

Workplace Behavior & Privacy Issues

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Employee Surveillance

- Video surveillance
 - Generally allowed
 - Benefits:
 - Increase productivity
 - Increase safety
 - Decrease theft and other misconduct
 - Need to provide notice and have written policy
 - Get employees' consent
 - Do NOT monitor bathrooms or changing areas



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Employee Surveillance

- Searching online/social media
 - May uncover information about protected class status
 - Race, religion, gender, marital status, family status, veteran status, disability, age, national origin
 - Only search public content
 - Do not make hiring decisions based on information about protected class status

Be consistent!



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Searches

- Search (v): to go or look through carefully in order to find something missing, lost, or concealed
- No right to privacy under the United States Constitution (except for governmental entities)
- Generally no expectation of privacy in common workplace areas (ex: lobbies, break rooms)
- But searches of quasi-private areas may implicate common law privacy rights



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Searches

- Employees may have expectation of privacy in offices, desks, files, lockers, computers, purses, backpacks, etc.
- Good policies and procedures can reduce expectation of privacy
- Fact specific analysis
 - Passwords
 - Locked doors
 - Policy language
 - Info requests/denials



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Searches—Best Practices

- Implement search policy that puts employees on notice that certain items may be searched
- Have employees acknowledge receipt of policy
- Obtain explicit consent to search when possible
- Be discreet when conducting searches
- Do NOT access employee's personal email accounts



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Monitoring Employee Communications

- Telephone calls
- Emails
- Internet Usage



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Monitoring Employee Communications

- General rule = monitoring is allowed as long as information is stored on employer-provided devices AND review is authorized by employer's policies



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Monitoring Employee Communications

- Telephone calls implicate federal wiretapping laws
- Exception = employer may monitor and record its own phone system for quality control purposes
- Known as the “Business Extension Exception”
- Can only intercept business calls

Must **notify** employees and callers!



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Monitoring Employee Communications

- Stored Communications Act applies to email and internet use
- Employers may not access an employee’s private email account without consent



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Monitoring Employee Communications

- What to do if employee is misusing work email or internet?
 - Conduct investigation
 - Policy should allow for review
 - Retrieve material from recipient's account
 - Follow disciplinary policy



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National Labor Relations Act

- Monitoring can implicate NLRA protections
- Do NOT take adverse action against employees for engaging in concerted activities for:
 - Collective bargaining; or
 - Other mutual aid or protection.
- Monitoring employees' concerted activities is considered an unfair labor practice



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Dress Code & Personal Appearance

- Employers generally have wide latitude in setting dress code and personal appearance guidelines
- Cannot be used to target a protected class (disparate impact) or a specific person (disparate treatment)
- Policy usually needs to have a bona fide business reason



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Dress Code & Personal Appearance

- Acceptable policies:
 - Machinists needed to be clean shaven to allow required respirator to seal
 - Not allowing shorts/jeans
 - Requiring uniform



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Dress Code & Personal Appearance

- Unacceptable policies:
 - Only allowing women to wear shorts
 - No “afro” hair styles
 - No head coverings for aesthetic reasons alone which prevented individuals from certain religions from qualifying



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Dress Code & Personal Appearance

- Implement written dress code and grooming policy
- Do NOT target particular protected class
- Evaluate requests for reasonable accommodation
- Do not impose undue hardship
- Be consistent!



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Drug & Alcohol Testing

- Common reasons for drug testing:
 - Encouraging productivity
 - Increasing safety
 - Investigating workplace accidents



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Drug & Alcohol Testing

- Pre-employment testing
 - Americans with Disabilities Act (ADA)
 - Allows for testing of illegal drugs
 - Does **NOT** allow for testing of alcohol before a conditional offer
 - Alcohol may be tested after offer **IF** it is job-related and consistent with business necessity
 - Obtain consent
 - Advise applicant that a clean test is necessary for employment



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Drug & Alcohol Testing

- Post-employment testing
 - Periodic or random testing
 - Reasonable suspicion testing
 - Post-incident testing
 - New OSHA rule: post-incident testing must be objectively reasonable and cannot be retaliation for reporting an accident
 - Legally- required testing (ex: DOT employees)



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Psychological & Personality Tests

- Polygraphs are generally not allowed under the Employee Polygraph Protection Act
- Integrity testing is the new(ish) way to go.
 - Paper and pencil (or electronic) tests designed to identify and predict the predisposition of job applicants
 - Looking for theft, misconduct, and/or counterproductive workplace behavior



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Psychological & Personality Tests

- Common types of integrity tests
 - Overt tests (theft/theft-related tendencies)
 - Personality-oriented measures
 - Clinical measures (diagnostic opinion)



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Psychological & Personality Tests

- Potential issues:
 - Disparate impact
 - ADA
 - Validity by test vendor



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Workplace Violence

- OSHA: nearly 2 million Americans each year are victims of workplace violence
- DOL: 463 workplace homicides occurred in 2012
 - Down from 1,608 deaths in 1993
- DOL: 15,980 workers in private sector were victims of workplace violence that required one or more days off in 2014



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Workplace Violence

- Conduct a safety analysis
- Implement workplace violence policy
 - Should cover physical acts AND bullying, harassment, and other intimidation
- Integrate with other policies on searches, monitoring, and code of conduct
- Make safety plan



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Workplace Violence

- Once policy is in place, consider:
 - Practicing workplace violence drills
 - Training supervisors and employees
 - Identify persons responsible for implementing safety plan



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Workplace Violence

- Pre-screen applicants
 - Ask about gaps in employment history
 - Consider criminal background check
 - Check references



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Workplace Violence

- Termination process
 - Document any performance issues
 - Notify employee of performance deficiencies
 - Prepare for termination meeting
 - Be direct about reasons for termination
 - Choose private location
 - Be professional and courteous
 - Involve security personnel in advance if concerned about violence



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Off-Duty Behavior & Activities

- Alabama is an at-will state
- No additional protections for off-duty behavior
- First Amendment only applies to governmental entities
- Do NOT retaliate for anything covered by federal laws (ex: NLRA, Title VII, OSHA)
- Other states have laws protecting off-duty tobacco use, “consumable” products, blogging, etc.



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Questions?

