

SEARCHING FOR ANSWERS ABOUT WORKPLACE PRIVACY

Q. Why might an employer wish to search a workplace?

A. There are many reasons, including recent theft, missing items, or rumors of drug or alcohol use in the workplace.

Q. Is it true that an employer cannot conduct a workplace search without "probable cause?"

A. You've been watching too many "Law and Order" episodes! "Probable cause" is something reserved only for criminal proceedings and will not usually involve the traditional employment relationship. However, both public and private employees have filed "invasion of privacy" lawsuits against employers who have conducted unexpected searches into the employee's workplace. This includes an employee's desk drawers, lockers, purses, briefcases and the like.

Q. So what rights to employers and employees have when it comes to workplace privacy?

A. Although the right to privacy is not delineated in any specific law, the U.S. Supreme Court has found that the U.S. Constitution provides a right to privacy. This right exists as between individuals and government entities, thus public employees have a constitutional right to privacy in their relationship with their employer that employees in the private sector do not have. This right includes, for instance, the right to be free of unreasonable searches and seizures.

Q. Does this mean that private employees have no rights to privacy in their relationship with their employer?

A. Not constitutional rights, generally; however there are other types of protections deriving from civil law that provide rights of action for non-governmental employees. These include torts such as defamation and invasion of privacy. The bottom line is that both public and private employers need to be mindful of their employees' privacy and that there could be consequences for disregarding it.

Q. When does an employer cross the "privacy" threshold?

A. As in the criminal law, the civil courts define "privacy" as a matter of expectation. Employees generally will have a right to privacy in those things that are not specifically declared by the employer to be "non-private." In other words, unless an employee has a "reasonable expectation

of privacy" in a certain area of the workplace, a court is likely to find that the employer had a right to search those areas.

This was illustrated by a recent federal court case, in which an employee had some private materials stored in her workplace locker. Although the locker belonged to the employer, the employer had allowed the employee to use her own padlock and key to secure the contents of the locker. Later, while conducting a workplace search, the employer arranged for the lock to be broken and the door to be pried open, without telling the employee.

When the employee subsequently filed an "invasion of privacy" lawsuit, the court ruled that because of the latitude the employer had allowed the employee in securing her belongings, the employer had effectively created a "reasonable expectation of privacy" in the employee regarding those belongings. Therefore, in searching the locker without the employee's consent, the employer had violated the employee's rights by overstepping the employee's expectation of privacy that the employer itself created.

Q. So how can I be free to conduct workplace searches without violating my employee's rights to privacy?

A. Your best bet is to have a clear policy stating that your workplace is subject to searches, and providing advance notice to employees that they should not have any expectation of privacy in their desk drawers, filing cabinets, lockers, computers, etc.

Q. You mentioned computers. What about them?

A . Read next week's column.

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