



Privacy In The Workplace
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PRIVACY IN THE WORKPLACE

Introduction

One cannot represent employees or employers in today's society without constantly being confronted with questions regarding privacy in the workplace. When can I administer a drug test to an employee? Can my employer fire me for inappropriate e-mail, even when there was not a policy regarding this? Do I have to take a lie detector test? Can my company make a physical a requisite for the job? This presentation will address these types of questions by focusing on the areas of medical exams, drug testing, polygraphs, and computer usage/electronic mail messages.

I. Medical Screening & Testing

A. Federal Law

1. The Americans With Disabilities Act contains significant restrictions regarding medical examinations and inquiries, 42 U.S.C. '12101, *et seq.* Keep in mind that the ADA defines an employer as one with over 15 employees for each working day in each of the 20 or more calendar weeks in the current or preceding calendar year.

The ADA does not allow employers to conduct a medical examination or make queries of the job applicants as to whether such applicant is disabled or to the nature or severity of such disability. There are exceptions to this rule:

An employer may make pre-employment inquiries into the ability of an applicant to perform job-related functions and it may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties and may condition the offer of employment and results of such examination if all entering employees are subject to such an examination regardless of disability and if the information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and separate medical files. These medical examinations must be "job-related and consistent with business necessity."

- a. In addition to the expected pitfalls of medical testing under the ADA (a discrimination suit if the tests are not administered equally and for job-related reasons), an employer may also be exposed to liability if injuries result from the screening, such as an improper diagnosis. See, Green v. Walker, 910 F2d 291 (5th Cir.(La.)1990) where a negligence claim arose when an employment medical examination revealed a prospective employee had a serious medical condition (cancer) and this condition was not disclosed to the employee. See also, Santiago v. Greyhound, 956 F.Supp. 144 (N.D.N.Y. 1997) where doctor hired by employer was found to owe duty of care to collect urine sample with due care.

B. New York State Law

1. New York State Executive Law (Human Rights Law) has disability discrimination provisions analogous to the ADA but it does not contain specific language regarding physical exams in the same manner as the ADA. However, the New York Code of Rules and Regulations does contain language which arguably applies to testing. Under 9 NYCRR 466.11 (j) an employer must not make pre-employment inquiries with regard to disability but if a need for an accommodation is made known to the employer, the employer has a duty to clearly request any medical information and/or documentation necessary for the accommodation. This language is broad enough for one to infer that the employer can require its own physical examination of the prospective employee to determine what kind of accommodation is required. (Obviously the ADA will also apply to New York employers who have 15 or more employees.) Note that the New York State Executive Law covers employers with four or more employees.

a. New York courts have similarly found employers liable for negligence in administration of employee medical examinations. See, McKinney v. Bellevue Hospital, 183 A.D.2d 563, 584 N.Y.S.2d 538 (1st Dept. 1992) where the failure to inform a prospective employee that his pre-employment physical has detected serious medical condition is an act of ordinary negligence and so potentially serious that the law imposes a duty to disclose upon the employer.

II. Drug Testing

Generally:

More and more employers in the private sector have implemented or are considering drug testing. As a general rule, private employers are free to do this and the at-will employee, if fired (or not hired) for refusing the drug test, does not have a viable action against the employer. There are, as always, some exceptions to this rule. One exception would be if the employer were using the drug test results in a discriminatory fashion, i.e., only firing or failing to hire African-American employees if the drug test came back positive. The obvious discrimination actions (Title VII, NY Exec. Law) would then ensue. Obviously, the government employee is going to have much more protection in this regard than the at-will private sector employee. The following touches upon that.

A. Federal

1. When dealing with drug testing of public employees, there is no dispute that compulsory drug testing by the government constitutes a "search" under the Fourth Amendment. See, Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989). Thus, the privacy interest of the public employee must be balanced against the government's interests. This is determined on a case-by-case basis but by way of example, the Government's interest in the efficient operation of the workplace is at its highest when the public's lives depend on the reliable and sober performance of government employees, i.e., a law enforcement officer or bus driver. See, Amalgamated Transit Union v. Cambria County Transit Authority, 691 F.Supp. 898 (W.D.Pa. 1988); Moxley v. Regional Transit Services, 722 F.Supp. 977 (W.D.N.Y. 1989); Verri v. Nanna, 972 F.Supp. 773 (S.D.N.Y. 1997).

How the Government implements the test is also important. Where the public employer singles out an employee in a safety-sensitive job and

requires the employee to submit to a drug analysis test, the public employer must have reasonable suspicion of drug use by the person subjected to the test. Yet, when the drug test is part of a systematic, uniformly applied program, it may meet the reasonableness requirement without requiring a showing of reasonable suspicion that an individual required to be tested had been using drugs. See, Verrisupra. The vehicle for the employee who feels that the Government intruded into his or her privacy and did not have a rational or compelling reason to do so would be a 42 U.S.C. ' 1983 action. See, generally, Schwartz & Kirklín, Section 1983 Litigation, Claims and Defenses, 3d. Ed. (1997).

