

**EMPLOYEE PRIVACY RIGHTS CHALLENGE  
EMPLOYER SCREENING TECHNIQUES  
FOR THE 1990s**

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**ABSTRACT**

Employers have a legitimate need to know certain things about their employees. However, employers can no longer ignore the impact of statutory and judicially-imposed workplace privacy mandates. Warning signals have surfaced that impose increased employer liability for privacy violations. Federal and state statutory protections of employee privacy interests are increasingly being considered and adopted. To understand this developing area, privacy's increased importance for employers is discussed as it affects the workplace in screening employee information.

From the moment an individual first walks through an employer's entrance, privacy rights are affected. Employees may disclose personal facts about their backgrounds and submit to employer scrutiny that may or may not be performance-related.

Employers have a legitimate need to know certain things about their employees. The employee's ability, honesty, and prior employment history are clearly reasonable job-related inquiries for an employer to scrutinize in its employment screening process. Workplace privacy, however, becomes more difficult when an employer wants to know if the employee smokes marijuana at home, is a homosexual, or socializes with the "wrong" kind of people; i.e., do these inquiries serve legitimate job-related purposes? It is against these employee privacy

interests that the employer's "need to know" in screening job-related information must be balanced.

Changes and additions to privacy requirements brought about by legislation and court decisions affect screening procedures used by employers in hiring, record-keeping, firing, and other aspects of the employment relationship. To understand this developing area, privacy's increased importance for employers is discussed as it affects the workplace in screening employee information.

## **WORKPLACE PRIVACY**

Workplace privacy concerns the nature and extent of an employee's right to be free from unwarranted non-job-related employer intrusions. It arises whether or not an employment relationship is created. Involved is employment information: 1) collection for hiring decisions; 2) storage, retention, and maintenance; 3) internal use in making decisions after hiring; and 4) disclosure to third parties. Accompanying these employment information interests is employee lifestyle regulation at and outside the workplace.

No comprehensive nationwide statutory protection of workplace privacy currently exists. Federal and state statutes do impose certain privacy restrictions. For example, the federal Employee Polygraph Protection Act of 1988 prohibits most employers from requiring, requesting, causing, or suggesting that an employee take a polygraph examination. Exempted from the act's provisions, however, are federal, state, and local government employers. There are also exemptions covering national defense and federal government security contractors.

Private sector employers may still request that employees take polygraph examinations during an ongoing investigation of economic loss or injury involving theft or embezzlement. However, the examination's use or the employee's refusal to take the examination under these circumstances must be accompanied by additional supporting evidence before an employer can commence an adverse employment action against the employee. This federal statute, along with existing antipolygraph state legislation, has severely restricted the polygraph examination's use for employment-related purposes, causing employers to question what other employment screening techniques are available to them.

Judicial protection of employee privacy also affects the employer's screening process. This employee protection is generally premised on constitutional, tort, or contract theories. For example, information contained in personnel files involving performance evaluations, test scores, salary histories, and medical information is private employee information. If wrongfully disclosed by an employer, this information could create invasion of privacy liability [1].

In the employment relationship, defamation may arise when an employer communicates false or derogatory employee information that should remain private. Wrongfully claiming that an employee has AIDS [2], or disclosing

reasons for termination to those not having a legitimate need to know, may create liability [3].

False imprisonment protects the individual's interest in freedom from restraint of movement. It occurs in the employment context when an employer or its agent restrains an employee to search, interrogate, or to administer a medical test [4].

Outrageous employer conduct may intrude upon an employee's privacy by intentional infliction of emotional distress. This may arise where private interests are intruded by an employer in requiring discontinuation of a social relationship with another employee outside the workplace, where no legitimate job-related basis exists [5].

Employers must act carefully in maintaining employment records or in providing employment references. Employees have recovered damages against employers who negligently maintained employment information by allowing private facts to be disclosed [6].

Fraudulent misrepresentation may affect employee privacy interests where an employer induces an employee to act or to refrain from acting. The employer could misrepresent reasons for collecting, maintaining, using, or disclosing employment information. This could occur where an employee confides his drug addiction in reliance on the employer's promise to provide confidential assistance.

