

LEGAL BRIEFS

Employment Law and Training Series

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Workplace Privacy: Does it Really Exist?

Facilitator's Guide

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Laws addressing issues covered in this video may vary from state to state. The video and support material are intended to provide a general overview of the law, but VisionPoint Productions does not represent that its contents are necessarily in accordance with every states' laws.

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Introduction

This program is designed to help your managers gain a clearer understanding of an employee's rights to privacy and an employer's rights to protect property, information, and security.

Workplace Privacy: Does it Really Exist? provides answers to several of the most common questions managers struggle with concerning workplace privacy:

- Are individuals guaranteed the same rights to privacy within the workplace that they are entitled to at home?
- Should employees sign a consent form prior to any employer searches?
- Do I keep all records pertaining to an employee together, centralized in one location?
- After an investigation, should a full report of the incident be shared with the entire management team?

In addition, the program provides managers with three specific actions they can take to help ensure they keep themselves and your organization in compliance with the law.

The program is designed to cut through the legal jargon to provide clear and concise information in terms that everyone can understand.

Uses

This program may be used in many ways:

- 60 minute training sessions
- Staff meetings
- Conferences
- New manager orientation
- Self-study/self-directed learning

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Key Learning Points

During the program, participants will learn:

- The employee's privacy rights
- The employer's rights to protect property, information, and security
- How to establish, document, communicate, and enforce an organization's employment policies
- Four main issues regarding privacy issues in the workplace
- Three action steps that managers can take to keep themselves and their organization out of court

Training Materials

Video – The video, *Workplace Privacy: Does it Really Exist?* is divided into two segments. The first segment identifies four main areas managers need to pay attention to when dealing with workplace privacy issues. Those areas are:

1. Managing Expectations
2. Obtaining Employee Consent
3. Protecting Confidentiality of Employee Records
4. Protecting Confidentiality in an Investigation

The second section focuses on the three actions managers can take to stay within the guidelines of the law. Those actions are:

1. Know your organization's policies and procedures
2. Communicate those policies clearly and completely
3. Protect the confidentiality of employee records

Facilitation Guide – The facilitation guide contains, complete step-by-step directions for conducting this course. With the exception of the session evaluation, the facilitation guide is not reproducible. If additional guides are needed, please contact your vendor.

Participant's Desk Reference – The participant's desk reference contains a complete review of the key information covered in the course, along with supplemental information regarding workplace privacy. In addition, it includes a pre-assessment and post-assessment. The post-assessment is removable and is designed to be included in the employee's personnel file, if desired. The participant's desk reference is not reproducible. If additional copies are needed, please contact your vendor.

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A g e n d a

This program is designed as a one-hour training session.

60-Minute Agenda

Program Introduction5 minutes
Show and Review Video20 minutes
Optional Review of Supplemental Materials30 minutes
Program Debrief5 minutes

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Facilitator's Checklist

Before the Training

- Read through the entire facilitation manual
- Watch the video several times
- Determine the length of your session
- Send out a memo inviting participants to the training
- Locate audio/visual equipment and make sure it works
- Make copies of any exercises needed for the training
- Identify any personal stories that may make the session more meaningful to participants

Day of the Training

- Review your notes
- Check the TV/VCR
- Prepare flipcharts
- Check lighting of the room
- Set up room arrangements. Participants will need to get into small groups during the session

After the Training

- Review the post-assessment and session evaluation
- Document recommended changes to your presentation or materials
- Follow-up with participants on next steps, commitments, or action plans, as agreed

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Step-By-Step Facilitation Instructions

Step 1 – Introduce the program

Communicate the following to participants:

Privacy. It is a topic that has been appearing almost weekly in the news headlines. Unfortunately, most of us don't realize that the privacy we have at home, is not necessarily the same as what we have in the work environment. An organization's right to protect their property, information, and security sometimes clashes with their employees' expectations of privacy in the workplace.

We are going to spend a few minutes going over some of the things you need to be aware of regarding workplace privacy. Let's face it; the last thing any manager, supervisor or organization wants to deal with is a lawsuit regarding privacy in the workplace.

By the time we are done today, you should know:

- The employee's privacy rights
- The employer's rights to protect property, information, and security
- How to establish, document, communicate, and enforce an organization's employment policies
- Four main issues regarding privacy issues in the workplace
- Three action steps that managers can take to keep themselves and their organizations out of court

Before we go any further, let's take a few minutes to introduce ourselves.

