, workers who are permitted to use these communication channels for personal reasons have the right to expect their appropriate exchanges with coworkers and outside persons will remain confidential. How can companies simultaneously honor these seemingly contradictory firm and employee interests? They should initially notify employees that their phone calls, e-mail exchanges, and Internet activities are subject to firm monitoring. They

should also have appropriate use policies indicating the specific activities that will not be tolerated. To minimize the obvious infringement of employee privacy, companies should assign designated persons to perform these monitoring functions, and these individuals should be forbidden to disclose the information they obtain except to proper company officials. Finally, they should only be permitted to apprise firm managers of actions which contravene the appropriate use guidelines. All other information they intercept should remain confidential.

In the relatively few employment environments in which unions represent the employees involved, employers are obliged to negotiate over worker monitoring practices.<sup>77</sup> Should they fail to do so, unfair labor practice liability would result.<sup>78</sup> In many cases, labor and management officials should be able to achieve mutual accommodations of their competing interests. If union negotiators do not acquiesce to company demands in this area, however, this would not prevent the establishment of monitoring policies. Once firm officials negotiate in good faith over these issues and reach bargaining impasses, they would have the right to unilaterally implement the monitoring policies they offered to union officials.<sup>79</sup> For the ninety percent of private sector workers no longer represented by labor organizations, they would have no meaningful way to influence corporate monitoring practices. They would have to hope that corporate leaders acted responsibly in this important area. If not, they would have to exercise the “exit voice” and look for work elsewhere.

What would motivate corporate leaders to adopt the types of monitoring policies that would appropriately respect employee privacy interests? The realization that if they fail to do so and employees become dissatisfied with more intrusive firm monitoring, workers will implore Congress and state legislatures to enact laws protecting worker privacy rights. Individual firms



now possess the capacity to formulate appropriate use and monitoring policies tailored to their particular needs and interests. Legislative bodies, on the other hand, tend to enact expansive statutes that apply equally to all covered entities. If corporations do not do the right thing voluntarily, there is a good chance they will have legislative regulations imposed upon them that will be far more restrictive than the limitations they should have devised on their own to avoid the unnecessary dilution of employee privacy rights.

## ENDNOTES

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1. Charles B. Craver, *The Inquisitorial Process in Private Employment*, 63 CORNELL L. REV. 1 (1977).

2. See MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 11 table 2 (1987).

3. See Daily Lab. Rept. (B.N.A.) No. 14 (Jan. 23, 2006), at AA-1. See generally CHARLES B. CRAVER, *CAN UNIONS SURVIVE?* (1993).

4. See MARK A. ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SCHROEDER & ELAINE W. SHOBN, *EMPLOYMENT LAW TREATISE* 401-02 (3<sup>rd</sup> ed. 2004).

5. See 42 U.S.C. § 12,112(d) (2000).

6. 29 U.S.C. § 157 (2000).

7. Employees also have the right to refrain from these activities. The duty to bargain is set forth in Section 8(d), 29 U.S.C. § 158(d) (2000).

8. See *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301 (1974) (acknowledging right of employers to reject union requests for voluntary recognition where they have not independently verified union claims of majority support).

9. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

10. See *Stoddard Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962).

11. See *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7<sup>th</sup> Cir. 1952); *May Department Stores Co.*, 59 N.L.R.B. 976 (1944), *enforced*, 154 F.2d 533 (8<sup>th</sup> Cir.), *cert. denied*, 329 U.S. 725 (1946).
12. See *NLRB v. Baptist Hosp.*, 442 U.S. 773 (1979). Employees may thus be limited to distribution and solicitation during their non-work time in other areas of health care facilities.
13. See *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953).
14. See *NLRB v. United Steelworkers of America*, 357 U.S. 357 (1958).
15. See *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953).
16. See *May Department Stores Co.*, 136 N.L.R.B. 797 (1962). The Sixth Circuit Court declined to enforce the Board's decision in this case, because it found that the Board had failed to articulate the specific basis for its conclusion that a significant communication imbalance had been created by the stores retail area ban. *May Department Stores Co. v. NLRB*, 316 F.2d 797 (6<sup>th</sup> Cir. 1963).
17. 351 U.S. 105 (1956).
18. 291 N.L.R.B. 11 (1988).
19. 291 N.L.R.B. at 14.
20. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
21. 502 U.S. 527 (1992).
22. See *United Services Automobile Assn.*, 340 N.L.R.B. No. 90, 173 L.R.R.M. 1331 (2003); *Electronic Data Systems Corp.*, 331 N.L.R.B. 343 (2000). See generally Martin Malin & Henry Perritt, *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 KAN. L. REV. 1 (2000).