2.As a side note, The Drug-Free Workplace Act of 1988 requires federal contractors and grantees to take actions to provide a drug-free workplace in order to qualify as a "responsible source" eligible for contracts. Any person wishing to receive a grant from any federal agency must take specified steps to provide a drug-free workplace such as publishing a statement making employees aware of that the unlawful use, distribution, etc. of controlled substances are prohibited in the workplace. 41 U.S.C. " 701, 702.

However, The Drug-Free Workplace Act does not require drug testing and the mere fact that a business is subject to extensive and detailed governmental regulation does not convert the business' action into governmental action for constitutional purposes, i.e., a ' 1983 action. Thus, if the private employer tests for drugs and fires the employee based on the refusal or results of that test, the government will not be liable under a 1983/violation of the 4th Amendment lawsuit unless there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be treated as that of the state itself. See, Parker v. Atlanta Gas Light Co., 818 F.Supp. 345 (S.D.Ga. 1993).

B.New York State Law

1.As indicated in the introduction, private employers are generally free to administer drug testing if done uniformly and fairly. Some states have wrongful discharge statutes under which a termination for refusal to take a drug test might create a cause of action but New York is not one of them. Yet, one must be wary of New York's Executive Law governing disability discrimination as it is much broader in its coverage than the ADA. It defines a disability as a A(a) physical, mental or medical impairment resulting from an anatomically, physiological, genetic or neurological condition which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques; or (b) a record of such impairment; or (c) a condition regarded by others as such an impairment.

This language is dangerous for New York employers. As stated by the General Counsel for the NYS Division of Human Rights, "The Human Rights Law forbids discrimination against disabled persons, including drug abusers, who are able to perform their jobs. It also protects persons who are erroneously believed to be drug abusers--as may happen when someone is labeled a drug abuser based upon a false test result." Moxley v. Regional Tr. Auth. (Oct. 28, 1987).

A case in New York County, affirmed by the First Department, best describes the quandary employers are placed in when drug testing

prospective or current employees in New York State. In Doe v. Roe, the court ruled that a complaint alleging that plaintiff was unlawfully discriminated against when defendant summarily refused to hire him after a urinalysis test which plaintiff was required to take came back positive for opiates states a cause of action under Executive Law ' 296. This statute prohibits discrimination in employment based on "disability", since that term, as defined in Executive Law ' 292 (21), has been held to encompass substance dependence and since the allegations in the complaint must be accepted as true on defendant's motion to dismiss; accordingly, plaintiff's allegations that defendant engaged in a discriminatory employment practice by unlawfully subjecting him to a urinalysis test as a condition of employment without demonstrating that such a test is job related, and that it refused to hire plaintiff on the basis of such test result without evaluating plaintiff's capacity to reasonably perform in the position sought, permit an inference that defendant engaged in unlawful discrimination. Whether defendant can successfully rebut that inference by demonstrating that plaintiff's disability prevents him from performing the duties of financial analyst in a reasonable manner, must await trial. See, Doe v. Roe, Inc., 539 N.Y.S.2d 876 (NY. Cty. Ct. 1989), aff'd 160 A.D.2d 255 (1st Dept. 1990).

One can see the dilemma employers are in when they wish to administer a drug test. Not only must the test be job related but they must also, regardless of the test result, evaluate the employee's ability to perform the job. Throw in the portion of the Executive Law which, like the ADA, makes it unlawful to "regard" someone as impaired or disabled and then you will understand the challenges facing employers today when it comes to drug testing.

III. Psychological and Polygraph Testing

A. Federal

1. Employee Polygraph Protection Act, 29 U.S.C. ' 2001, *et seq.*: The Act prohibits employers engaged in or affecting commerce from using lie detector tests and to discharge, discipline or deny employment to any employee who either refuses to take the test or on the basis of such test. 29 U.S.C. ' 2002. Exceptions are made for governmental employers (federal, state and local), controlled substance manufacturers, defense contractors, national security functions and others. 29 U.S.C. " 2006, 2007.

An exception is also made for the use of polygraphs in connection with an ongoing investigation involving economic loss or injury to the employer's business such as theft, embezzlement or industrial espionage. Even in these cases the employee must have had access to the premises and there must be reasonable suspicion of the employee's involvement. Id. at ' 2006. Also, under this exception, an employee may not be discharged based on the results of a polygraph or the refusal to take one without "additional supporting evidence" and there are significant restrictions on what can be asked. 29 U.S.C. ' 2007.

a. Civil actions exist for employees fired in violation of the EPPA. See, Lyle v. Mercy Hospital, 876 F.Supp 157 (S.D. Ohio 1995) where employer's summary judgment motion failed as it did not qualify for "ongoing investigation" exemption and there existed issue of fact as to whether employee was directly or indirectly

asked to submit to lie detector test and as to whether he was fired for refusing the test.

B. New York State Law

1. New York Labor Law has provisions relating to psychological stress evaluators and employment. NY Labor Law ' 733 defines a psychological stress evaluator as any mechanical device or instrument which purports to determine the truth or falsity of statements made by an employee or prospective employee on the basis of vocal fluctuations or vocal stress. Labor Law ' 735 makes it a misdemeanor (1st offense - class B misdemeanor/class A misdemeanor for any subsequent offense) for an employer to require request, suggest or knowingly permit any employee or prospective employee to submit to a psychological stress evaluator examination.

