

“I’ve Got My Eye On You!” – Employee Privacy Rights in the Workplace

Presented By:

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Top Privacy Issues for California Employers

- Employer-owned resources vs. BYOD
- Social Media
 - Applicants
 - Current Employees
 - Former Employees
- Marijuana in the Workplace
- Employee Monitoring
- Employee Mobility
- Pros & Cons of using the Cloud
- Litigation

- How does California define the right to privacy?



- Where does the definition come from?

Employee Privacy: Legal Basis

- California constitutional rights
- 4 Common Law Privacy Claims:
 - Public disclosure of private facts
 - Portraying an individual in a false light
 - Use of an individual's name or likeness
 - Intrusion into an individual's private solitude or seclusion
- State and federal statutes protecting employee privacy

Privacy & Company Equipment

■ Legal Claims

- Invasion of Privacy
- Federal and State Wiretapping laws
- Electronic Communications Privacy Act of 1986
- Stored Electronic Communications Act

■ Exceptions

- System provider
- Prior consent

Examples

- *Sidell v. Structured Settlement Investments*, 2009 WL 103518 (D. Conn. 2009)
 - Continued access to Yahoo e-mail account after employee resigned
- *Campbell v. Woodard Photography*, 433 F. Supp.2d 857 (N.D Ohio 2006)
 - Expectation of privacy in e-bay activities on company computer during work hours
- *Sims v. Lakeside School*, 2007 WL 2745367 (W.D. Wash. 2007)
 - Expectation of privacy on web-based e-mail accounts on work computer
 - Attorney-Client Privilege

Rise In BYOD

Are Your Employees Are **Too** Connected

- 82% of companies let employees use personal devices in the office
- 90% of American adults have a cellphone
- 67% of cellphone owners check their cellphone for messages even when no notification has been received
- 44% of Americans sleep with their phone next to their bed so they do not miss any calls, text messages or emails
- 28% of all car crashes by drivers talking or texting



BYOD Issues

- Employee Privacy
 - *Lazette v. Kulmatycki*, 949 F. Supp. 2d 748 (N.D. Ohio): Violation of Stored Communications Act (SCA) to access electronic information through company-issued smartphone
 - What about Employee-owned phones?
- Data security
 - UCLA notified members that their health information may have been compromised when a laptop with the information was lost
- Data preservation
 - Plaintiff in employment discrimination case engaged in spoliation when he only kept text messages that were beneficial to his lawsuit

Pros of BYOD Policies:

- Employees technology may be better than yours!
- There's an App for that!
 - Timekeeping
 - Location
- Saves money on hardware
- Boost worker efficiency and productivity
- Increase worker mobility
 - The virtual office
- Reduce IT management, troubleshooting and support costs

Cons of BYOD Policies:

- Lines between personal time and work time are blurred
 - The “continuous workday”
- Wage/hour for non-exempt employees
 - Off-the-clock communications
 - Expense reimbursement:
 - *Cochran v. Schwan’s Home Serv. Inc.*, 2014 WL 3965240 (Cal. Ct. App. 2014)
- Private and personal information comingled
- Security & trade secrets (current & former employees)
 - Public Wi-Fi
- Data preservation for litigation

Develop A BYOD Policy

- Who is eligible?
- What devices may be used?
- Reimbursement
- Define security protocols
- No “friends and family” use
- Limit information that can be stored on device (if possible)
- Define protocol for lost or stolen devices
- Define protocol for terminating employees
- Define acceptable and non-acceptable use
- Get signed acknowledgement

Social Media



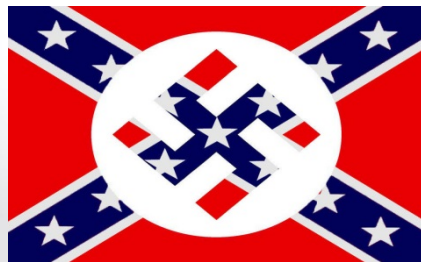
- 73% of American adults who go online now use some form of social media
- 52% said they use more than one social networking site
- Fastest growing social media apps: Snapchat, Instagram, Pinterest, Vine
- 71% of Internet users are on Facebook

Social Media

Mary regularly updates her Facebook page, where she typically shares her favorite recipes, funny cat videos and vacation photos. Mary recently complained in a status update that her paycheck was short and she planned on reporting the error to the state agency. Mary's co-worker and Facebook friend, Rick, "liked" Mary's status and added a comment that their boss was a "shady little man" who was stealing from everyone's paychecks. The Company terminated Mary and Rick when it discovered the posts.

