

25TH LABOR & EMPLOYMENT SEMINAR

LIVE STREAM

Virtual for
2020

 HINSHAW

Do Your Workplace Policies Acknowledge Employee Privacy Rights?

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Monitoring Employees at the Workplace

- ❖ Monitoring Employees – Old School Rounds on the Floor
- ❖ Next Video Surveillance



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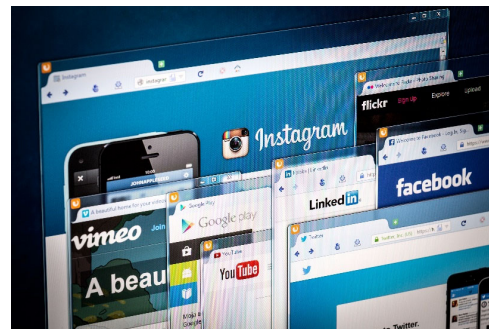
Monitoring Employees at the Workplace

- ❖ Now through software Employers can monitor the key strokes, web searches, efficiency, production and review of digital documents, app usage, GPS location data and many other digital metrics that measure the productivity and workplace activities of employees using employer computer systems on-site or from remote locations

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Using Social Media to Screen Applicants

- ❖ EEOC and Federal Trade Commission – Published Joint Non-Discrimination Guidelines on Background checks
- ❖ Fair Credit Reporting Act
 - ❖ CONSENT
 - ❖ DISCLOSURE



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Employee Digital Privacy

- ❖ Employer has policy that compels Applicant or Employee to provide Employer with social media password data
- ❖ Employer has policy that permits managers to ask for social media password of Employees
- ❖ Employer has practice of obtaining social media passwords of Employees

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State Employee Digital Privacy Laws

- ❖ Since 2013, the general rule in Illinois is that an employer may not ask or compel an employee or applicant for access to their social media account password or user name in order to access the personal online account of an applicant or employee. 820 ILCS 55/10(b)(1).
- ❖ Other states have similar laws that protect personal online accounts of employees. Conn. Gen. Stat. §31-40x; Mich. Comp. Laws §37.271-31.278; Del. Code Ann. title 19, §709A (only social networking accounts); R.I. Gen. Laws §28-56-1; Utah Code Ann. §34-48-102 (these two laws cover additional login-protected personal online accounts including email or messaging accounts).
- ❖ Exceptions can include investigations of employee misconduct or legal violations related to use of employer issued electronic devices

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Global Use and Regulation of Social Media

- ❖ European Union
- ❖ Canada
- ❖ United Kingdom



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Employer Monitoring Practices

- ❖ Employer held Welcome Back Talks with Employees who returned from sick leaves and vacations and recorded the experiences, symptoms of illnesses, and diagnoses of Employees
- ❖ Employer's managers held discussions with Employees and recorded details of family problems and religious beliefs of Employees
- ❖ Employer collected, updated, and used data for Employee performance evaluations and to profile Employees for measures and decisions about employment relationships
- ❖ Data was available and readable by up to 50 other Managers

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GDPR Applied to Employment

- ❖ Hamburg Commissioner for Data Protection and Freedom of Information fined H&M \$41.3 million
- ❖ Fine based on illegal surveillance of Service Center employees located in Germany
- ❖ Data became accessible company-wide for a few hours when Employer discovered security breach and a configuration error occurred
- ❖ HC found ongoing research and recording activities “led to a particularly intensive interference with the rights of those affected.”

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Workplace Electronic Communications

- ❖ Any other perils for not having or following a policy?
- ❖ *Blakely v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J. 2000).
- ❖ Employer’s use of CompuServe electronic bulletin board was analogized to physical bulletin board with space set aside for employee messages as forming part of the workplace environment.
- ❖ Employers not held to have duty to monitor employees’ private communications.
- ❖ But Employers do have duty to take effective measures to stop co-employee harassment when employer knows or has reason to know that it is occurring as part of a pattern of workplace harassment.

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Employer Social Media Policy

- ❖ Employer has policy that sets rules and guidelines for employees' personal use of social media. "Be professional and responsible when posting on external social media; you are responsible for what you post." Policy lists discrimination and harassment prohibitions. "Your use of social media that harms or impairs Employer's financial or professional reputation or is damaging to Employer in any other respect may result in ...disciplinary action, up to and including termination of employment, if you violate this Policy."

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Employer's Social Media Policy

- ❖ *Ellis v. Bank of N.Y. Mellon Corp.*, No. 18-1549 (W.D. Pa. May 20, 2020).
- ❖ Exceptionally rated employee comments on personal Facebook account that councilperson should have driven bus to plow through protestors.
- ❖ Court accepted Employer's argument that post was offensive, advocated violence, showed poor judgment, and was reputational risk. No pretext in application of policy was shown due to absence of any similarly situated comparators whom were treated differently.