23. *See generally* ARTHUR B. SHOSTAK, CYBER UNION: EMPOWERING LABOR THROUGH COMPUTER TECHNOLOGY (1999).
24. *See* Waco, Inc., 273 N.L.R.B. 746 (1984) and Blue Cross-Blue Shield of Ala., 225 N.L.R.B. 1217 (1976) (compensation discussions); Scientific-Atlanta, Inc. 278 N.L.R.B. 622 (1986) (pay increase discussions).
25. Employees have the statutory right to discuss with fellow workers complaints about managers, and employer efforts to restrict such behavior may similarly contravene the NLRA. *See, e.g.*, Claremont Resort & Spa, 344 N.L.R.B. No. 105, 177 L.R.R.M. 1193 (2005).
26. 29 U.S.C. § 206(d) (2000). The statute permits differentials based upon seniority, merit, systems measuring earnings by the quantity or quality of production, or any other factor other than sex.
27. 42 U.S.C. § 2000e-2 (2000). *See* County of Washington v. Gunther, 452 U.S. 161 (1981) (sex); Bazemore v. Friday, 478 U.S. 385 (1986) (race).
28. 42 U.S.C. § 2000e-3(a) (2000).
29. 29 U.S.C. § 215(a)(3) (2000).
30. *See* Lambert v. Ackerley, 180 F.3d 997 (9<sup>th</sup> Cir. 1999) (en banc), *cert. denied*, 528 U.S. 1116 (2000); Valerio v. Putnam Associates, Inc., 173 F.3d 35 (1<sup>st</sup> Cir. 1999).
31. 29 U.S.C. § 158(a)(5) (2000).
32. *See* NLRB v. Truitt Mfgr. Co., 351 U.S. 149 (1956). *See generally* Florian Bartosic & Roger Hartley, *The Employer's Duty to Supply Information to the Union – A Study of the Interplay of Administrative and Judicial Rationalization*, 58 CORNELL L. REV. 23 (1972).
33. NLRB v. Truitt Mfgr. Co., 351 U.S. at 153.
34. *See* NLRB v. Acme Industrial Co., 385 U.S. 432, 436 (1967).

35. *See, e.g.*, *Oil, Chemical & Atomic Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983); *H.M.S. Machine Works*, 284 N.L.R.B. 1482 (1987).
36. *See, e.g.*, *Hercules, Inc. v. NLRB*, 833 F.2d 426 (2d Cir. 1987).
37. 440 U.S. 301 (1979).
38. *See* 440 U.S. at 315-16.
39. *See* 440 U.S. at 317-320.
40. *See* *Pennsylvania Power & Light Co.*, 301 N.L.R.B. 1104 (1991).
41. *See* *Chicago Tribune Co. v. NLRB*, 965 F.2d 244 (7<sup>th</sup> Cir. 1992).
42. *See, e.g.*, *Party Lite Worldwide, Inc.*, 344 N.L.R.B. No. 155, 177 L.R.R.M. 1379 (2005).
43. *See* *Timkin Co. v. NLRB*, 171 L.R.R.M. 3215 (6<sup>th</sup> Cir. 2002) (not published in F.3d). Actual surveillance of protected conduct will violate Section 8(a)(1), 29 U.S.C. § 158(a)(1) (2000), even if the targets are unaware of the spying. *See* *NLRB v. Grower-Shipper Vegetable Assn.*, 122 F.2d 368 (9<sup>th</sup> Cir. 1941). Where employers have not actually spied upon protected activities, unfair labor practice liability may still be imposed, if they give the workers the *impression* their actions have been monitored. *See* *Idaho Egg Producers*, 111 N.L.R.B. 93 (1955), *enforced*, 229 F.2d 821 (9<sup>th</sup> Cir. 1956).
44. *See* Richard S. Rosenberg, *The Technological Assault on Ethics in the Modern Workplace* in *THE ETHICS OF HUMAN RESOURCES AND INDUSTRIAL RELATIONS* 141, 148 (John W. Budd & James G. Scoville, eds. 2005).
45. *See id.*
46. *See id.* at 145.
47. *See id.* at 146.
48. *See* 18 U.S.C. § 2511(1) (2000).