Step 2 – Introduce yourself and then have participants introduce themselves.

This would be a good time to share a story or personal experience regarding privacy in the workplace. By opening yourself up and sharing something personal, you will give participants permission to do the same.

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Step 3 – Distribute a copy of the participant’s desk reference to each participant.

Communicate the following:

Before we view the video, I’d like you to take a few minutes to complete the pre-assessment in your desk reference. This self-assessment is designed to give you a clearer picture of your present understanding of workplace privacy.

Give participants a few minutes to complete the assessment.

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Pre-Assessment – Facilitator’s Copy

Instructions:

Please answer the following questions.

1. If someone wants to, they can track every keystroke on a particular computer.

True or False
2. Consistency is very important. Preferential treatment for friends or employees with seniority could get you into legal trouble.

True or False
3. If an employee is working on equipment or supplies that have been supplied by the company, then it is acceptable to monitor computers, phones, and day-to-day activities without notifying employees that you are doing so.

True or False
4. Records of investigations and complaints should be kept separate from personnel files and kept as confidential as possible.

True or False
5. If things are disappearing around your office and you think you know who is doing it, then it is perfectly acceptable to open up their desk or locker to look for missing items.

True or False
6. Surveillance and monitoring of public restrooms is illegal.

True or False
7. It is important to have specific procedures to go with your policies regarding workplace privacy so that you have a blueprint for action.

True or False
8. When employers allow employees to purchase their own locks for lockers or storage units without providing the employers a key or combination – the employer is effectively waiving their rights of re-entry.

True or False
9. A consent form should be signed by employees prior to any employer searches.

True or False
10. After an investigation of sexual harassment, a full report of the incident should be shared with the entire management team so that everyone can learn from the situation.

True or False

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Step 4 – Show the video.

Communicate the following:

Now we are going to watch a video, which addresses some of the tough questions managers ask regarding issues of workplace privacy. When we're done, we'll take a few minutes to review the information the video covers and talk about how those ideas apply within our organization.

Play the video from start to finish.

Step 5 – Discuss the case study.

Communicate the following:

In order to gain some perspective on the information covered in the video, let's take a few minutes to discuss a hypothetical situation that you might face as a manager.

You have an employee that you believe to be an excellent candidate for a promotion. This employee has been with the company for many years and has had excellent performance reviews. The employee has received many compliments on the on-line satisfaction survey for outstanding customer service.

You don't typically monitor calls, although you have the capacity to do so from your office. You decide to monitor some of the employee's calls for two reasons. First, you want to hear this excellent employee in action to have some specific examples to use in your report regarding why this person should be promoted. Second, you want to see what customers consider outstanding customer service. Your company doesn't have a policy on monitoring, so you have no guidelines to follow. If it's not in the policy and procedure manual, you tend to just make up your own procedures.

As you log on and listen to the employee's conversation, you realize that your employee is talking to a lawyer regarding getting a divorce. You start to listen to the conversation out of concern for your employee, but then decide to log off and not listen to the rest of the conversation. After logging off you start to rethink the promotion. If the employee is going to go through an ugly divorce, then this employee may not be able to handle any more responsibility.

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What are some of the issues you would need to consider in this situation and why?

We have included some questions and potential responses below to help you guide the discussion of this case study.

Q. What mistakes did the manager make?

- A. *First, if the manager doesn't typically monitor calls, then employees probably aren't aware that their calls are being monitored. The manager should have communicated to the employee that the calls would be monitored. Second, as a manager, all employees should be treated fairly and equitably, therefore if you are going to monitor one employee then all employees should be monitored. Third, if the organization doesn't currently have a policy on something, it is not within a manager's rights to just make something up. Managers should be responsible for contacting HR or their company's legal department and request information regarding the employee's privacy and the employer's right to monitor customer calls.*

Q. What mistakes did the organization make?

- A. *The organization has monitoring equipment and yet no policy or procedure for handling the situation. Also, if there is no policy, it is safe to assume employees were not told about the monitoring.*

Q. If the manager decided not to give a promotion based on the employee's pending divorce, would the employee have grounds for a lawsuit?

- A. *It is possible that if the employee found out about the situation, they may have grounds for a lawsuit. First, because the employee was given no notification of the call monitoring. Second, because the information learned during the call was personal and had no bearing on the employee's work performance.*

Q. What should the organization do to fix the situation so that things like this don't happen again?

- A. *First, the organization should establish, document, communicate, and enforce their employment policy regarding workplace privacy and specific procedures for managers regarding call monitoring. Second, the organization should provide training to managers regarding workplace privacy issues.*

Q. Since we can't go back and change this situation, what should the manager do now?

- A. *The manager should not monitor an employee again without first communicating to the employees about the organization's policy on privacy and call monitoring issues. The manager should also not allow the information heard on the phone call to affect the promotion/employment decision.*

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Step 6 – Review the key points.

Communicate the following:

The three actions you can take to help make sure you're in compliance with workplace privacy issues are:

1. Know your organization's policies and procedures in regard to privacy, monitoring, drug testing, equipment use, and investigations, and enforce them consistently.
2. Communicate those policies clearly and completely. Make employees aware that e-mail, phone calls and voice mail, Internet and computer use, may all be monitored to ensure appropriate use.
3. Protect the confidentiality of employee records. Keep medical records, Worker's compensation records and I-9 forms in a secure location separate from the general personnel file. Also, record of investigations and complaints should be kept separate from personnel files and as confidential as possible.

Step 7 – Complete the post-assessment.

Ask participants to complete the post-assessment in their desk reference. Then take a few minutes to review the correct answers with the participants.

Ask the participants to sign and date the Certification of Training, then remove it from the desk reference and turn it into to you.

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Post-Assessment – Facilitator’s Copy

Instructions:

Please answer the following questions. Once you have completed the assessment and reviewed your answers with your facilitator, please sign and date the Certificate of Training on the next page. Then remove this page and turn it in to your facilitator.

1. If someone wants to, they can track every keystroke on a particular computer.

True or False

2. Consistency is very important. Preferential treatment for friends or employees with seniority could get you into legal trouble.

True or False

3. If an employee is working on equipment or supplies that have been supplied by the company, then it is acceptable to monitor computers, phones, and day-to-day activities without notifying employees that you are doing so.

True or **False**

4. Records of investigations and complaints should be kept in one centralized location, separate from personnel files and kept as confidential as possible.

True or False

5. If things are disappearing around your office and you think you know who is doing it, then it is perfectly acceptable to open up their desk or locker to look for missing items.

True or **False**

6. Surveillance and monitoring of public restrooms is illegal.

True or False

7. It is important to have specific procedures to go with your policies regarding workplace privacy so that you have a blueprint for action.

True or False

8. When employers allow employees to purchase their own locks for lockers or storage units without providing the employers a key or combination – the employer is effectively waiving their rights of re-entry.

True or False

9. Prior to any employer searches, employees should sign a consent form.

True or **False**

10. After an investigation of sexual harassment, a full report of the incident should be shared with the entire management team so that everyone can learn from the situation.

True or **False**

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Step 8 – Wrap up the session.

Distribute the session evaluation and give the participants a few minutes to complete it.

Communicate the following:

Research shows that 45% of U.S. companies monitor employees' Internet usage, including e-mail. Therefore, it is important to know and understand how workplace privacy issues affect you as a manager and our organization. Now we don't expect you to become experts in this subject. However, the organization does expect you to take the three actions that we just talked about. Know our organization's policy, communicate the policies clearly and completely to employees, and protect the confidentiality of employee records.

Your desk reference contains answers to more frequently asked questions regarding workplace privacy, as well as a list of additional resources available to you.

I encourage each of you to take the time to review the information, and keep the booklet in a handy place for future reference.

Thank you for your time.

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Session Evaluation

Instructions:

Please answer the following questions. Your answers will help assess the effectiveness of this training and identify areas for improvement.

As a result of this training are you better able to:

1. Understand an employee's privacy rights.

Yes No Not Sure

2. Understand the employer's rights to protect property, information, and security.

Yes No Not Sure

3. Explain the importance of establishing, documenting, communicating, and enforcing an organization's employment policies.

Yes No Not Sure

4. Identify the four main issues regarding privacy issues in the workplace.

Yes No Not Sure

5. Identify and take action on the three steps that managers can take to keep themselves and their organizations out of court.

Yes No Not Sure

Comments for presenter:

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Supplemental Reference – Facilitator's Copy

The following supplemental reference information is contained in the participant's desk reference.

FAQ's about Workplace Privacy

Q. What is the first step an organization should take if they decide to monitor their employees' phone, e-mail, or Internet usage?

- A. An organization's first step is to define the policy and procedures. Let's face it; the best way to prevent a problem is to keep it from happening. Then an organization must take appropriate steps to ensure that managers and supervisors explain the monitoring policy to employees, they should have the employee sign a consent form acknowledging they understand the policy and consent to its implementation with respect to them personally. It is also helpful if during the communication, the organization takes the time to explain why the monitoring is taking place and what it will protect or prevent from happening. If your organization is going to monitor their employees, there should be a reasonable business purpose to support the action.

The other important aspect of communicating is doing so consistently. If you communicate to all current employees and don't add it to the new hire training, then the organization is being left wide open for potential hazards. However, if you cover all your current employees and all new employees in new hire training, then everyone has consistently been communicated to regarding the workplace privacy policy. Therefore, should a problem arise the next step should be very clear to the manager, organization, and the employee.

Q. If an employee is new to an organization and the organization has not clearly communicated the policy regarding workplace privacy, should the employee just assume there is no policy or should they inquire about the policy?

- A. It is very important for an employee to take responsibility for complying with an organization's employment issues. Therefore, the employee should ask about the organization's policy. If the organization doesn't have a policy in place, the employee should think about this: if you are being paid by the organization to get a job done and you are doing something other than your job, then you are leaving yourself open to potential problems. While at work, an employee's best bet is to focus on their job duties.

Q. What type of information should a procedure on workplace privacy contain?

- A. A procedure on workplace privacy should contain information regarding: Who will conduct a search? Will there be witnesses? How will it be documented? Where will the employee be? When will the police be called? Could the searches be random? Must there be reasonable suspicion? If company property is missing, will all employees' desks/lockers be searched?

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Q. If an employee telecommutes, does the organization have the right to monitor them?

A. There is not a clear-cut answer here because the employee is technically at home. A good rule of thumb would be to ask yourself the following questions: Is the employee paid to work a set number of hours or during a specific time frame, for example 9 a.m. – 5 p.m.? If so, then during those hours an employer has the right to know what you are working on. Is the employee using company equipment? Is the employee logged onto a corporate website that will monitor activity? In order for a telecommuter to really maintain their privacy, their best bet would be to use their own personal computer for personal things and the business computer for work-related activities.

Q. Should all organizations have the same policy regarding workplace privacy?

A. No, although some policies may be similar in content, every organization needs to be conscious about having policies and procedures specific to their organizations' needs. Before an organization can monitor, drug test, or do a credit check on a potential employee, there should be a sound business reason for the organization to obtain this information. Also, the employee must have consented or acknowledged the monitoring or check.

Q. Do all states have to follow the federal guidelines regarding workplace privacy?

A. Yes. Federal guidelines take precedence over state guidelines, however, where state laws provide greater protection, organizations are usually subject to both. A state may choose to make their guidelines stricter than the federal guidelines as long as the state's guidelines don't conflict or negate federal guidelines. An organization may also choose to have their organizational policy and procedures even more detailed than the state guidelines as long as the guidelines do not conflict or negate the state or federal guidelines. The most important thing for an organization to do is to communicate the policy and procedures consistently to all employees.

Q. My organization has an option in the e-mail software to mark a message confidential. Is the message really confidential?

A. Probably not. Most e-mail software has the capability to mark e-mail confidential or private. This does not mean that others cannot obtain access to the information or that a judge couldn't subpoena the information if applicable to a court case.

Q. Can my employer videotape me while I am working?

A. The answer depends on the type of work being monitored and if there is a specific business purpose for the monitoring. Federal law prohibits organizations from using video cameras to monitor any union meetings. State law may also limit the type of activities that can be monitored. For example, monitoring an employee locker room, or bathrooms may be forbidden.

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For Further Information

Here are some sources for additional information on workplace privacy.

Web Sites

The Privacy Foundation web page
<http://www.theprivacyfoundation.org/workplace>

Privacy Rights Clearinghouse
<http://www.privacyrights.org>

ScientificAmerican.com
<http://www.sciam.com/>

FindLaw.com labor and employment law links
<http://www.guide.biz.findlaw.com>

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