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Employer Policies

- ❖ Issue was whether Employee violated three policies of municipal Civil Service Commission: (1) did behavior “reflect[ed] discredit upon [her]self, the department, and/or the Metropolitan Government,” (2) was conduct “unbecoming of an employee of the Metropolitan Government,” and (3) did Employee’s Facebook profile disclose that she was a Metro employee but failed to include a disclaimer that her “expressed views are [hers] alone and do not reflect the views of the Metropolitan Government.” The charge letter included a summary of the incident, described the three rules Employee was accused of violating, and outlined her due process rights. The letter explained that “[t]o advance the mission [of ECC], it is vitally important that all department employees conduct themselves in a manner free of bias, demonstrate unquestionable integrity, reliability and honesty,” and that “[t]he success of [the] agency can be measured by the perception and confidence the public has in the employees representing the agency.”

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Court Relies on Employer Rules

- ❖ Emergency communications employee posted Facebook comment about voters in 2016 presidential election that used racial slur. Employee found to lack any evidence that she did not violate three Civil Service Rules that were cited as grounds for reversing trial court ruling that governmental Employer had violated First Amendment rights of Employee. The case was remanded for further proceedings under a corrected analysis of the First Amendment.
- ❖ *Bennett v. Metropolitan Gov’t of Nashville*, No. 19-5818 (6th Cir. 10/6/2020).

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Employer Policies on Marijuana Use

- ❖ Division of states that criminalize or legalize recreational and/or medical marijuana use
- ❖ Beyond incidents where reasonable cause for suspicion of employee being intoxicated or under the influence at work, does Employer have screening policy?



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Employer Drug Screening Policies

- ❖ Employer policy requires applicants and employees who are on leave for over 90 days to submit to drug test.
- ❖ Employee provides expired medical marijuana card at drug test and says she will be recertified at her next doctor appointment.
- ❖ Employer discharges Employee for not having a valid medical marijuana card at time of drug test.
- ❖ Employee's doctor writes letter to Employer saying Employee had prescription for month's supply of medical marijuana until medical card expired, that employee was certified for such use, and that any medical marijuana would stay in employee's system for 2 months.

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State Law Actions on Use of Legal Product

- ❖ U.S. District Court in Pennsylvania predicts that Pennsylvania Supreme Court will find that private right of action exists under Pennsylvania Medical Marijuana Act provision prohibiting employers from discharging, threatening, refusing to hire, discrimination or retaliating against employee for status as person certified to use medical marijuana. *Hudnell v. Thomas Jefferson Univ. Hospitals, Inc.*, Civ. Act. 20-01621 (W.D. Pa. 9/25/2020).

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Other State Courts on Medical Marijuana Protections

- ❖ The *Hudnell* court cited four other state courts that also found their state laws to imply a right of action.
- ❖ *Whitmire v. Wal-Mart Stores, Inc.*, 359 F.Supp.3d 761 (D. Ariz. 2019); *Chance v. Kraft Heinz Food Co.*, No. K18C-01-056 NEP (Del. Super. Ct. 12/17/18); *Noffsinger v. SSC Niantic Operating Co.*, 273 F.Supp.3d 326 (D. Conn. 2017); *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680 (R.I. Super. Ct. 5/23/17).

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Other States with Different Marijuana Laws

- ❖ Ohio law does not protect employees who test positive for marijuana use even if they are lawful users of medical marijuana. ORC Section 3796.28(B); 3796(A)(6); 4123.54(B).
- ❖ Company lawfully applied its substance abuse policy to union employee and 10 day suspension upheld in arbitration.
- ❖ ZF Active and Passive Safety and UAW, Local 1181., 20-2 ARB ¶7646 (Mar. 17, 2020).

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Workplace Email Policy

- ❖ Employer policy strictly prohibits Employees from using Employer's email system in connection with activities that include: 1) engaging in activities on behalf of organizations or persons with no professional or business affiliation with Employer;
- ❖ 2) sending uninvited email of a person nature; and
- ❖ 3) distributing or storing solicitations or other non-business material or activities.

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Workplace Email Policy



- ❖ National Labor Relations Board issues decision and order that upheld Electronic Communication Policy but that finds that Employer unlawfully applied its ECP so as to restrict employees' Section 7 rights.
- ❖ *Purple Communications, Inc., et al.*, 370 NLRB No. 26 (Sept. 28, 2020).