Privacy interests are affected by the employer's intrusion into matters where no legitimate job-related right exists by intentionally interfering with prospective contractual relations. For example, the situation where an employer writes to another employer that a particular employee should not be hired [8].

With the at-will employment relationship's continued modification, public policy violations may also protect employee privacy rights. Causes of action have been permitted for violating a clear statutorily declared policy where privacy interests are protected from disclosure involving polygraph examinations [9], reporting unlawful or improper employer criminal conduct [10], and for refusing to accede to improper employer sexual advances [11]. It is within these parameters that employee screening must be undertaken by employers.

### **LIMITING EMPLOYER SCREENING LIABILITY**

After an application is submitted, employers use various procedures to verify employee information. Verification is the selection method that checks applicant information accuracy. Almost every qualification an applicant offers for employment consideration can be verified. Verification sources include previous employers, schools, colleges, military records, certifying or licensing bodies, public records, and so forth. Public records include those from courts, law enforcement agencies, licensing bureaus, tax assessors, and financial departments.

Certain verification information may be irrelevant and not job-related. To safeguard employee privacy interests and minimize employer litigation exposure, procedures and policies must be developed to counteract these privacy problems. Credit checks, arrest records, criminal convictions, reference checks, employment records, and medical records offer particular employer screening problems.

### **Credit Checks**

Credit information collection, maintenance, use, and disclosure present significant employee privacy concerns by potentially revealing non-job-related data affecting speech, beliefs, and associational interests. Federal and state statutes place certain restrictions on credit information used for employment purposes. Non-job-related credit reports may violate federal and state fair employment practice (FEP) statutes. A requirement that applicants and employees have a good credit record may have to be justified by a legitimate job-related business necessity.

To ensure that employee privacy interests are observed in undertaking a credit check, an employer should:

1. Select a reputable credit agency and periodically review the choice;
2. Notify the applicant and/or employee that a credit check will be performed and indicate:
  - a. the types of information expected to be collected that are not collected on the application, and, as to information regarding character, general reputation, and mode of living, each area of inquiry;
  - b. the techniques that may be used to collect the information;
  - c. the sources that are expected to provide the information;
  - d. the parties to whom and circumstances under information about the individual may be disclosed without authorization, and the information that may be disclosed;
  - e. the statutory procedure by which the individual may gain access to any resulting record;
  - f. the procedures the individual may use to correct, amend, or dispute any collected record; and
  - g. that information in any report prepared by a consumer reporting agency may be retained by that organization and subsequently disclosed by it to others;
3. Obtain the applicant's and/or employee's written consent for undertaking a credit check;
4. Not share the information received regarding an applicant and/or employee with potential creditors;
5. Limit credit checks to job-related information and purposes;
6. Consider credit information highly confidential and sensitive; and
7. Certify that credit information will be used only for job-related purposes [12].

## **Arrest Records**

Many employers believe that arrest history is critical, or at least relevant, to employment. Arrest information raises employee privacy concerns because it indicates only that a law enforcement agency believed that probable cause to arrest existed for some offense. It does not reflect guilt, nor does it indicate that the person actually committed the offense.

Refusing employment or terminating employees because of arrest records is not permitted without evidence that such information is related to the employer's business. Certain state statutes prohibit arrest record inquiries. Even when a legitimate preemployment inquiry is made regarding arrest records, an applicant's rejection based solely on an arrest record may violate federal and state FEP statutes.

The following should be considered regarding arrest records and their possible employment use:

1. Whether the state's statute prohibits arrest record inquiries;
2. That a differentiation be made between arrest and conviction;
3. That a careful evaluation be made of the frequency and severity of arrests;
4. Age at time of the arrest;
5. The elapsed time since an arrest;
6. The whole individual; i.e., his/her aptitude, abilities, interests, and educational level, rather than one aspect of personal history;
7. The job's nature and its relation to the employability of those with arrest records; and
8. Geographic location of the incidents involved.

## **Criminal Convictions**

Criminal convictions present different employee privacy concerns than do arrests. A conviction is a societal judgment regarding an individual's actions. Unlike an arrest record, a conviction record is complete. Guilt and accountability have been finalized.

Even though an employer may take legitimate employment actions based on criminal convictions when it correlates the offense's nature, gravity, and time elapsed since the conviction to job-relatedness, privacy concerns over subsequent use and disclosure remain, and affect associational and lifestyle interests. Conviction record use may violate federal and state FEP statutes.

Employers must consider a conviction's legitimate job-related circumstances regarding impact and effect before determining that employment would be inconsistent with safe and efficient business operation. These circumstances include:

1. The job and its responsibilities;
2. The time, nature, and number of convictions;
3. Each conviction's facts;

4. Each conviction's job-relatedness;
5. The length of time between a conviction and the employment decision;
6. Employment history before and after the conviction;
7. Rehabilitation efforts;
8. Whether the particular conviction would prevent job performance in an acceptable businesslike manner;
9. Age at the time of conviction; and
10. The conviction's geographic location.

## **Reference Checks**

Reference checks represent another employer effort to compile and verify the most complete and accurate information regarding applicants. Requesting detailed references from former employers is one precaution an employer can take during the hiring process to limit vulnerability to employment litigation. By failing to request references, the employer may risk negligent hiring liability. Negligent hiring arises out of employee acts committed while in the employer's service, but outside the employee's employment scope. While an employer generally is not liable for employee acts outside of the employment's scope, employer liability for negligent hiring has been found where an employee was responsible for others' safety or security.

Some states statutorily regulate employee references. Federal or state FEP statutes, along with claims for invasion of privacy and defamation, may also offer employee protection.

In checking references, the following should be considered:

1. Obtain the employee's written permission to check references;
2. Check references before making the final job offer;
3. If a discrepancy exists between facts or recommendations, a more extensive investigation should be undertaken;
4. Be skeptical of all subjective evaluations, especially those that do not include verifiable acts or behavior; and
5. View silence as an indication for further investigation; an employer may attempt to avoid wrongful termination litigation by negotiating a settlement with an employee that includes no favorable references.

## **Employment Records**

Employer methods for collecting, maintaining, accessing, using, and disclosing employment information vary. Certain employment record aspects are regulated by federal and state statutes. These statutes generally set forth what employment information may be collected, along with providing for employee access and the right to review and copy record contents. Some statutes permit employees to place a counterstatement in the record when information is incorrect or challenged.

Overall considerations for preparing employment record privacy procedures and policies should include:

1. A uniform system of collecting, maintaining, accessing, using, and disclosing employment information;
2. Preserving and protecting employee privacy confidentiality;
3. Collecting employment information by reviewing:
  - a. the number and types of records maintained;
  - b. information items;
  - c. information uses made within the employer's decision-making and non-decision-making structure;
  - d. information disclosure made to those other than the employer; and
  - e. the extent to which employees are aware and regularly informed of the uses and disclosures that are made of this information [12, p. 235];
4. Fair information collection procedures and policies concerning applicants, employees, and former employees that:
  - a. limit information collection to that which is job-related;
  - b. inform what records will be maintained;
  - c. inform of the uses to be made of this information;
  - d. adopt procedures to assure information accuracy, timeliness, and completeness;
  - e. permit review, copying, correction, or information amendment;
  - f. limit internal use;
  - g. limit external disclosures, including disclosures made without authorization, to specific inquiries or requests to verify information;
  - h. provide for a regular policy compliance review;
  - i. contain an employment application with a waiver authorizing the employer to disclose employee file contents to those to whom the employee grants access; that is, reference checks by subsequent employers, and to make a credit check where applicable;
  - j. indicate on the file when and where these employee reviews took place;
  - k. restrict information access to those with a need to know and those who are authorized outside of the employer; that is, law enforcement officials, government agencies, etc.;
  - l. ensure that information retention conforms to applicable law; and
  - m. contain a privacy clause [12, pp. 237-238].

### **Medical Records**

Medical records may contain employee personal details regarding age, life history, family background, medical history, present and past health or illness, mental and emotional health or illness, treatment, accident reports, laboratory reports, and other scientific data from various sources. They may also contain medical providers' notes, prognoses, and reports of the patients' response to

treatment. Should this medical information be disclosed, it could cause embarrassment, humiliation, damage to family relationships, or even employment termination, while infringing on privacy rights related to speech, associations, and lifestyles.

A privacy interest in medical records has been partially acknowledged, and the employee privacy interests in preserving medical record confidentiality has been recognized by federal and state privacy statutes. Society's legitimate need for this information may supersede an employee privacy interest even though an employee's medical records, which may contain intimate personal facts, are entitled to privacy protection. Employee privacy rights must be evaluated against the public interest represented by certain government investigations.

Employers should take precautions to protect medical information confidentiality by restricting access to managerial employees who have a legitimate job-related business interest in obtaining the information. Except in emergency situations, employers should avoid seeking medical information directly from an employee's physician without prior employee consent. Employee hospital records should be accorded similar deference.

In developing medical record procedures, the employer should consider the following:

1. Medical information disclosure;
2. The relationship between the employee and employer regarding any third party requesting the information;
3. The employee's privacy interest in not releasing the information;
4. The employer's statutory or other duty to disclose the information;
5. Identity of the person making the request;
6. The request's purpose;
7. Restricting disclosure to necessary information only;
8. When an employee who is the subject of medical information maintained by an employer requests correction or amendment, the employer should:
  - a. disclose to the employee, or to a person designated by him or her, the identity of the medical information's source;
  - b. make the correction or amendment within a reasonable time period if the person who was the information's source concurs that the information is inaccurate or incomplete; and
  - c. establish a procedure for an employee who is the subject of employer medical information to present supplemental information for inclusion in the employer's medical information, provided that the supplemental information's source is also included [12, p. 263].

## CONCLUSIONS

Employers can no longer ignore the impact of statutory and judicially imposed workplace privacy mandates. Sufficient judicial warning signals have surfaced



that impose increased employer liability for privacy violations as we enter the 1990s. Likewise, statutory protections of employee privacy interests are increasingly being considered and adopted at the federal and state levels.

Workplace privacy intrusions will become a significant judicial inquiry in reviewing violations of rights arising out of the employment relationship. Despite these possibilities, employers can protect themselves by using legitimate job-related screening techniques, some of which have been reviewed herein. Unless these job-related screening techniques are used, employers will find themselves subject to increased scrutiny for employee privacy violations.

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## REFERENCES

1. *O'Brien v. Papa Gino's*, 780 F.2d 1067 (1st Cir. 1986) (privacy rights invaded by polygraph test).
2. *Little v. Bryce*, 733 S.W.2d 937 (Tex. Ct. App. 1987) (defamatory communication that an employee has AIDS).
3. *Biggins v. Hanson*, 252 Cal. App. 2d 16, 59 Cal. Rptr. 897 (1967) (reasons for employee termination).
4. *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985) (employee forcefully transported from employer's plant to the doctor's office; complaint dismissed prior to reaching this issue).
5. *Rulon-Miller v. IBM*, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (dating a sales representative from a competing employer could not be prohibited where the employee did not have access to sensitive or confidential information).
6. *Bulkin v. Western Kraft East, Inc.*, 422 F. Supp. 437 (E.D. Pa. 1976) (negligent maintenance of employment records).
7. *Paradis v. United Technologies*, 672 F. Supp. 67 (D. Conn. 1987) (termination of an employee for refusing to identify fellow drug-using employees was wrongful where the employer promised assistance and to refrain from discrimination or retaliation if the employee disclosed his drug dependency).

8. *Gordon v. Lancaster Osteopathic Hosp. Ass'n*, 340 Pa. Super. 253, 489 A.2d 1364 (1985) (letters from a medical staff requesting a hospital board to terminate a pathologist's privileges).
9. *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1393 (3rd Cir. 1979) (refusing to take a polygraph examination in state prohibiting its employment use).
10. See *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (supplying information to local law enforcement authorities about possible criminal activities).
11. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (female employee refusing to go out with foreman).
12. See Privacy Protection Study Commission, *Personal Privacy in an Information Society*, pp. 250-51, 1977.

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