Social Media Issues

- Recruiting
- Monitoring
 - Labor Code sec. 980
 - Expectation of privacy
- Ownership
 - *Eagle v. Morgan & Kravitz v. PhoneDog*
- NLRB's position
- Protecting Company information
- Developing a policy



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Social Media Policy

- Do you need one?
- Work-related or non-work-related or both?
- Who owns it (account names, access, edit)?
- Integrate existing policies
- Protocol for identification of users
- Protection of intellectual property
- Non-disparagement of competitors
- No interference w/rights under NLRA
- No illegal activity



Dazed And Confused: Marijuana in the Workplace

- 75% of Americans believe the sale and use of marijuana will eventually be legal nationwide
- Medical Marijuana
 - 23 states have legalized medical marijuana
 - Usually for individuals suffering from a “debilitating medical condition.”
 - Often requires registry identification card
 - No state (except Arizona) has taken any specific position requiring employer to accommodate the use of medical marijuana in the workplace

Where Does This Leave Drug Testing

- Permissible in limited circumstances
 - Pre-employment and “reasonable suspicion” – OK
 - Random – Only for “safety sensitive positions”
- Generally advisable
 - *Hopkins v. Uninsured Employers’ Fund*
 - Employee’s use of marijuana to “kick off” a day of working with grizzly bears was “ill-advised” and “mind-bogglingly stupid.”
- Best practices:
 - Informed consent for testing
 - Uniform enforcement
 - Any detectable level of an illegal controlled substance a violation



Monitoring Employees

- Internet Usage
- GPS & video surveillance of current employees
- Background checks of current employees
 - “Ban-the-box” revolution

I can see U...



Internet Surfing

- 44.7% of employees waste time surfing the internet at work
- 23.4% of employees surveyed waste time emailing at work
- Average worker spends 2 hours a day doing personal business on the computer
- 70% of non-productive time is attributed to computers
- 11% of Internet users say they've tried to hide their online activity from an employer, supervisor, or co-worker

Internet Surfing

- Estimated that 31 million working-age Americans participate in fantasy sports online.
 - One estimate puts lost productivity from fantasy sports at \$14 billion.
 - Not all bad? 40% of respondents to a 2006 survey said work fantasy sports leagues increased camaraderie among employees and generally a positive influence in the workplace
- Anti-Gambling Policies
 - In 2009, Fidelity Investments discharged four employees who were running fantasy football leagues
 - Designated as a form of “gambling”

Internet Surfing

Employee outsourced his job to a worker in China.

Average day:

- 9:00 a.m. – Arrive and surf Reddit for a couple hours. Watch cat videos.
- 11:30 a.m. – Take lunch
- 1:00 p.m. – eBay time.
- 2:00 p.m. – Facebook updates, LinkedIn.
- 4:30 p.m. – End of day update e-mail to management
- 5:00 p.m. – Go home.

Where Are You & What Are You Doing?

■ GPS

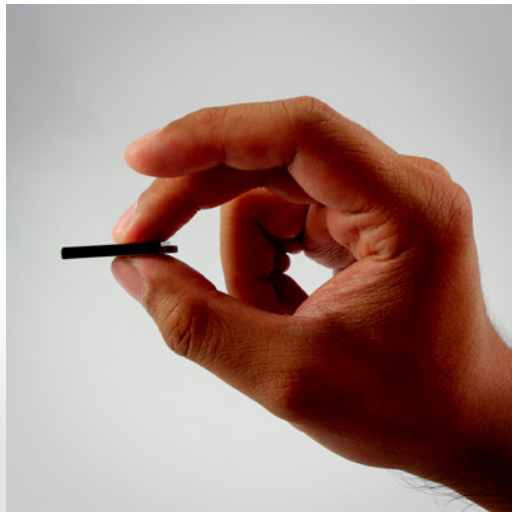
- Employee suit for wrongful termination after she was fired for uninstalling Xora (GPS app) from company phone
 - Employees had to keep phones on at all times
 - Can you require employees to put app on personal phone?
- Cal. Penal Code. section 637.7

■ Cameras

- Cal. Labor Code 435(a)
- Smartphones, GoPro, ParaShoot

Employee Mobility

- Uniform Trade Secrets Act (“UTSA”)
- Computer Fraud & Abuse Act (“CFAA”)
- Stored Communications Act (“SCA”)
- Best Practices for protecting the “crown jewels”



Litigation Issues

- Obligations to preserve information
 - It's a two-way street
 - Importance of litigation holds
- Discovery from employees
 - *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430 (S.D. Ind. 2010)
 - **Fitbit- the next frontier?**
- Discovery from social media sites





For More Information

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