' 738 states that any employee or prospective employee damaged as the result of a violation of this law shall be entitled to file an action for damages in the supreme court of this state. ' 736 has what would appear to be a retaliation provision, although not dubbed that, wherein it states that no employee shall be discharged, disciplined or discriminated against in any manner for filing a complaint or testifying in any proceeding or action involving violations of the provisions of this article. Any employee discriminated against in violation of the provisions of this section shall be compensated by his employer for double the amount of any loss of wages and benefits arising out of such discrimination and shall be restored to his previous position of employment.

2. Please note that NY Labor Law ' 733, *et seq.* does not address conventional polygraph tests which are based on fluctuations in blood pressure, pulse beat, breathing and galvanic skin response and the traditional polygraph test is not outlawed by this statute. See, *Scott v. Transkrit Corp.*, 91 A.D.2d, 682 (2d Dept. 1982).

3. See also, *Hall v. UPS, Inc., et al.*, 76 N.Y.2d 27 (1990) where Court of Appeals, on appeal from the Fourth Department, ruled that a person who has been subject to a lie detector test may not maintain an action against the examiner for an alleged negligent administration of the test. This plaintiff was pressured into resigning from employment after "failing" a polygraph. The Court made specific mention, however, that this case turned on the nature of the harm, injury to personal and professional reputation and that these injuries have long been compensated by defamation claims which require a showing of malice. If the harm had been a physical one, a cause of action may well have existed. Along these lines, see *People v. Hamilton*, 511 N.Y.S.2d 190 (4th Dept. 1986) where Executive Law discrimination action existed when employer used person to administer polygraphs who unnecessarily touched breasts of women and asked improper sexual questions.

4. See also, NY General Business Law ' 380-j(g) which prohibits credit reporting agencies from retaining records of any lie detector tests an individual may have taken and NY General Business Law ' 74(1)(b) which provides for a civil action in cases involving 'willful or malicious' misconduct by licensed detective agencies.

IV. Computer/E-Mail Privacy

A. Federal

1.The Electronic Communications Privacy Act ("ECPA") protects most electronic communications, including e-mail from interception, attempted interception, disclosure, use and unauthorized access. See 18 U.S.C.' 2510(12), 2510(17)(A), (B). This statute contains both criminal penalties and authorizes a civil action for the aggrieved individual.

However, the ECPA does not prohibit the monitoring of stored e-mail messages. A message must be in transit for it to be intercepted so accessing stored messages or mailboxes is not an interception under the ECPA. See, 18 U.S.C. ' 2510(17), U.S. v. Moriarty, 962 F.Supp. 217 (D.Mass. 1997). Also, the ECPA has exceptions when a non-interstate system is at issue (i.e., the intra-office e-mail system), where prior consent is obtained (either explicitly or implicitly or where interception occurs "in the ordinary course of business." 18 U.S.C. ' 2511.

There are also provisions within the ECPA which further indicate that viewing or accessing stored information such as internet activity history (web hits) would not constitute an interception. 18 U.S.C. ' 2511(2)(h)(ii), 2701.

2.Also, let us not forget the governmental employee and that pesky Fourth Amendment. A ' 1983 action may lie for the public employee whose computer files are searched by his employer as he does have a privacy interest in the contents of his computer. As such, there must be a balancing of governmental and private interests. See, Levanthal v. Knapek, 266 F.3d 64 (2d Cir. 2001).

B.New York State Law

1.New York State Penal Law '250.00 et seq., makes it unlawful, like the ECPA, to intercept or access an electronic communication. This would most likely include e-mail. See, People v. Kramer, 92 N.Y.2d 529 (1998). Yet, this law does not contain the civil action provisions that the ECPA does and is criminal in nature, focusing on wiretapping, etc. Moreover, the same arguments/exceptions would apply to what is "intercepting."

a.See, Hudson v. Goldman Sachs & Co., Inc., 725 N.Y.S.2d 318 (1st Dept. 2001) where an employee's allegation that employer learned about his extramarital affair with a coworker, for which he was terminated, by intercepting his e-mail stated claim for violation of ECPA. The court acknowledged the fact that the law only covers contemporaneous interceptions but the fact that the employee alleged an interception was enough to survive a motion to dismiss.

Conclusion

It is anticipated that as technology continues to advance, lawmakers will eventually adopt more specific laws governing privacy in the workplace especially that concerning electronic mail and the Internet. As a general proposition, the private at-will employee can have his computer access reviewed and can be fired as a result. The government employee has further constitutional protection. All of these actions are subject to the established employment laws, i.e., Title VII, the ADA, Human Rights Law, etc. Thus, even though an employer can view an employee's e-mail, internet usage, etc., it cannot be for a discriminatory reason. An employer would be best served to have clear and concise internet usage policies that are disseminated to and signed by every employee so as to avoid or reduce any confusion. Regarding physical exams, drug testing and polygraphs the laws are more specific although none less confusing for employers. Great care should be taken when venturing into these areas.