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EMPLOYMENT ISSUES SPECIFICALLY IMPACTING RESTAURANT OPERATIONS©

By

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BIO OF ROGGE DUNN

The Texas Connection

Rogge Dunn is a fifth generation Texan, born in Dallas in 1957. Mr. Dunn and his wife are active in charitable, political and civic causes.

Recognized Trial Expertise

Mr. Dunn has been repeatedly recognized by *Texas Monthly* as a Texas "Super Lawyer" and by D Magazine as one of the Best Lawyers in Dallas.

Dunn was honored by *Texas Monthly* in 2005 as one of the Top 100 Attorneys in Dallas/Fort Worth. Dunn was recognized as a Purveyor of the Year by Outback Steakhouse in 2001, 2002 and 2004.

Legal and news organizations have sought his opinion on legal issues, including: The CBS Evening News, The Wall Street Journal, MSNBC, Texas Lawyer, U.S. News & World Report, Entrepreneur Magazine, USA Today, The American Bar Association Journal, The National Law Journal, The Dallas Morning News, The Dallas Business Journal, Risk & Insurance Magazine, D Magazine and Ft. Worth Star-Telegram.

Mr. Dunn regularly appears as a legal commentator for television and radio stations.

Complex Litigation Nationwide

Mr. Dunn is one of only 25 attorneys in Texas who is Board Certified in both Civil Trial Law and in Labor and Employment Law. He has litigated complex business, employment and personal injury disputes throughout the country and tried cases to a jury verdict in four states.

Corporate Investigations

Fortune 500 companies have hired Rogge Dunn and his team to investigate sensitive corporate governance, harassment claims and other matters.

Hospitality Law Experience

Dunn has extensive experience handling hospitality industry issues. He represents single-unit operations to Fortune 1000 multi-concept restaurant concerns. He spent his pre-law years learning the food and beverage business working as everything from a server to a manager. He knows how to “expo” and deal with restaurant issues.

His extensive experience enables him to address a wide range of hospitality law issues. He represents food and beverage concerns in covenant-not-to-compete, trade secret, and non-solicitation cases. He handles all aspects of harassment, discrimination and retaliation claims. A significant portion of his hospitality law practice involves complicated partnership and ownership valuation claims.

He is also available to present seminars and counseling to prevent claims from occurring, or to respond promptly with investigations when problems arise. His practice includes drafting employment contracts, non competes, policies, procedures and employee handbooks.

From food poisoning, to dram shop liability, to commercial disputes, Dunn knows the hospitality industry business.

Some of the results obtained by Dunn for hospitality concerns include:

▲Handle all EEOC charges filed west of the Mississippi for Fortune 1,000 restaurant concern with over 1,000 units world-wide

▲Obtained injunctive relief for new owner of white tablecloth steakhouse restaurant against former owner arising out of restaurant sale

▲Obtained defense verdict finding no breach of partnership agreement or fiduciary duty for Fortune 1,000 restaurant concern

▲Obtained take nothing dismissal in favor of executive employed by Fortune 500 fast-food concern sued in a glass ceiling class action lawsuit

▲Successful defense of two nationwide restaurant chains in class action suit seeking refunds for alleged sales tax overcharges

▲Conducted discrimination and harassment training for Midwest restaurant group management team

▲Obtained injunctive relief for restaurant clients enforcing non-competes on numerous occasions across the country

Hospitality Industry Clients

Some of Dunn's food and beverage clients include: Adelmo's, Bonefish Grill, Carrabba's Italian Grill, Cheeseburger in Paradise, Dippin' Dots, Flemming's Prime Steakhouse, New World Restaurant Group, Outback Steakhouse, Paul Lee's Chinese Kitchen, Roy's Restaurant and Sonny Bryan's.

OVERVIEW & MODEL TO REDUCE EXPOSURE

I. REDUCING EXPOSURE IS ABOUT REDUCING AND MANAGING RISKS

A. Everything we do involves risk

B. Today's discussion provides ways to reduce and even eliminate risk

II. EMPLOYERS CAN REDUCE AND ELIMINATE RISKS IN THE WORKPLACE BY MANAGING RISKS

A. Your managers are the best risk manager your company has

B. Ideas for training your managers

III. "SELLING" YOUR MANAGERS ON RISK ELIMINATES AVOIDING DISCRIMINATION/HARASSMENT IN THE WORKPLACE IS AN IMPORTANT ASPECT OF CUSTOMER SERVICE

A. Dignity & Common Respect

B. Consequences

C. Prevention is the Key

IV. POSTING AND REPEATEDLY EMPHASIZING YOUR POLICIES

V. REVIEWS AND APPRAISALS

Performance appraisals provide a powerful, effective, and written method to evaluate and develop employees, and avoid legal liabilities. All too often, performance appraisals are synonymous with either disciplinary actions or cursory yearly reviews to fill out a file. Properly

used, performance appraisals assist everyone to develop to their potential. Improperly used, performance appraisals provide plaintiffs' attorneys with deadly effective trial exhibits.

The following provides an analysis of performance appraisals and practical suggestions for their use.

1. Potential Liabilities in Performance Appraisals

Despite the effectiveness of performance appraisals for an organization, the focus of this paper is avoiding or reducing legal liability exposure. Thus, one should consider the consequences of providing the plaintiff's attorney sound bites if performance appraisals are mishandled.

Generally, performance appraisals may subject an organization to the following legal liabilities:

- Defamation
- Discrimination
- Retaliation

A. Defamation

Meaningful performance appraisals require candor and honesty. However, performance appraisals must be tempered with a complete understanding of the associated legal implications. Mishandled performance reviews can subject an employer to liability for defamation.

Fortunately for employers, many states provide safe harbors for performance appraisals. Generally, if comments are made as part of a performance appraisal, and are disseminated only to those individuals in the company with a "need to know," a defamation action will fail. However, if the performance appraisal is disseminated to others, especially anyone outside the

company, defamatory comments may support an action. Normally, courts consider direct managers and human resources personnel as individuals with a need to know.

Practice Tip: Ensure that the organization implements a specific, written policy establishing the individuals, departments, or positions who have a "need to know." An effective way of ensuring performance appraisals reach only appropriate individuals is to include a checklist or routing page on the outside of the envelope indicating to whom the appraisal should be delivered and allowing the person delivering and receiving the performance appraisal to initial.

B. Discrimination

Claims of discrimination may arise based on the comments provided in and use of performance appraisals. Obviously, inappropriate comments used in performance appraisals, verbal or written, may provide indicia of discrimination or a hostile work environment. Similarly, the use of performance appraisals may provide the factual predicate for a claim. For example, if performance appraisals are only used for certain groups of employees, who are detrimentally impacted by the performance appraisals, a claim may arise.

More importantly, performance appraisals, when properly used, provide an excellent method of documenting an employee's progress, strengths, weaknesses, and defending any claimed discrimination.

Practice Tip: Use Performance Appraisals Consistently. Ensure that performance appraisals are used in a consistent manner using the same criteria, questions, and follow-up actions. Similar to the script we

recommend for hiring employees, management should follow a specific form and set of criteria when performing evaluations. The consistency reduces the likelihood of claims of disparate treatment.

C. Retaliation

One of the primary issues in avoiding retaliation claims is timing. The tendency is to use performance appraisals to paper an employee's file after an incident to lay the groundwork for the individual's discharge. Great care must be taken when using this tactic. Sudden changes in performance evaluations, receiving a greater number of evaluations than other employees, and comments made in evaluations may provide bases for retaliation claims. Importantly, evaluations must be used consistently. Furthermore, some states are employment-at-will states where employees may be terminated for good or no cause, just not an illegal reason. The necessity of papering the groundwork for a termination may prove more of a detriment than benefit in these states.

D. Reviews Improve Morale

Other detriments include reduced morale, less productive employees, and employee violence. Although these issues are outside this paper's scope, the importance of employee participation, rebuttal memos, and appeal procedures are helpful in addressing these issues. Employees who are permitted to have meaningful participation in the appraisal process will likely accept negative comments with less resentment.

2. Establishing Performance Appraisal Systems

Performance appraisal systems must be tailored to a specific organization's, or even groups within an organization's, needs and objectives. Input from the organization's executives,

human resources department, managers, and employees will assist an organization in implementing an effective and useful performance appraisal system.

Importantly, it must be remembered that performance appraisal systems are a means for communication. Basic principals of communication must be considered, including the free flow of communications among employees, supervisors, and executives.

Generally, performance appraisal systems should include a foundation of standards for employees and appraisers, specific guidelines for when, how, and by whom appraisals are made, employee feedback opportunities, and periodic reviews of the appraisers by their managers.

(a) Establish Written Standards

To assist employees and supervisors, basic standards should be set forth in writing. It is helpful to establish up front what is expected of an employee. Specifically:

- what are the employee's duties
- how is the employee to perform the duties
- what are management's expectations for the employee in the future, both short- and long-term
- by what criteria will the employee be reviewed
- when will performance appraisals occur

Most of these basic standards may be communicated through written job descriptions, training, and employee handbooks. For example, a job description may establish the employee's duties, training materials may convey how the duties are to be performed, and employee manuals may establish the frequency of performance appraisals. Some organizations may want to perform a goal-setting appraisal at the beginning of the individual's employment.

(b) Types of Performance Appraisals

Annual, bi-annual or anniversary-date performance appraisals are generally effective. However, in an effort to increase communication among employees, management, and executives, and to handle arising issues promptly and effectively, other performance appraisals may prove beneficial. Three categories of performance appraisals are available:

- Disciplinary Reviews
- Praise
- Scheduled Reviews

Each type of appraisal used correctly and in conjunction with the others strengthens an organization's ability to track employee progress, the organization's goals, and limit potential liabilities.

(c) Disciplinary Reviews

Disciplinary reviews are necessary to ensure prompt action is taken and documented with regard to employees whose performance or conduct fails to meet the organization's objectives or standards. Including a disciplinary review policy in the employee manual assists in establishing a framework from which the employees and managers may work. After advising employees of the implementation and purpose of a disciplinary review policy, the actions which may be taken, emphasizing that the action will be commensurate with the act requiring disciplinary action, should be set forth.

3. Counseling Employees

a. Employee Counseling and Oral Reprimands

Organizations regularly begin disciplinary action with employee counseling or an oral

reprimand. This discipline should be limited to minor offenses, misunderstandings, or to improve job performance. Documenting this type of reprimand is usually unnecessary and may defeat the purpose. Allowing and assisting an employee to improve, without a mark on their permanent record, may help in fostering communication and motivating employees. However, it is important that the manager not limit reprimands to oral censures.

b. Written Reprimands

Written reprimands are appropriate for continued poor job performance and policy violations. The employee may also receive a written reprimand where the supervisor believes that an offense in the first instance warrants a formal written notice because of its seriousness. The written reprimand ensures that the employee is fully aware of the employee's level of misconduct and is advised in writing of those areas of performance that must be improved. The written reprimand should also include what action should be taken to remedy the problem.

c. Final Written Reprimand

If the employee continues to violate a policy or put forth poor performance even after prior counseling, a final written reprimand may be provided to the employee. The final written reprimand should include and reference the prior written reprimand.

d. Suspension

Suspension is appropriate when an employee continues to fail to correct their performance issues, continues to violate company policy, or has committed an act of a serious enough nature to warrant immediate suspension. The file should be documented reflecting the reason for the suspension and all other pertinent details.

e. Termination

Termination of employment should normally be taken when the organization has made attempts to have the employee correct performance or conduct and the employee has not responded or no practical alternatives exist. Termination is the ultimate consequence for poor performance or violations of organization policy. However, remember that in some states employees are "at-will" and disciplinary action is not required to allow the termination of the employee.

D. Scheduled Performance Reviews

Scheduled performance reviews allow the manager, executives, and employee to review progress and deficiencies on a regular basis. Further, scheduled performance reviews ensure that each employee is treated the same, receives a review at the same intervals, and is aware that their work and efforts will be assessed, critiqued and praised as warranted.

1. Employee Participation

Employee participation in any performance appraisal will assist in ensuring that the performance appraisals are carried out fairly and that the employee does not feel he or she is being treated differently. Employees should have the opportunity to review and comment on evaluations before they become final. Normally, an employee should be provided an opportunity to sign the evaluation form. The signature should provide that:

(1) the employee has met with the supervisor,

(2) has had an opportunity to review the evaluation,

(3) understands the comments made in the evaluation and the new goals set forth, and

(4) is aware of the organization's policy for filing appeals or grievances over the evaluation.

Instead of simply having the employee resent a supervisor for the actions taken in the review, the employee should have an opportunity to file an appeal or response to the evaluation. This may be done through providing a separate page for employee feedback and comments along with the signature block, or submitting a memo or response to the immediate supervisor for review. The appeal procedure allows an employee to vent any problems, whether it be with the review or the manager, and reduces the potential for decrease productivity or litigation from a poor evaluation. Further, it provides an excellent tool for supervisors to get the whole picture and to ensure that their subordinates are properly performing the appraisals.

Along the same lines, it is important that supervisors are counseled on their performance as appraisers. Considering the comments will be placed in an employee file, will potentially affect the employee's future, and may affect the company in any potential litigation, constant decks are required to ensure that the appraisal process is carried out fairly, efficiently, and with an understanding of the legal consequences. Constructive criticism and the free flow of information to assist in reaching the organization's goals and avoiding litigation are fostered by this review of the appraiser's actions.

VI. GENERAL PERFORMANCE EVALUATION POINTERS

1. Persons to Involve in the Evaluation Process

- Immediate Supervisor
- Second Line Supervisor
- Human Resources Officer

2. Ensure Evaluation Done Professionally

- Avoid typos, jargon and slang
- No epithets
- Show your compassion
- Show the company's patience
- Show company giving another chance (three strikes and you're out)
- **Remember** these will be exhibits for a jury

3. Be Honest, Accurate and Consistent

4. Base the appraisal on the typical performance of the employee during the entire period, not just recently

5. Ensure that appraisals are based on accurate data keeping in mind the job requirements

6. Ensure that each appraisal factor is assessed individually

7. Do not rely on previous appraisals and ensure that each appraisal is independently performed.

8. Allow Employee to Raise Concerns or Explanations

9. Have Employee Sign Evaluations

- Doesn't mean employee necessarily agrees with evaluation

10. Document Problems, Requirements and Solutions

- Show where improvement needed
- Expectations for improvement

•If possible, how improvement will be measured (quantitative vs. quantitative)

VII. VERBAL AND WRITTEN COUNSELING

1. Immediately document the counseling session
    a. Put it in writing
    b. File it
2. Be Professional
3. Identify reasons for counseling
4. Be honest, accurate and consistent
5. Have the appropriate personnel present during the counseling
    •Supervisor
    •H.R. personnel
6. Keep counseling as confidential as possible
7. Specify the violations
    a. Identify the problem(s)/violations
    b. Identify specific rules involved
    c. Demonstrate how employee's misconduct adversely affects the company
    d. Review all prior warnings/performance problems
8. Encourage employee to provide explanation of his or her explanation in writing
9. * Employee should sign a written record of counseling
10. Identify specific improvement plan

VIII. OFFENSIVE E-MAILS

Rules of "Netiquette"

IX. INTERCEPTION AND MONITORING OF EMPLOYEE COMMUNICATIONS

As the sophistication of electronic equipment increases, an employer's ability to and methods of monitoring its employees have expanded tremendously. While efficiency experts may extol the virtue of monitoring employees' performance by surveillance, any such surveillance should be done in light of existing statutes and case law.

In today's workplace many employers monitor the communications of their employees. The employers argue that they are only attempting to provide better service to their customers, control their exposure to liability that may arise out of their employees' communications and protect confidential company information. In response, employees argue that employer monitoring of their communications is simply a way for the employer to eavesdrop and intrude on an employee's private communications.

A. Recording Phone Calls and Conversations in General

The surveillance and monitoring of employee communications is regulated by Title III of the Federal Omnibus Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522. The Act, which is commonly referred to as the "Federal Wiretap Act," prohibits employers, employees, and other persons from intercepting wire, oral or electronic communications of others. Under the Act, a third party may not intercept a telephone conversation unless the person is a party to the conversation or where one of the parties has give prior consent to the interception. 18 U.S.C. § 2511(2)(d).

The Act also prohibits the interception of communications for the purpose of committing any criminal or tortious acts. 18 U.S.C. § 2511(2)(d). The Act provides for criminal penalties and civil damages against violators. 18 U.S.C. §§ 2511, 2522. For a good overview of the Act see S. Kopecky, "Dealing With the Intercepted Communication: Title III of the Omnibus Crime Control and Safe Streets Act in Civil Litigation," 12 Rev. Lit. 441 (1993).

B. Recording Phone Calls in the Workplace

In the employment context, courts have recognized an exception to the general rule proscribed by the Act, known as the "extension phone exemption" or the "business extension exemption." This exemption allows an employer to monitor employee conversations if the monitoring is done on the employer's phone system, in the ordinary course of business and does not concern purely personal calls. Watkins v. L.M. Berry & Co., 704 F.2d 577, 580 (11th Cir. 1983).

Accordingly, in Briggs v. American Air Filter Co., 630 F.2d 414 (5th Cir. 1980), the Fifth Circuit held that an employer's monitoring of an employee who was suspected of divulging trade secrets to a competitor was permissible because it fell within the ordinary course of business exception. See also Burnett v. State, 789 S.W. 2d 376, 378 (Tex. App.--Houston [1st Dist.] 1990, writ ref'd) (finding that security employee's use of extension phone to listen in on defendant employee's phone conversation fell within ordinary course of business exception and thus contents of conversation were admissible at trial); James v. Newspaper Agency Corp., 591 F.2d 579, 581-82 (10th Cir. 1979) (holding that monitoring of employees' handling of telephone transactions was permissible when monitoring was business related and employees were aware of installation of monitoring system); Simmons v. Southwestern Bell Tel. Co., 452 F. Supp. 392,

395-96 (W.D. Okla. 1978), aff'd, 611 F.2d 342 (10th Cir. 1979) (permitting employer to monitor employee calls in order to determine whether employees were making personal calls).

However, once an employer monitoring an employee's telephone call recognizes it as a personal call, the employer must cease monitoring the call or subject itself to liability. Deal v. Spears, 780 F. Supp. 618, 622-23 (D. Ark. 1991), aff'd, 980 F.2d 1153 (8th Cir. 1992) (holding that employer violated Act when it monitored employee's telephone calls to discover whether she had participated in a theft and continued to listen and tape sexually provocative discussions between employee and her boyfriend).

One exception to monitoring an employee's personal phone calls occurs when the employer suspects that the employee is making unauthorized use of the telephone. The Eleventh Circuit specifically held in Watkins that:

> A personal call may not be intercepted in the ordinary course of business under the exemption in § 2510(5)(a)(I), except to the extent necessary to guard against unauthorized use of the telephone or to determine whether a call is personal or not. In other words, a personal call may be intercepted in the ordinary course of business to determine its nature, but never its contents.

Watkins v. L. M. Barry & Co., 704 F.2d 577, 583 (11th Cir. 1983).

Courts in other jurisdictions have also addressed the tape recording or monitoring of phone calls under the Federal Wiretap Act. See Payne v. Norwest Corp., 911 F. Supp. 1299, 1303 (D. Mont. 1995) (finding bank employee's tape recording of conversations with bank's customers without consent or knowledge of customers did not violate Federal Wiretap Act because employee was party to conversations and conversations were not intercepted "for the purpose of committing any criminal or tortious act"); see also Sanders v. Robert Bosch Corp., 38 F.3d 736 (4th Cir. 1994); Ali v. Douglas Cable Communications, 929 F.Supp. 1362 (D. Kan.

1996) (finding that common law invasion of privacy claim available for monitoring personal calls but not business-related calls). Amati v. City of Woodstock, Illinois, 829 F. Supp. 998 (N.D. Ill. 1993).

C. Texas Code of Criminal Procedure

Article 18.20 Amended Effective September 1, 1997

Senate Bill 1120 amended article 18.20 of the Code of Criminal Procedure. The amendment was made to conform article 18.20 and 18.21 with Title 18 of the United States Code. The Act expands the definition of wire communication and electronic communication to include the radio portions of a cordless telephone conversation. Section 17 of article 18.20 deleted the exceptions contained under Section A and now provides that the article is not applicable to conduct described as affirmative defenses under Article 16.20(c) of the Texas Penal Code. The affirmative defenses are exactly the same of the deleted portions of section 17.

D. Duty to Inform All Parties When Taping a Phone Call

Although the Texas and Federal Wiretap laws require the party recording a conversation to obtain only the permission of one party to the conversation, an employer should never forget to be sure that they understand and follow any wiretap laws of other states which may be applicable. A recording made in another state or a recording made of a person in another state may subject the company to liability for failure to follow that state's laws regarding wiretaps.

For example, Massachusetts has adopted a state law similar to the Federal Wiretap Act except that its procedures are more stringent. Pursuant to Massachusetts law, both parties to a conversation must consent to a recording. Wiretapping Statute, Mass. Gen. L. ch. 272, § 99 (1993).

PRACTICE TIP: If a Company Plans to Record, Inform Employees

The best way for an employer to protect itself from potential liability for monitoring phone calls and other electronic communications is to obtain the specific written permission of the employees. Permission can be obtained in a job application form. Another method is to adopt a written policy and procedure that is distributed to all employees informing them of the monitoring.

As with any policy that is distributed to employees, an employer is well advised to obtain written confirmation from an employee that he or she received and read the policy. Adopting such a policy extinguishes any expectation of privacy that the employee might have in any telephone calls or electronic communications.

Of course, depending on the state law that an employer is subject to, monitoring a phone call may also require the permission of all parties to the conversation. An employer may unwittingly violate the law of some other state when it monitors a phone call that its employee makes or receives involving a customer or vendor in another state. For example, in California it is illegal for anyone to secretly record any conversation. This prohibition applies even though the person recording participates in the conversation. Cal. Penal Code § 629.38 (West 1996).

If an employer tape records or monitors such a call, it may end up being sued in another state. Therefore, many employers utilize a recording which gives all parties on the telephone line notice at the beginning of the call and/or beeps throughout the call to ensure that all parties to the conversation are aware that the call may be recorded or monitored.

E. Civil Remedies for Improper Tape Recording

If a person violates the provisions of article 18.20, Texas law permits the person whose communications were intercepted to bring a civil cause of action pursuant to provisions of the Code of Criminal Procedure. If successful, the plaintiff can recover actual damages, including not less than liquidated damages at the rate of $100 a day for each violation or $1,000, whichever is higher, punitive damages, reasonable attorney fees and court costs. Tex. Crim. Proc. Code Ann. art. 18.20 (16) (Vernon 1994).

In addition, the Texas Civil Practice and Remedies Code authorizes a civil cause of action against a person who intercepts a communication without one party's consent and allows a party to seek an injunction against future interceptions. Civil penalties under this law include: statutory damages of $1,000, all actual damages in excess of $1,000, punitive damages, reasonable attorney's fees and court costs. Tex. Civ. Prac. & Rem. Code §§ 123.002 and 123.004 (Vernon 1997); see Collins v. Collins, 904 S.W.2d 792 (Tex. App.--Houston [1st Dist.] 1995), writ denied per curiam, 923 S.W.2d 569 (Tex. 1996); Parker v. Parker, 897 S.W.2d 918 (Tex. App.--Fort Worth 1995, writ denied).

The employer should not underestimate the fact that a jury or judge may become angry with telephone monitoring that they view as unfair or improper. The potential for a sizable award of punitive damages is significant. For example, in the Parker case the court affirmed the lower court's imposition of $1,000,000 in punitive damages against a husband who used bugging devices to eavesdrop on conversations between his wife and her attorney. Parker at 930-31.

Accordingly, an employer who wishes to monitor or record an employee's conversations must either be a party to the conversation, obtain the employee's consent, or have a reason that is

justified by business necessity. Otherwise, the employer runs the risk of subjecting itself to substantial criminal and civil penalties for violations of federal and state wiretap statutes.

PRACTICE TIP: Forbid Employees From Tape Recording in the Workplace

The price and sizes of hand held tape recorders have been significantly reduced. Consequently, many employees are tape recording conversations with their supervisors and co-employees to prove claims of discrimination, harassment, retaliation and/or intentional infliction of mental distress. An employer should implement a policy which prohibits employees from tape recording conversations in the workplace. Further, an employer is in a better position to have a court exclude from evidence such clandestine tape recording if it enacts a company policy forbidding employees from tape recording in the workplace.

For years, many high tech companies have forbidden employees from possessing tape recording devices or cameras in the workplace. Given the electronic age and the increased use of tape recorders, this policy also makes sense for other companies as well.

Two cases address electronic surveillance by employees: Talanda v. KFC Nat'l Management Co., 1996 US Dist. LEXIS 7634 (N.D. Ill. 1996) (deferring to jury whether employee's secret tape recording of supervisor's telephone conversation with employee protected form of opposing discrimination under ADA). WVIT, Inc. v. Gray, 1996 Conn. Super. LEXIS 2841 (Conn. Super. Ct. Oct. 25, 1996) (ruling that co-worker's secret tape recording of plaintiff's conversations in workplace violated her common law right to privacy).

X. ETHICAL TRAPS FOR ATTORNEYS IN THE ELECTRONIC AGE

A. Liability for Using a Cell Phone

In an effort to be efficient, more and more attorneys are using cell phones to return calls when they are in their car, at the airport or in seminars. Attorneys should be extremely cautious when using cell phones.

As the Newt Gingrich incident proves, cell phones are not secure and many individuals may be listening and recording your cell phone call. Obviously, this can lead to an unintended and inappropriate disclosure of a client's secrets and confidences, trial strategies, and other sensitive matters. Given that it is common knowledge that such calls can be intercepted, an attorney who discusses confidential matters on a cell phone may face substantial liability if those confidences are heard by someone and used against the attorney's client.

Indeed, at least one state bar that has issued an opinion regarding e-mail and cell phones that an attorney may violate the rules of conduct if certainty cannot be obtained regarding confidentiality. South Carolina Ethics Op. 94-27.

Some cell phone experts have told us that the new digital or "PCS" cell phones cannot be intercepted. The newer digital phones may provide some protection, but given the expected glitches in new technology and the fact that "spy" and "anti-spy" devices and even stores catering to these products are prevalent, discussion of any confidential matters on a cell phone is a risky proposition.

PRACTICE TIP: Limit Discussions on Cell Phones To Non-Confidential Matters

Given the ease with which cell phone transmissions can be intercepted, an attorney should not discuss confidential matters on a cell phone. Further, an attorney should warn the

client in writing against discussing any confidential matters regarding the client's case with anyone over a cell phone. If an emergency presents itself and an attorney cannot get to a land line, the attorney should speak generally about the matters or use a code so that anyone who is listening in cannot learn the confidences and secrets.

B. Ethical Rules Concerning Taping By Attorney

1. State Bar Generally Prohibits Taping by Attorney

While anyone in Texas who is a party to a conversation can tape record same, attorneys are subject to additional restrictions. These restrictions prohibit an attorney from taping a telephone call.

For many years, Texas attorneys were allowed to tape record conversations, if the tape recording did not violate some law. See Ethics Op. No. 84, Texas Comm. on Professional Ethics (1953).

In 1974, the State Bar of Texas' opinion conflicted with an American Bar Association Committee on Ethics' taping. The ABA had ruled that it was unethical for an attorney to secretly tape record a conversation -- even if one party consented to that opinion. ABA Formal Opinion 337, ABA Committee on Ethics and Professional Responsibility (1974).

In 1978, the Texas Professional Ethics Committee followed the ABA's lead and withdrew Ethics Opinion No. 84, which had recognized Texas attorneys' right to record conversations. Ethics Op. No. 392, Texas Committee on Professional Ethics (1978). In addition, the Dallas Bar Association issued a similar ethics opinion in 1991. Dallas Bar Association Op. No. 1991-02 (1991).

Finally, in 1996, the Texas Professional Ethics Committee issued another opinion reaffirming the State Bar's position that a lawyer may not record conversations unless the lawyer advises all parties to the conversation that the call is being taped. This notice must occur before the taping begins. Ethics Op. No. 514, Texas Committee on Professional Ethics.

The State Bar did carve out one exception to the rule prohibiting lawyers from tape recording conversations. The Bar stated that in special situations involving a State Attorney General or a local law enforcement officials conversations may be taped, providing they adhere to strict statutory regulations that are constitutional.

2 Clients May Make Secret Tape Recordings

Although attorneys should not tape record conversations, an attorney is permitted to properly advise his client of the law. Specifically, the Ethics Opinion states that lawyers are entitled to explain the law of tape recording to their clients. In other words, a lawyer can advise his client that the client may secretly tape record conversations as long as the client is a party to a conversation or at least where one participant in the conversation consents of the taping. Ethics Op. 514.

Of course, an attorney may not avoid the Bar's ethical prohibitions on taping by requesting his/her clients record conversations in which the lawyer is a participant. This is similar to the disciplinary rules prohibitions against a lawyer using a client to communicate with another party on the subject of the lawsuit when that party is represented by an attorney.

For a good article discussing this issue and addressing what some other states ethics opinions are concerning lawyers tape recording conversations see R. Gilbreath & C. Cukjati, Tape Recording of Conversations: Ethics, Legality and Admissibility, 59 Tex. B. J. 951

(November 1996); S. Arkin, Attorneys, Tape Recorders and Perfidy," N.Y.L.J. at 3 (Apr. 14, 1994); Adams, "Tape Recording Telephone Conversations -- Is It Ethical for Attorneys?", 15 J. Legal Prof. 171 (1990); 59 Tex. Jur. 2d Privacy § 9, 10 (1988).

C. Ethical Considerations for Attorneys Using the Internet

The advent of attorney Internet usage continues to raise unanswered questions. Traditional rules, including rules of professional conduct, were initially developed for other media and are not necessarily appropriate for attorneys' use of the Internet. The rapid insurgence of law firms[1] and lawyers into the Internet has, to date, outpaced substantive guidance regarding the applicability of traditional rules and development of specific rules applicable to the new technology.

A recent article from the American Bar Association–A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies: A White Paper Presented for the Purpose of Discussion by the American Bar Association Commission on Advertising, July 1998, posted at http://www.abanet.org/legalserv/advertising.html–provides a thorough overview of major issues and scenarios affecting lawyers use of the Internet.

The following addresses the issues of client confidences and analyzes the Texas State Bar's approach to Internet advertising.

[1]One source notes that in November of 1994 only five law firms were believed to maintain web sites. A mere six months later, 500 law firms maintained sites. See Elizabeth Wasserman, "Lawyers File Few Objections to Advertising on the 'Net," San Jose Mercury News, July 17, 1995. A 1997 ABA study noted that 98 percent of large firms offered Internet access. Large Law Firm Technology Survey: 1997 Survey Report, ABA Legal Technology Resource Center, 1997, at page 2.

1. Maintaining Client Confidences When using the Internet

Of significant concern to attorneys is the maintaining of client confidences when using electronic medium. Attorney/client communications and attorney work-product are of primary concern. The rules and considerations applied to paper medium should similarly apply to electronic medium.

In International Employment Service Corp. v. Liberty Mutual Insurance Co., Civ. No. 93-2528-G (Suffolk County, ME, order dated Dec. 12, 1994), e-mail messages between Liberty Mutual's in-house attorneys and other employees were the basis for a Motion to Compel which was denied. The court applied principles governing the analysis of privilege and work-product for communications in paper medium to the e-mail and found that the e-mail were not discoverable.

The ease with which e-mail and other electronic communications may be misdirected raises the important consideration of the application of the "inadvertent disclosure doctrine" which is applied by the Texas courts. See Alldread v. City of Grenada, 988 F. 2d 1425 (5th Cir. 1993); Granada Corp. v. First Court of Appeals, 844 S.W. 2d 223 (Tex. 1992).

In Granada Corp., the Texas Supreme Court determined issues of waiver of attorney/client and work-product privileges by a party's inadvertent disclosure of documents. In Granada Corp., former shareholders sued Granada claiming that its officers had fraudulently induced them to relinquish stock.

During the deposition of Granada's president, three memoranda were tendered to the president and questions asked about the documents for several minutes before Granada's attorney objected. Granada sought protection asking the court to order the three memoranda

along with a fourth which was not tendered returned. Additionally, sixty-two (62) other documents were determined to fall within the crime-fraud exception to the attorney/client privilege.

On mandamus to the Texas Supreme Court, Granada contended that the four memoranda were "inadvertently included" in a one hundred and fifty thousand (150,000) page production. The shareholders' attorney designated the memoranda for photocopying and the copies were sent to Granada and bate stamped prior to release.

Interpreting Rule 511 of the Texas Rules of Civil Evidence which provides that

> A person upon whom these rules confer a privilege against disclosure waives the privilege if (1) he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged. . . .

The Supreme Court disagreed that the production was inadvertent. The Court held that disclosure is "involuntary" only in circumstances when the disclosing party took efforts reasonably calculated to prevent the disclosure which did not work. The Court listed as other factors the delay in rectifying the error, the extent of any inadvertent disclosure, and the scope of the discovery.

Similar to documents in paper medium, information produced inadvertently through misdirected e-mails or voice mails should be analyzed under the inadvertent disclosure principles. A means of maintaining client confidences includes utilizing encryption software and passwords. Web browsers such as Netscape and Explorer have some built-in security features

which utilize passwords on information transmitted. Software packages including Pretty Good Protection (PGP) provide separate additional security by encrypting the transferred data. Note that encryption software will require the sender and recipient to have the same type of software; however, considering the expense, attorneys with larger corporate clients may find the encryption software affordable and of significant benefit, if, for nothing else, peace of mind.

As provided in Alldread, the courts will consider the circumstances surrounding disclosure on a case by case basis. Alldread, 988 F. 2d 1434. Investing in encryption software or utilizing the built-in security features of browsers, will provide positive evidence that specific attempts were made to insure that the confidentiality of the communications remained intact.

XI. SURVEILLANCE AND SEARCHES

A. Video Surveillance

Another area of concern to employees and employers alike is video surveillance of employees. Employers often keep video surveillance of areas to protect workers from crimes by other employees or strangers; however, surveillance may also intrude upon an employee's right to privacy.

In the only Texas case addressing this issue, the court held that the surveillance of an accused thief in a woman's dressing room by a female department store security officer did not violate her right to privacy because a sign was posted in the dressing room that stated the room was under surveillance. Gillet v. State, 588 S.W. 2d 361 (Tex. Crim. App. 1979).

Other courts addressing this issue have reached similar conclusions. See Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182-83 (7th Cir. 1993) (determining that non-employee worker could not succeed on a privacy claim absent evidence that she used locker

room where video surveillance allegedly took place); Thompson v. Johnson County Community College, 930 F. Supp 501, 507 (D. Kan. 1996) (holding that open, public nature of security personnel's locker room, which also housed heating and electrical equipment, defeated any reasonable expectation of privacy in area and thus, video surveillance by college did not violate Fourth Amendment of U.S. Constitution); Marrs v. Marriot Corp., 830 F.Supp 274, 282-83 (D. Md. 1992) (finding that surveillance of employee in open office was not actionable because employee was not in seclusion and thus did not have expectation of privacy); Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento, 59 Cal. App. 4th 1468 (3d Dist. 1996) (ruling that video in area accessible to number of employees not violative of privacy rights under Fourth Amendment or California Constitution).

On the other hand, surveillance in an area where a person has a reasonable expectation of privacy can be unlawful. People v. Triggs, 506 P.2d 232 (Cal. 3d 1973). In People, the court held that a person has a reasonable expectation of privacy in a restroom and authorities may not intrude upon that privacy. Id. at 236-37. For additional cases on this issue see Privacy Expectation in Restroom, 74 A.L.R. 4th 508 (1989).

PRACTICE TIP: Inform Employees of Video Surveillance or Conduct Video Surveillance Only in Areas Where They Have No Expectation of Privacy

The best way for employers to avoid liability for video surveillance of their employees is to obtain the written permission of employees to do so. In the alternative, the employer should distribute policies and procedures or other written notice to employees about the surveillance so that they will have no reasonable expectation of privacy. In those cases where surveillance must be done secretly to be effective, video surveillance should be limited to public areas or other

areas where employees would not have a reasonable expectation of privacy.

B. Surveillance by Private Investigators

As employers experience more problems with "inventory shrinkage" due to theft of inventory by employees more and more companies are utilizing private investigators to do undercover surveillance of employees. These activities by outside investigators can subject a company to significant liability.

Generally, the same principles previously addressed apply to private investigators and anyone else monitoring an employee's activities outside the workplace. If the employee is in a public area or area where she or he has no reasonable expectation of privacy, then following, filming and photographing an employee will generally not subject an employer to liability.

When the monitoring involves a location or activity where an employee has a reasonable expectation of privacy, employers should limit the time and scope of their investigations. A case out of Maryland provides a lesson in this regard.

In Pemberton v. Bethlehem Steel Corp., 502 A.2d 1101 (Md. Ct. Spec. App. 1986), an employer hired a private investigator to monitor the activities of a union employee to learn if the employee had sabotaged company property. The court held that the private investigator's surveillance of the employee on public roads, outside his home, at a shopping center and at his girlfriend's home did not violate the employee's privacy rights. Id. at 1117. The court granted the employer summary judgment on the surveillance issue.

Nevertheless, the court denied the employer's motion for summary judgment on the employee's claims that the private investigator utilized a listening device to monitor the employee's activities in a motel room where he was staying. The court stated that such

monitoring was the "kind of surveillance [that] has been held actionable." Id. at 1117.

PRACTICE TIP: Use of Private Investigators to Monitor Employees' Activities

If a company feels it necessary to monitor employees' activities outside the workplace, we recommend that the company hire an outside investigator to do so. This work should be done by a trained professional. Further, hiring a third party may help insulate the company from liability or provide an entity that can indemnify the company in the event that the investigation leads to a lawsuit for invasion of privacy.

The private investigator should be warned that the company does not want the investigator to violate any laws or invade reasonable expectation of privacy of any employees. Further, the company should obtain an indemnification agreement and a certificate of insurance from the private investigator. Finally, the employer should choose the private investigator carefully.

We recommend that an employer interview the investigator extensively inquiring about the investigator's experience, whether her or his license has been revoked, whether any investigation conducted has led to a lawsuit and determine the length and level of his or her prior law enforcement training and experience. The best investigators are typically individuals who have had a long and successful career with major law enforcement entities such as the FBI, Secret Service, U.S. Marshal, or major state or city police departments.

C. Searches of Employee Areas

1. Constitutional Protection From Searches

Both the United States Constitution and the Texas Bill of Rights protect an employee from unreasonable searches or seizures by employers in the workplace. However, the employee

must have a reasonable expectation of privacy in the area searched. O'Connor v. Ortega, 480 U.S. 709 (1987). In O'Connor, the court held that an employee's desk and file cabinets in their office satisfies the reasonable expectation of privacy test and therefore, generally cannot be searched by an employer.

2. Common Law Protection From Searches

Texas recognizes the tort of invasion of privacy as a matter of state constitutional law and common law. However, there are few cases discussing an employer's search of an employee's work areas in Texas. The main case is K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. Civ. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.), aff'd per curiam, 686 S.W.2d 593 (Tex. 1985).

In that case, plaintiff brought suit when the employer searched the employee's locker that was provided by the employer. The employee had placed a padlock on the locker. The court explained that when the employee put a lock on the locker, the employee had a reasonable expectation that the locker's contents would be free from intrusion. Id. at 637-38.

Employers are usually permitted to search an employee's areas if the search is work-related, limited in scope, and has a legitimate basis, such as the likelihood that the employee is guilty of some type of misconduct. O'Connor v. Ortega, 480 U.S. 709, 719 (1987).

As noted, the primary factors courts consider in determining whether or not a search by an employer is legal is whether or not the employee had a reasonable expectation of privacy. Courts are much more likely to hold that a search of the top of an employee's desk is reasonable, while the search of an employee's purse, wallet or desk drawer is not.

In determining an employee's reasonable expectation of privacy, the courts consider not only what is searched, but the particular job that an employee has and the industry in which she or he works. For example, courts would tend to hold that an engineer working on a classified weapons project has less expectation of privacy than a cook at McDonald's. Similarly, employees working in highly monitored industries, like the gambling and gaming industries, and employees working in highly regulated industries, such as those affecting public safety like nuclear power plants, have a reduced expectation of privacy.

Thus, searches by employers are evaluated under a reasonableness standard that balances the business interests of the employer with the privacy expectations of the employee.

XII. EMPLOYER'S INTRUSION INTO AN EMPLOYEE'S PERSONAL LIFESTYLE

An employer's ability to terminate employees on the basis of their personal lifestyles is limited by constitutional provisions as well as many state statutes.

A. Romantic or Social Relationships

An employer should hesitate to inquire into an applicant or employee's romantic or social relationships without a legitimate business justification. An employer could also subject itself to lawsuits based on discrimination if the employee or applicant is considered to be in a "protected class" by the courts.

1. Anti-Fraternization Policies

To avoid potential problems, many companies have enacted anti-fraternization policies which prohibit or limit employees from maintaining relationships with co-employees.

The courts that have addressed anti-fraternization policies have generally upheld the policies as long as they are not discriminatory against any "protected class" and justified by a

sufficient business requirement. In Shawgo v. Spradlin, 701 F.2d 470, 483 (5th Cir. 1983), the court upheld the disciplinary action taken against two unmarried police officers who were cohabitating in violation of department policy. The court held that the state's interest in its anti-fraternization policy did not infringe upon the officers' constitutional rights. Id. at 482-83.

The Shawgo case is consistent with others where the courts have permitted public employers to put more restrictive policies on their employees. See Smith v. Walmart Stores, 891 F.2d 1177, 1180 (5th Cir. 1990) (upholding termination of employee for violating company's anti-fraternization policy by engaging in romantic relationship with co-worker); Watkins v. United Parcel Service, 797 F. Supp. 1349 (S.D. Miss.), affirmed, 979 F.d. 1535 (5th Cir. 1992) (finding that employee's privacy was not violated because employee failed to show bad faith or reckless prying by employer, as required to support invasion of privacy claim). But see Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir.), cert. denied, 404 U.S. 991 (1971) (finding marital status classifications which discriminate by gender cannot be used for employment purposes).

2. Common Law, Public Policy and Privacy Claims

Some claims have been brought against employers based on a violation of public policy or individual privacy. For example, in City of Sherman v. Henry, 928 S.W.2d 464 (Tex. 1996), cert. denied, 117 S.Ct. 1098, the Texas Supreme Court held that the Civil Service Commission's denial of an officer's promotion for having an affair with the wife of another officer did not violate the United States or Texas Constitution because they do not guarantee a right to engage in adultery.

Similarly, in Talley v. Washington Inventory Serv., 37 F.3d 310, 311-12 (N.D. Ill. 1993), the court held that the discharge of an employee for dating a co-employee did not violate Illinois's public policy favoring "the union of men and women through marriage" nor did it constitute marital status discrimination under the Illinois Human Rights Act.

However, in Reuter v. Skipper, 832 F. Supp. 1420, 1423 (D. Or. 1993), the court held that dismissal of a corrections officer for cohabitating with a felon violated her right to privacy because the county failed to establish that her relationship with him was reasonably tailored to serve a distinct interest in security and protection of the jail facility.

3. Homosexuality/Sexual Preference

While the courts have been more willing to protect an employee's right to privacy in family and marital relationships, the courts have chosen not to extend that same protection to all relationships and sexual preferences.

In Sarff v. Continental Express, 894 F. Supp. 1076, 1081-82 (S.D. Tex. 1995), affirmed, 85 F.3d 624 (5th Cir. 1996), the court held that a male employee did not establish a claim for retaliatory discharge claim under Title VII when he was allegedly terminated as a result of complaints to his employer about actions of a male co-worker who presumed that the employee was gay and proceeded to act on a stereotype to humiliate the employee by leaving earrings and a make-up brush in his coffee mug. But see Steffan v. Aspin, 8 F.3d 57, 69 (D.D.C. 1993) (holding that dismissal of student at the U.S. Naval Academy based solely on his homosexual orientation, violated his right to equal protection of law).

PRACTICE TIP: Sexual Orientation Discrimination Prohibited in Some Jurisdictions

While discrimination on the basis of sexual orientation is not prohibited by Texas law or federal law, a number of states have adopted laws prohibiting discrimination on the basis of sexual orientation. Some of these states include Massachusetts, New York and California. These states have included this prohibition in their state law equivalent of Title VII.

In addition, a number of cities have adopted ordinances which prohibit discrimination on the basis of sexual preference and some of these ordinances may apply. For example, the City of Dallas recently adopted an ordinance prohibiting discrimination on the basis of sexual orientation, which may apply to companies doing business with the City.

Finally, in recent years a number of bills have been introduced into Congress that would add sexual orientation to the list of prohibitions found in Title VII. While it is unlikely that those bills will pass any time soon, we suspect that more states and municipalities will be prohibiting discrimination on the basis of sexual preference.

B. Smoking

Employers regulating smoking in the workplace must be cautious. If an employer permits employees to smoke in the workplace, the employer may be susceptible to suits by the nonsmokers and if the employer does not permit employees to smoke, then it may be sued by the smokers. Recently nonsmokers have brought suit for injuries or potential injuries arising out of second hand smoke. The courts have more recently favored suits by the nonsmokers as opposed to the smokers.

In Johns-Mansville Sales Corp. v. International Ass'n of Machinists, 621 F.2d 756, 759-60 (5th Cir. 1980), the court rejected the public policy argument that smoking in the workplace

creates a hazardous work environment and upheld an arbitrator's decision to reinstate employees terminated for smoking on company premises for breaking the employee's collective bargaining agreement.

A recent case in New York, however, has opened the door for lawsuits by nonsmokers. In Johansen v. N.Y.C. Dep't. of Hous., 638 N.E. 2d 981, 983 (N.Y. 1994), the court permitted a nonsmoker to receive damages under New York's workers' compensation law for an injury that resulted from her exposure to secondhand smoke in her workplace. But see Palmer v. Del Webb's High Sierra, 838 P.2d 435 (Nev. 1992) (finding that employee who developed lung disease as result of his exposure to ETS from working at casino could not receive benefits under Occupational Disease Act).

The Florida Supreme Court in a four to two decision reversed a Third Circuit Court of Appeal's decision holding that a city regulation which required that all job applicants be smoke free the year prior to application for employment violated the employee's right to privacy under the state constitution. City of North Miami v. Kurtz, 653 So.2d 1025 (Fla. 1995), cert. denied, 116 S. Ct. 701.

In Kurtz, the court specifically held that an applicant applying for a position with the city did not have a legitimate expectation of privacy regarding whether or not she smoked tobacco, and her Florida constitutional right of privacy was not implicated by the regulation. Id. at 1028. Further, the court found that the city's interest in reducing the city's health care costs and increasing productivity was a compelling interest and thus there was no violation of the federal constitution. Id. at 1028. But see Grusendorf v. City of Oklahoma, 816 F.2d 539 (10th Cir. 1987) (upholding fire department regulation which required all firefighters to sign agreement

stating that they would not smoke during training period, whether on duty or off-duty--court found health risks associated with smoking as well as need for firefighters to be in top physical condition justified regulation).

Further, many states such as Texas have statutes that make it a criminal offense to smoke in some public areas. Tex. Penal Code Ann. § 48.01 (Vernon 1994). Many local ordinances also restrict smoking in office buildings to designated smoking areas.

XIII. TESTING AND EXAMINATION

A. Polygraphs

It is beyond the scope of this paper to address fully the ramifications of the Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009 (the "EPPA"). Suffice it to say, however, the Act is extremely detailed with extensive "bright line" rules. Failure to follow these rules exactly can subject an employer to substantial liability. The circumstances under which an employer can require an employee to take a polygraph are extremely limited. Further, when an employer requires an employee to take a polygraph, various specific procedures must be followed.

The specific situations in which the polygraph can be requested are very limited and the procedures must be followed exactly. The EPPA is a trap even for the wary. Time and time again employers and/or its polygraph examiners fail to follow the EPPA's requirements, which result in employers being held liable.

Given the difficulty of complying with these rules and procedures and the potential for liability, most employment lawyers, including ourselves, recommend that an employer not ask employees to take polygraph examinations except in the most exceptional circumstances. In

those rare cases, an employer should consult an attorney and proceed very carefully. Further, only the most reputable and experienced polygraph examiners should be hired.

The Texas courts that have addressed the use of polygraph examinations by employers have concluded that the particular polygraph procedures employed by the entities involved in the cases violated the employees' right to privacy under the Texas Constitution. See Texas State Employees Union v. Texas Dep't of Mental Health and Mental Retardation, 746 S.W.2d. 203 (Tex. 1987) (court held that department's mandatory polygraph policy violated Texas Constitution); Woodland v. City of Houston, 918 F. Supp. 1047 (S.D. Tex. 1996) (court held that City of Houston's pre-employment polygraph procedures were arbitrary and unreasonably intrusive and thus violated implicit right to privacy embodied in Texas Constitution). Accordingly, employers in Texas should either abstain from or be extremely cautious about using polygraph testing.

PRACTICE TIP: Avoid Requesting Polygraphs From Applicants or Employees

Given the difficulties in adhering to the rules and procedures under the Employee Polygraph Protection Act and the judicial interpretation of the Texas constitutional provisions, we recommend that employers not give employees polygraph tests except under exceptional circumstances. If an employer believes that a polygraph exam should be given the employer should first consult an attorney and make sure that the polygraph examiner is reputable, experienced and knows the exact procedures that must be followed to comply with the provisions of the Act and the Texas Constitution.

B. Medical or Physical Exams

The use of physical exams in the employment selection process is regulated by the Americans with Disabilities Act, 42 U.S.C. § 12112 (the "ADA"). Under the ADA, an employer cannot require an employee to undergo a physical examination until a conditional offer of employment has been given.

While the ADA strictly prohibits all pre-offer examinations, an employer can, however, condition an applicant's employment on the results of the physical exam if all entering employees are subject to examination. The ADA does allow an employer to make pre-employment inquiries into the ability of an applicant to perform the essential job related functions of the job.

Post-offer examinations or inquiries of employees cannot be conducted to determine if an employee has a disability, unless the examination or inquiry is job-related and consistent with business necessity. See Doe v. Kohn Wust & Graf, P.C., 866 F. Supp. 190, 197 (E.D. Pa. 1994) (holding that attorney with HIV stated cause of action against law firm for which he worked for violating ADA provision which prohibited employer's inquiries of employee as to whether individual has disability when another attorney in firm searched plaintiff attorney's office and discovered a letter from AIDS Services and placed it in lawyer's personnel file).

Texas does not have laws that specifically restrict the use of physical examinations in the pre-employment process. The Texas Commission on Human Rights (TCHRA) does, however, prohibit discrimination by an employer on the basis of an employee's disability. Tex. Lab. Code Ann. § 21.051 (Vernon 1996). Accordingly, Texas courts may apply TCHRA or the ADA in disallowing discrimination against employees with a "disability."

C. Drug/Alcohol Testing

While employees continue to bring suits against employers arising out of drug testing, the courts have consistently permitted drug testing as long as the tests are conducted according to a reasonable drug testing policy and with an employee's consent.

In Farrington v. Sysco Food Servs., Inc., 865 S.W.2d 247 (Tex. App.--Houston [1st Dist.] 1993, writ denied), the court held that a reasonable random drug test does not violate an employee's right to privacy, but the employee must have the opportunity to refuse such a test. Id. at 253.

Similarly, the court in Jennings v. Minco, 765 S.W. 2d 497 (Tex. App.--Austin 1989, writ denied), upheld Minco's drug-testing plan because it did not violate the employee's right to privacy because the test was only conducted with the employee's consent, notwithstanding that failure to consent was grounds for dismissal. Id. at 502; see also Texas Employment Comm'n v. Hughes Drilling Fluids, 746 S.W. 2d 796 (Tex. App.--Tyler 1988, writ denied) (finding that at-will employee's conduct in continuing to work with full notice of drug testing policy amounted to acceptance of terms and provisions of policy as condition of employment).

Accordingly, the court in Kaminski v. Texas Employment Comm'n, 848 S.W.2d 811 (Tex. App.--Houston [14th Dist.] 1993, no writ) held that an employer can terminate an employee for misconduct, if the employee refuses to take a drug test which is administered pursuant to a reasonable drug testing policy. Id. at 813.

In an action brought by a custodian challenging the school board's drug testing policy, the court held that material issues of fact remained as to whether the custodian's position was "safety-sensitive" such that, pursuant to board policy, the custodian could be subjected to random

drug testing and whether policy as promulgated would pass constitutional muster precluding summary judgment for the board. Aubrey v. School Bd. of Lafayette Parish, 92 F.3d 316 (5th Cir. 1996).

PRACTICE TIP: Drug/Alcohol Testing Must be Applied Consistently

Companies that utilize drug and alcohol testing programs should do so in a consistent manner. Failure to do so can result in charges of discrimination and disparate treatment.

I recommend that all drug testing policies be in writing and applied consistently. Random drug testing is permitted as long as the testing is truly random and not used to retaliate against an unpopular employee or an employee management would like to discharge.

Many companies require drug testing as part of the hiring process or after some specific event like an on-the-job accident.

As further protection against lawsuits by employees for negligent or improper testing, an employer should consider having the drug testing company take enough samples from an employee so that should an initial test show positive the employee can be retested. Further, some companies will conduct urine samples, which are less expensive and if the tests are positive then do further more sophisticated and accurate testing like testing of hair samples.

D. HIV/AIDS Testing

While the Texas Commission on Human Rights Act (TCHRA) was amended in 1989 to prohibit discrimination by employers based on a "disability," the Act specifically excludes from the definition of disability a person with AIDS or HIV if that person "constitutes a direct threat to the health or safety of other persons or that makes the affected person unable to perform the duties of the person's employment." Tex. Lab. Code Ann. § 21.002(6)(B) (Vernon 1996).

However, no Texas case has addressed whether a person that does not constitute a threat to others and is able to perform the duties of their job can maintain a cause of action under TCHRA for discrimination based on a "disability."

In an action brought under the ADA by an employee with AIDS, the court held that when an employer changes its health insurance benefits to a carrier that will not cover one of its employees because of the employee's disability, the employer violates the ADA. Anderson v. Gus Mayer Boston Store of Delaware, 924 F. Supp. 763 (S.D. Tex. 1996).

In a rather lengthy opinion, the court found that both HIV and AIDS were per se disabilities under the ADA. Thus, the court held that an employer could not discriminate in its employment practices or health insurance coverage against current or prospective employees that have either HIV or AIDS. Id. at 778.

Texas statutory law also prohibits employers from requiring an employee to be tested for AIDS or HIV as a requirement for employment unless it is a bona fide occupational qualification and there is not a less discriminatory means of satisfying the occupational qualification. Tex. Health & Safety Code Ann. §§ 81.102-81.103 (Vernon 1992 & Supp. 1997).

Further, disclosure of any AIDS/HIV test results may also subject an employer to liability for releasing employee's confidential medical information. See Tex. Health & Safety Code Ann. §§ 85.001-85.206 (Vernon 1992 Supp. 1997) (HIV testing results conducted by Texas Department of Health cannot be used "to determine suitability for employment, or to discharge a person from employment"). Some employers in health-related industries may be allowed to test their employees for AIDS/HIV in order to protect others from exposure.

Finally, local ordinances and local commissions on human rights may also prohibit discriminating against employees on the basis of an AIDS-related illness.

E. Genetic Testing

Some employers have considered genetic testing of their employees to discover which employees may be susceptible to future illnesses and to deny those applicants employment to save money on future health care costs. Employees respond that the testing is an invasion of their right to privacy. To date, no cases address an employer's use of genetic testing of employees in the workplace.

In response to this growing controversy, many states, such as Florida, Iowa, Oregon and Rhode Island have adopted legislation that effectively prohibits an employer from using an employee's genetic information in employment decisions. See Mark A. Rothstein, Genetic Discrimination in Employment and the ADA, 29 Hous. L. Rev. 23 (1992) (arguing that ADA prohibits employer from using genetic information to discriminate against job applicants and employees).

XIV. STANDARDS AND JOB PERFORMANCE CRITERIA

A. Height and Weight Requirements

Some employers impose height and weight requirements on prospective and current employees. In the past, this has lead to Title VII discrimination lawsuits. In these lawsuits, employees claim that the restrictions had a discriminatory disparate impact on them. For example, a number of women sued fire and police departments claiming that the height and weight requirements were not necessary for the job. In cases where the employers could not

prove that the height, weight or other requirement was necessary for the job, the policies were struck down by courts as being illegal.

Recently, most of the complaints or lawsuits filed by employees challenging height and weight requirements have been filed pursuant to the ADA. The courts, however, generally hold that excessive weight or obesity is not considered a disability under the ADA. E.g., Torcasio v. Murray, 57 F.3d 1340, 1354 (4th Cir.) cert. denied, 116 S. Ct. 772 (1995); Smaw v. Virginia Dep't of State Police, 862 F. Supp. 1469, 1475 (E.D. Va. 1994); 29 CFR Pt. 1630 App. § 1630.2(j).

However, in a recent case filed by the EEOC against an employer who refused to hire an applicant for a bus driver position because of his obesity, the court held that the employer violated the ADA because it "regarded" the applicant as disabled and refused to hire him on that basis. EEOC v. Texas Bus Lines, 923 F. Supp. 965 (S.D. Tex. 1996). Further, the court also found that the employer could not establish a sufficient business necessity or health and safety concern which would justify its decision not to hire the applicant. Id. at 979.

B. Educational and Job Performance Standards

Job performance standards can address a number of areas. They can range from requirements for degrees, a minimum GPA or the time necessary to complete an agility drill. As a general proposition, implementing such standards does not violate an employee's right to privacy. Of course, an employer is well advised to obtain written permission to obtain the applicant's permission to obtain those records and take the required tests.

On the other hand, an employer must always recognize that any standard has the potential to have a disparate impact, which could lead to a discrimination lawsuit. While such standards

are "color blind" and neutral on their face, if the policies exclude a disproportionate number of minorities, a discrimination lawsuit could result. Long ago, the United States Supreme Court recognized that job standards that have a disproportionate impact on protected classes must be justified by the employer as a necessary standard to ensure quality job performance. If there is no rational basis for the standard and the standard has a disparate impact, then the standard will be struck down. See Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849 (1971).

Such standards should "bear a demonstrable relationship to successful performance of the jobs for which it was used." (Id.)

PRACTICE TIP:

If job standards require information or testing of an applicant, it would be a good idea to obtain that applicant's written permission to obtain this information or have the applicant perform the test. Further, whenever job standards are adopted, a company should be sure that the standards are a good predictor of future success in that job. The standards should be compared with the job description to ensure that the standards are consistent with the essential job functions. Taking the time to make this comparison and carefully consider the job standards will help the company avoid a lawsuit over its standards.

XV. COMMON LAW LIABILITY FOR AN EMPLOYER'S INTRUSION INTO AN EMPLOYEE'S PRIVACY

A. Common Law, Public Policy and Privacy Claims

Some claims have been brought against employers based on a violation of public policy or individual privacy. For example, in City of Sherman v. Henry, 928 S.W.2d 464 (Tex. 1996), cert. denied, 117 S.Ct. 1098, the Texas Supreme Court held that the Civil Service Commission's denial of an officer's promotion for having an affair with the wife of another officer did not

violate the United States or Texas Constitution because they do not guarantee a right to engage in adultery.

Similarly, in Talley v. