

Privacy Information

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A project of **Consumer Action**

Workplace Privacy Guide

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PRIVATE

Introduction to this guide

It's easy to assume that the privacy we enjoy in our personal lives would extend to our jobs. But, actually, employees have relatively few rights to privacy in the workplace. Investigating and monitoring employees has become a growing trend—it's estimated that today more than three-quarters of U.S. employers monitor at least some of their employees' communications some of the time.

Still, many workers remain unaware that they are or could be monitored—until they are disciplined or fired because they have violated company policy. Many job applicants and employees also are caught off guard when they do not get a job or a promotion because the employer learned something about their past or their personal life. Forewarned is forearmed: Workers who understand when and how their employer can monitor and gather information about them are better prepared to protect their privacy and their jobs.

This guide can help answer many questions about employee and employer rights. This publication is part of a module that includes a companion brochure, "Workplace Privacy: Your Rights on the Job"; a training guide for classes and seminars; PowerPoint slides; and class activities.

The brochure and other materials in this module are free for individuals, non-profits and community-based organizations. For more about these materials, visit the Consumer Action Privacy Information website at www.privacy-information.org. For materials and information on other topics, from money management and credit to housing and insurance, visit www.consumer-action.org.

Workplace monitoring

What is employee monitoring?

Employee monitoring means observing or tracking employees' activities on the job.

Is it common for employers to monitor their employees?

While not all employers monitor their workers, the majority of employers monitor at least some of their employees' activities some of the time. Whether an employer will monitor depends in part on the size and resources of the company.

Why would an employer want to monitor its employees?

Employers monitor employees for many reasons. Monitoring, they say, helps them evaluate performance, guard company informa-

tion, and protect themselves against lawsuits.

What types of communications and activities might an employer monitor?

An employer could monitor:

- *Incoming and outgoing email and instant messages (IM), including those sent through web-based services (Gmail and Hotmail, for example) when the account is accessed from a company computer*
- *Business-related telephone calls and voicemail messages*
- *Phone numbers called*
- *Amount of time spent on the phone*
- *Number of computer keystrokes*
- *Websites visited*
- *Amount of time spent away from the computer*
- *Documents on the hard drive of an employee's work computer*
- *Location (of employees and/or company vehicles)*
- *Number of stops and length of each stop while driving a company vehicle*
- *Employee actions (through surveillance cameras)*

Is it legal to monitor employees?

Generally speaking, employers can monitor employees and their communications within reasonable limits. To protect themselves from a lawsuit, employers typically:

- *Warn employees that they will be, or may be, monitored*
- *Avoid giving employees reason to believe their activities and communications are private*
- *Make sure they have a compelling reason to monitor (such as guarding against theft or protecting company information).*

Your state's laws may provide privacy protections above and beyond federal law. To learn more about your rights in your state, contact your state's department of labor. (See the "Assistance and information" section at the end of this manual for contact information.)

Does an employer have to notify employees that they're being monitored?

Federal law does not require that an employer notify employees about monitoring, though some states have laws that do. Even if they are not required to do so by law, many employers do notify

employees that monitoring or searching will, or could, take place. Such notification typically appears in the company's employee handbook or in a memo, though there can be other forms of notification.

Can an employer listen to employees' phone conversations or track their phone calls?

Federal law allows employers to monitor business-related calls. Some states require employers to notify callers that they are being monitored.

An employer cannot monitor an employee's personal call unless the employee knows the call is being monitored and has given consent. If, however, the employee makes a personal call from a business phone that he or she was told not to use for personal calls, he or she runs the risk of being monitored.

Can an employer listen to employees' voicemail messages?

Employers can monitor messages that go through the company's voicemail system.

Voicemail and text messages on a cell phone the company pays for are most likely off limits because they are stored by the phone company, not by a storage system owned or directly paid for by the employer.

Can an employer monitor employees' computer use?

Some employers are able to monitor the number of keystrokes made at an employee's workstation (this might be done to evaluate productivity), how much time is spent away from the computer, and which websites are visited.

An employer has the right to access documents on the hard drive of an employee's work computer.

Can an employer read employees' email messages?

An employer has the right to read any message that goes through the company's email system, including instant messages (IM). Some employers also monitor email sent through web-based email services (Gmail and Hotmail, for example) when the account is accessed from a company computer.

Can an employer monitor employees' activity on devices such as a PDA (personal digital assistant) or cell phone?

If the employer pays the bill for an employee's cell phone or PDA, the employer will be able to see what numbers were called, who text messages were exchanged with, what websites were visited, and how much time was spent online or on the phone. (If a phone

is outfitted with the right GPS or RFID technology, it could also tell an employer of the employee's whereabouts throughout the day.)

Voicemail messages and the content of text messages on a cell phone the company pays for are most likely off limits because they are stored by the phone company, not by a storage system owned or directly paid for by the employer.

Are deleted messages or documents safe from monitoring?

No. In most cases, deleted messages and documents are still accessible on the company's "back-up."

Can an employer track an employee's whereabouts and activities?

Yes. For on-site tracking, the employer could require employees to wear a badge with a radiofrequency identification (RFID) chip in it. GPS (global positioning system) tracking systems in company vehicles can monitor vehicle location. A phone outfitted with the right GPS or RFID technology also could reveal an employee's whereabouts throughout the day. And surveillance cameras installed on company property can monitor employees' actions on the job. (Generally, an employer can't use surveillance cameras where employees have a reasonable expectation of privacy, such as in bathrooms or locker rooms.)

If the employer says employees are not being monitored, should they believe it?

Companies are generally expected to honor their own internal privacy policies. So, for example, if an employer says that email marked as personal will not be monitored, it shouldn't be.

Still, your safest bet is to assume you could be monitored or searched even if your employer has said or implied you won't be. Also, assume that you have no protections if your employer is investigating you for some type of wrongdoing.

How can an employee tell if he or she is being monitored?

In some cases, monitoring is obvious, such as when surveillance cameras are visible or a recorded telephone line sounds a beep tone to signal it is being monitored. But in many cases, employees cannot tell that they're being monitored. That's why it's safest for employees to assume that their employer could be monitoring them at any time.

When can an employee be certain his or her communications are private?

Employees can only be absolutely certain their communications

are private when they are using a non-work computer or phone.

Does an employer have the right to search an employee or his or her office?

While workplace searches are not illegal under federal law, an employer must have a specific, legitimate reason to search an employee or an employee's belongings. Your state's laws may provide additional privacy protections.

Can an employer videotape employees?

Surveillance cameras are generally legal as long as they are in an area where employees do not have an expectation of privacy, such as a bathroom or a locker room.

State law or a union contract may further restrict an employer's right to monitor employees by camera. For example, Connecticut and Delaware require employee notification of electronic surveillance.

Can an employer audiotape employees?

If the surveillance camera also picks up sound, or if the employer uses an audio recorder, he or she must comply with federal and state wiretapping and eavesdropping laws. Depending on where you live, such laws may require that one or all parties to the recorded conversation provide consent to being tape-recorded.

Checks and tests

A prospective employer wants to check my credit report before hiring me. Why? And is that legal?

Many employers check a job applicant's credit report, reasoning that someone who pays his or her bills responsibly is likely to be a responsible worker, too. A credit check also allows an employer to verify information provided on the job application, such as current and previous addresses and employers.

The Fair Credit Reporting Act (FCRA) requires an employer to get your signed permission before accessing your credit report.

If the employer decides not to hire or promote someone based on information in their credit report, they must provide a copy of the report and let the applicant or employee know of his or her right to challenge the report under the FCRA.

Some states have more stringent rules limiting the use of credit reports.

I was denied a job because I filed Chapter 7 bankruptcy five years ago. Is that legal?

Most of the information in your credit report stays there for up to seven years; bankruptcy information remains for 10 years.

Federal law prohibits employers from discriminating against applicants because they have filed for bankruptcy. This means they cannot decide not to hire you simply because you've declared bankruptcy in the past.

Can I get a copy of my credit report?

Yes, you can get a free copy of your credit report from each of the three major credit reporting companies every 12 months by visiting www.AnnualCreditReport.com or by calling 877-322-8228.

You also are entitled to a free report if you are turned down for credit, insurance or a job because of information in your report.

A prospective employer wants to do a background check before hiring me. Do they have the right to do that?

In some cases, running a background check on a job applicant is up to the employer's discretion. In many other cases, a background check is required by federal or state law. For example, most states now require a criminal background check on anyone who works with children, or with elderly or disabled people. And jobs related to national security typically require a "security clearance."

Generally speaking, an employer has the right to conduct a background check on a prospective employee, but the FCRA requires that the employer get the job applicant's signed permission first.

The law also requires the employer to notify the job applicant or employee promptly if information in the report could result in an "adverse action," such as being denied a job or promotion, or being reassigned or fired. In such a case, the employer must provide a copy of the report and information about disputing the contents of the report.

What is included in a background check?

State laws vary regarding what information can be included in a background check, but it can range from marital status and criminal records to driving records and the results of interviews with friends, neighbors, and associates.

In general, the check should be relevant to the job. For example, checking for criminal convictions would most likely be considered relevant for an armored car driver but not for a house painter.

Is there anything that can't be included in a background check?

Yes. For example, federal and state laws make educational records confidential. And some states prohibit employers from asking about juvenile crimes, arrests, or convictions that occurred well in the past. Laws may differ from state to state, with some offering more privacy protections than others.

Can I get a copy of my background report?

Because federal law does not require employers to disclose the name of their screening company upfront (though some states, including California, do), the Privacy Rights Clearinghouse (PRC) strongly suggests you ask for the name of the screening agency at the time the employer notifies you that a background check will be conducted. Then request your annual free disclosure from that agency promptly since some screening agencies do not maintain files.

Can an employer subject me to tests?

Yes, as long as the test is designed to predict a job applicant's actual ability to do the job, it's probably legal. For example, it would be reasonable for an employer to require a typing test for a word processing job or a strength test for a job that requires heavy lifting.

An employer should have a legitimate, work-related reason to test a current employee.

Is drug testing of employees legal?

Drug testing laws vary widely among states, with some allowing the tests for any occupation and others banning them except in cases where the employer has a reasonable suspicion an employee is impaired.

In general, drug testing is more widely permitted during the hiring process. A prospective employer can test applicants as long as they've been told the test is part of the screening process, they've been offered the job (it can be offered contingent upon passing the test), and all applicants for the same position are required to be tested.

Testing an existing employee for drugs is typically permitted in certain occupations or under certain circumstances, such as following a workplace accident or if the employee appears impaired.

When state and federal law differ, employers are supposed to apply the law that is most worker-friendly. To find out more about

state drug testing rules, contact your state department of labor.

Can I refuse to take a drug test?

You have the right to refuse to take a drug test, but doing so will likely bring about the same results as if you took and failed the test.

My drug test came back positive. What can I do?

There may be nothing you can do, particularly if you are a job applicant and not an employee. If that is the case, you probably will be rejected for the job. Or, you could ask for a retest if you have not used drugs and can convince the employer of that.

If you are an existing employee, you can ask for a retest if you have not used drugs. If the test results are accurate, and you have used drugs, you may be given the opportunity to keep your job if you obtain treatment. Your options will depend on your employer's policies, your state's laws, and, perhaps, your job performance up to this point.

Depending on where you live, failing a drug test could disqualify you from certain benefits such as unemployment or workers compensation if you injure yourself or get fired. Contact your state's department of labor for more information.

What is a psychological test? Can a prospective employer require me to take one?

Some employers use psychological or personality tests to help determine if a job candidate is a good fit with the company, or to get an idea of an applicant's moral code. Test questions must be job related (not about, for example, religion or sexual orientation) and not discriminatory. Some state laws limit these tests.

You don't have to submit to any type of testing you don't want to, but refusing will likely bring about the same results as if you took and failed the test.

I'm getting mental health counseling through my company's EAP (employee assistance program). Can my employer get information about that?

Typically, an EAP will not report anything back to the company without authorization from the employee. If your employer is not aware of your use of EAP services (in other words, the employer did not refer you to the EAP and/or your request for services does not have anything to do with job performance issues), then he or she is unlikely to ask for information related to your treatment and almost surely will not ask you to authorize release of information.

In some cases, however, you may be required by your employer to give your authorization. For example, if your employer has referred you to the EAP for counseling or treatment that would allow you to keep your job, he or she is likely to require the ability to confirm with the EAP that you are following through.

What is a polygraph test? Can I be required to take one?

Federal law prohibits most private employers from requiring a lie detector test, except in certain industries (security services or pharmaceuticals, for example) or if the employer reasonably suspects a worker of theft or embezzlement. Many states ban worker polygraph testing.

What can my employer find out about my medical history? What kind of medical information can my employer keep on file?

An employer cannot request your medical records—he or she may only ask about your ability to perform specific job duties.

However, if you have an illness or injury that requires a work-related accommodation (longer breaks or a special desk, for example), you may need to provide documentation from your doctor.

The Americans with Disabilities Act (ADA) requires employee medical information to be kept separate from other personnel files, accessible only to supervisors, emergency medical personnel and government ADA compliance inspectors.

What kind of medical tests can a prospective or current employer require?

Generally, an employer can require a medical exam to ensure you are physically able to do the job, but only if the exam is required for all employees entering the same position, and only after you've been offered the job. (The employment offer can be made contingent upon your passing the medical exam.)

An employer can require a current employee to submit to a medical exam if the employee has shown he or she is physically or mentally unfit to perform essential job duties, or if there's a concern for workplace health or safety.

Federal law prohibits medical testing to screen out applicants with disabilities or who have HIV or AIDS.

I told my employer I'm HIV-positive. Who can my employer disclose this or other medical information to?

Your employer is required to keep your medical information, including your HIV status, confidential. However, it is impossible to

prevent someone from revealing private information. The legal protections you have can only help you to punish your employer after the fact.

To protect your privacy, you should remind your employer that you wish to keep your medical information confidential.

Can I be fired—or not hired—because of my medical history?

Legally, a prospective employer can require a medical exam and choose to not hire you if he or she believes you are unable to perform the essential duties of the job. Once you are on the job, an employer can only ask about your condition or require a medical exam if you have shown signs that you are physically or mentally unfit for the job. Federal law prohibits employers from making employment decisions based on medical history.

That is not to say that medical history does not play a part in an employer's decision-making process. An employer that chooses not to hire or promote you or chooses to fire you may never reveal that the decision was based on your medical history. Though an employer is not allowed to ask you for your medical history, he or she can usually obtain it if you enroll in the company's health and/or life insurance plan and sign the required authorization form.

Your privacy rights in the workplace

Are there any laws that protect my privacy at work?

There are some federal laws that protect your privacy at work. Each state also has its own laws regarding on-the-job privacy. When state and federal law differ, employers are supposed to apply the law that is most worker-friendly.

Do public and private employees have different rights?

Government employees have some additional protections under the U.S. Constitution.

Does my employer have to notify me if I'm being monitored?

Under federal law, private sector employers generally do not have to notify employees that they are being monitored. Some states do require notification. Check with your state's department of labor for information specific to your area.

Do I have the right to have a private phone conversation while on the job?

Yes and no. An employer cannot monitor a personal call unless the employee knows the call is being monitored and has given consent. If, however, you make a personal call from a business

phone that you were told not to use for personal calls, you put yourself at risk of being monitored.

The best protection is to use your own cell phone or a non-business phone for personal calls.

Can my employer read all my email messages—even personal ones?

Your employer has the right to read any message that goes through the company's email system or appears on a company computer. Companies are generally expected to honor their own internal privacy policies, however. So, for example, if your employer says that email marked as personal will not be monitored, it shouldn't be.

Still, your safest bet is to assume your personal email could be read even if your employer has stated or implied it won't.

Can I be fired because of my communications at work or my computer activity on the job?

Generally, yes. Private sector employees typically can be terminated at will. That means you could be fired for any reason that is not discriminatory.

Can my employer fire or discipline me for things I do outside the workplace, or for something I've written in a blog or on a social networking site?

Yes and no. Some laws prohibit retaliation against a worker for lawful conduct off the job. Still, an employee could suffer consequences that are difficult or impossible to prove as being retaliatory.

To be safe, don't post anything on your personal blog or a social networking site (Facebook and MySpace, for example) that you wouldn't want current or future employers to see. Use a pseudonym, not your real name, if you post anything online that could be considered controversial or reflect poorly on your employer.

Can my employer prohibit my socializing with coworkers outside of work?

No. Government and public employees have a constitutional right to privacy that protects them from employer intrusion into their off-the-job conduct. Private sector employers, too, are prohibited from intruding into their employees' private lives. Some states, including California, prohibit employers from taking any action against an employee based on that worker's lawful conduct off the job.

We're trying to organize a union. Can our employer monitor our meetings and activities?

It's illegal for an employer to monitor union activities inside or outside the workplace, or to monitor employees when they gather to discuss work conditions, even if they are not unionized.

Does being in a union provide any special rights to privacy on the job?

An employer can't monitor you on the job if a union contract forbids it. Even if monitoring is allowed, union members often have more rights when it comes to contesting disciplinary action or termination.

Do I have the right to look at my personnel file?

It depends on the laws of the state you live in. Check with your state's department of labor.

Dos and don'ts

How can I avoid getting caught doing something I could get in trouble for?

Many employees don't realize they've been monitored until it's too late—they find out during a performance review or when learning of disciplinary action. Protect yourself by learning your employer's privacy policies if you don't already know what they are. And always assume that your employer could be monitoring your actions and communications.

How can I make sure my personal communications remain private?

The best way to make sure your communications are private is to:

- *Make personal calls from your own cell phone or home phone.*
- *Send and receive personal email through your home or another non-work computer.*
- *Surf the Web from home or another non-work computer.*
- *Keep personal data files off your company computer.*

How can I make sure my online activity outside of work doesn't jeopardize my job?

Don't post anything on your personal blog or a social networking site (Facebook and MySpace, for example) that you wouldn't want your current or future employers to see. Use a pseudonym, not your real name, if you post anything online that could be considered controversial or reflect poorly on your employer.

How can I reduce the chances of my prospective or current employer seeing negative credit report information?

Protect yourself by building and maintaining a good credit record.

Order your free credit report from each of the three major credit reporting companies (Equifax, Experian and TransUnion) every 12 months to check for errors and for items that should have dropped off the report (most items stay on for seven years; bankruptcy stays on for 10 years). Dispute any inaccuracies with the credit bureau. If they can't verify the information is correct, they must remove it.

If you know there's something negative in your report that could harm your chances of getting a job or promotion, you may want to address it with the employer in advance. At least then you'll have the opportunity to make your case.

Is there anything I should do to prepare for a background check?

According to LawyerIntl.com, workers who know they will be looking for a job soon can do the following to reduce the chances of being surprised by the information in a background check:

- *Order your credit report from each of the three major credit reporting companies. Dispute any inaccurate information.*
- *Check county court records to make sure they reflect the correct outcome of any cases you have been involved in.*
- *Request your driving record from the Department of Motor Vehicles to make sure all information is correct.*
- *Order your own employment background screening report to get an idea of what an employer might see. ChoicePoint is just one of hundreds of companies that do employment background screening. Request your report at www.ChoiceTrust.com or 866-312-8075.*
- *Ask your former employer if you can see your personnel file (some states' laws enable you to do so). Or ask what the company's policy is on releasing personnel records to new employers, screening companies or others who request them.*
- *Tell neighbors and colleagues that they may be contacted for information about you as part of a job application.*

Assistance and information

What can I do if my privacy rights have been violated? Who should I notify?

If you feel you your privacy rights have been violated at work, contact your state's department of labor. You can do an online search for your state's name plus "department of labor," or find the link at the U.S. Department of Labor site (www.dol.gov/esa/contacts/state_of.htm). You also can check the state government section of your local phone book.

Where can I find more information about workplace privacy and my rights?

There are many government agencies and non-profit organizations that offer information and assistance related to privacy rights in the workplace. Since state laws differ and often provide more protections than federal laws, start by contacting your state's department of labor.

Here are some additional resources:

U.S. Department of Labor www.dol.gov

This government agency administers federal employment laws.

Privacy Rights Clearinghouse www.privacyrights.org

The PRC offers information on a wide range of consumer protection topics, including background checks, medical records and other privacy issues.

Federal Trade Commission www.ftc.gov / 877-382-4357

The FTC provides information about your rights under the Fair Credit Reporting Act (FCRA).

Workplace Fairness www.workplacefairness.org

This non-profit organization provides information and assistance to workers nationwide and advocates for employee rights.

National Workrights Institute www.workrights.org

This organization works to protect human rights in the workplace.

Consumer Action

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