49. *See* 18 U.S.C. § 2511(2)(d) (2000).
50. *See* 18 U.S.C. § 2511(2)(a)(1) (2000).
51. *See* 18 U.S.C. § 2510(2) (2000).
52. *See* MARK A. ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SCHROEDER & ELAINE W. SHOBNEN, EMPLOYMENT LAW TREATISE § 5.5 (3d ed. 2004).
53. *See id.* at § 5.6.
54. 42 U.S.C. § 12,112(d)(2) (2000).
55. *See* 42 U.S.C. § 12,112(d)(2)(B) (2000).
56. *See* 42 U.S.C. § 12,112(b) (2000).
57. *See* 42 § 12,112(d)(4) (2000).
58. *See* 42 U.S.C. § 12,114(d) (2000).
59. *See* Paul Steven Miller, *Is There a Pink Slip in My Genes? Genetic Discrimination in the Workplace*, 3 J. Health Care L. & Pol’y 225 (2000).
60. *See* 42 U.S.C. § 12,102(2) (2000).
61. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999). *See generally* Charles B. Craver, *The Judicial Disabling of the Employment Discrimination Provisions of the Americans with Disabilities Act*, 18 LAB. LAW. 417 (2003).
62. *See* 42 U.S.C § 12,112(d)(4)(B) (2000).
63. *See* 42 U.S.C. § 12,114(d) (2000).
64. *See* 29 U.S.C. § 2001-2009 (2000).
65. *See* 29 U.S.C. § 2006(d)-(f) (2000). These exceptions pertain to on-going investigations of theft, embezzlement, misappropriation, or industrial espionage or sabotage where the suspected employee had access to the property in question and the employer can articulate a reasonable

suspicion of that person's involvement (d), firms providing security services pertaining to the production or transmission of electric or nuclear power (e), or firms authorized to manufacture or distribute controlled substances (f).

66. *See* 42 U.S.C. § 2000e-2(k)(1)(A) (2000).

67. *See* Part II of *Uniform Guidelines of Employee Selection Procedures*, 43 Fed. Ref. 38290 (1978).

68. *See* 42 U.S.C. § 12,112(b)(7) (2000).

69. *See* 42 U.S.C. § 12,112(b)(6) (2000).

70. *See* 29 U.S.C. § 623(a) (2000).

71. *See* *Smith v. City of Jackson, Mississippi*, 125 S. Ct. 1536 (2005).

72. *See* 125 S. Ct. at 1545, interpreting 29 U.S.C. § 623(f)(1) (2000).

73. 401 U.S. 424 (1971).

74. 401 U.S. at 431-32.

75. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

76. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?* 53 U.C.L.A. L. REV. \_\_\_\_ (2006).

77. *See* *Colgate-Palmolive Co.*, 323 N.L.R.B. 515 (1997). They also have to negotiate over mandatory drug testing (*Johnson-Bateman Co.*, 295 N.L.R.B. 180 (1989)), but not over drug testing of job applicants (*Star Tribune*, 295 N.L.R.B. 543 (1989)). *See generally* Marion Crain, *Expanded Employee Drug-Detection Programs and the Public Good: Big Brother at the Bargaining Table*, 64 N.Y.U. L. REV. 1286 (1989).

78. *See* *Brewers & Maltsters Local 6 v. NLRB*, 414 F.3d 36 (D.C. Cir. 2005).

79. *See* *NLRB v. Katz*, 369 U.S. 736 (1962).