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Workplace Email Policy

- ❖ *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019).
- ❖ Board stated that “employer does not violate the Act by restricting the nonbusiness use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communication with each other, or proof of discrimination.”
- ❖ Under the limited exception, Employees may use IT resources of Employer for non-business use, even absent discrimination, where employees would otherwise lack any reasonable means of communicating with each other.

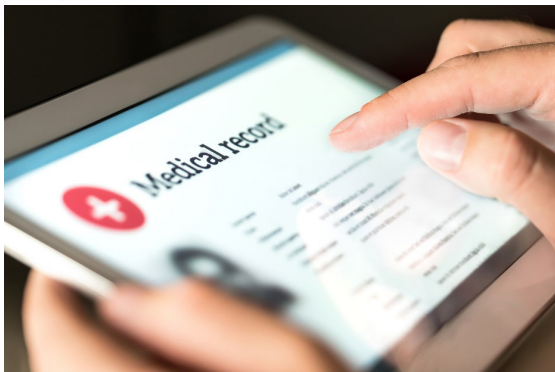
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Workplace Email Policy

- ❖ NLRB then found on the merits that the record did not show that the employees lacked access to other reasonable means of communication. Moreover, no one argued that the employer's email system was the only reasonable means for the employees to communicate with each other. Therefore the Board found that the Employer did not violate Section 8(a)(1) by maintaining its Electronic Communication policy. *Purple Communications, Inc.*, 370 NLRB 33 (Oct. 8, 2020)(Second Supplemental Decision and Order).

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GINA Case Law



- ❖ Plaintiff firefighter obtained summary judgment on GINA claim. Employer protested that it did not request genetic data on employee.
- ❖ Physician added family history of heart disease question to an OSHA questionnaire.

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GINA Case Law

- ❖ Employer failed to qualify under “wellness exception” to GINA, 42 U.S.C. §2000ff-2 since no voluntary authorization form was signed by employee
- ❖ Employer must tell health providers not to collect genetic data. 29 CFR §1635.8(d). *Lee v. City of Moraine*, 2015 U.S. Dist. LEXIS 25638 (S.D. Ohio March 3, 2015).

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Privacy – Autonomy/Relationships

- ❖ Does your governing State Constitution detail a right of privacy?
- ❖ California Constitution states privacy is an inalienable right. Cal. Const. art. 1, §1.
- ❖ California courts recognize “autonomy privacy.” *Hill v. NCAA*, 865 P.2d 633, 657 (Cal. 1994).

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Privacy - Autonomy/Relationships

- ❖ Autonomy Privacy as defined in *Hill* means a person's "interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference."
- ❖ California courts decide as a matter of law whether a legally recognized privacy interest exists in a case.

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Privacy – Autonomy/Relationships

- ❖ California federal court finds that Store Director Employee has a privacy interest in pursuing an intimate or sexual relationship with co-employee that is protected by California policy against wrongful termination in violation of public policy.
- ❖ *Howe v. Target Corp.*, No. 20-cv-252-MMA (S.D. Cal. 9/21/2020)(plaintiff employee allowed to pursue claim that Employer discharged her over protected relationship and that alleged violation of reimbursement policy was pretext).

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Privacy Torts Still Exist

- ❖ Unreasonable Intrusion Upon Seclusion Of Another
- ❖ Appropriation of Another's Name or Likeness – Right of Publicity – Commercial Benefit; State laws or legislation on Right of Publicity
- ❖ Public Disclosure of Private Facts
- ❖ Publicity that unreasonably places another in a false light before the public – “False Light Claims”

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Employment – Private Facts Claim

- ❖ Tenured faculty member allowed to proceed with claim that confidential University-Wide Committee on Sexual Misconduct investigation and disciplinary proceeding details were private facts that were later disclosed in a manner that allegedly led to his demotion from endowed chairs.
- ❖ *Simons v. Yale University*, No. 3:19-cv-01547-VAB (Conn. 9/30/2020).

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Credit Check Policy - Applicants

- ❖ Employment policy requires temporary part-time CSR/Customer Service Representative with a starting wage of \$31.42 per hour, entry-level position, requiring a high school diploma or equivalent, to have offer of employment contingent upon the completion of a successful background check, credit check, and drug screen.



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Credit Check Policy - Applicants

- ❖ Employer obtains a consumer report on the plaintiff that included certain information about her credit history. Then a representative of the Employer sends an e-mail to the plaintiff that rescinds the conditional offer of employment.
- ❖ The e-mail that "due, in part, to information received from the consumer report previously provided to you, we are not able to offer you employment at this time."

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Does State Law Privacy Claim Exist Over Employer Policy?

- ❖ Employee files a class action complaint against the Employer alleging that Employer violated her rights under the Employee Credit Privacy Act (820 ILCS 70/1 *et seq.* (West 2016)) by investigating her credit history in connection with a conditional offer of employment as a customer service representative (CSR) and ultimately refusing to hire her because of the results of that investigation.

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State Privacy Laws – Credit Searches

- ❖ *Rivera v. Commonwealth Edison Co.* – Court rejected “low-level” employee designation for plaintiff because CSRs had ability to obtain, see, and use confidential and personal data as part of job duties to assist customers
- ❖ Though monitored, less than 1% of CSR calls were actually monitored.
- ❖ CSRs seeing only partial customer data numbers still involved access to personal and confidential customer data.

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State Fair Credit Reporting Law

- ❖ *Rivera v. Commonwealth Edison Co.*, 2019 IL App (1st) 182676. - Employer obtained summary judgment on claim made under Illinois Employee Credit Privacy Act, 820 ILCS 70/1 et seq.
- ❖ *Rivera* court held that it was undisputed that employer kept personal or confidential customer data in CIMS database.
- ❖ Customer service representatives (CSRs) could see partial SSN, driver's license, bank account, credit card numbers after entry of data in CIMS system.

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Similar Policy?

- ❖ Employer admits that applicant after was interviewed, a credit check was ordered, and plaintiff was not hired. Employer admits that Employee was "provided a contingent offer of employment as a sales associate pending the completion of a successful background check, including a credit check" and that Employer "had elected not to extend her an offer of employment."
- ❖ Employer admits that it ordered credit reports for other Illinois sales associates and that it had elected not to extend offers of employment to others based on their credit history.
- ❖ Employer denied it engaged in any unlawful conduct and denied that class treatment was proper. Employer alleged several affirmative defenses including that a satisfactory credit history is a *bona fide* occupational requirement for the sales associate job.

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Do Facts Lead to Opposite Outcome?

- ❖ *Ohle v. The Neiman Marcus Group*, 2016 IL App (1st) 141944.
- ❖ Different outcome based on sales associates not having access to personal or confidential information of customers.
- ❖ After sales associates received applications they were provided to managers.
- ❖ Only managers, credit office, and loss prevention employees could obtain, keep, process, or see customer data in computer database.
- ❖ Employer failed to meet its burden of establishing that one of the exemptions of the Employee Credit Privacy Act applied.

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Biometric Information Privacy Act

- ❖ Enacted by the Illinois legislature in 2008.
- ❖ Employers must have a policy which explains the specific purpose and length of time for which a biometric identifier or biometric information is being collected, stored, or used. The policy must explain when the biometric identifier or biometric information will be deleted. See Section 15(a).
- ❖ Employers must first obtain written releases from employees before collecting, storing, using or disclosing the biometric identifiers or biometric information. See Sections 15(b) and (d).

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Biometric Information Privacy Act

- ❖ BIPA provides that “any person aggrieved by a violation” shall have a private right of action. See Section 20.
- ❖ BIPA allows for a prevailing party to recover liquidated damages of \$1,000 for each negligent violation or \$5,000 for each willful violation plus attorneys’ fees and costs. See Section 20.
- ❖ BIPA plaintiffs need not plead or prove that they sustained an injury. *Rosenbach v. Six Flags Entm’t Corp.*, 2019 IL 123186.

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Biometric Information Privacy Act

- ❖ We are certain that there is uncertainty.
 - ❖ What is the statute of limitations?
 - ❖ Is a class action claim in barred by the Workers’ Compensation Act?
 - ❖ *McDonald v. Symphony Bronzeville Park, LLC*, 2020 IL App(1st) 192398
 - ❖ Is there an arbitration clause?
 - ❖ *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645.

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Biometric Information Privacy Act

- ❖ Is the employee subject to a CBA?
 - ❖ *Miller v. Southwest Airlines, Co.*, 926 F.3d 898 (7th Cir. 2019).
- ❖ Is there a class action waiver agreement?
- ❖ Does an exemption apply?
- ❖ Is BIPA Constitutional?
- ❖ The lawsuits keep coming.

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Class Action Planning – BIPA & Privacy Claims

- ❖ Class Action Waivers
- ❖ Arbitration Agreements
- ❖ Employment Contracts
- ❖ Audit and Update Employee Policies and Employment Handbooks



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Questions?

Any questions not answered during today's presentation will be addressed at our **Advice on Tap** session on **Friday, October 30 at 12:00 Noon Central.**

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THANK YOU



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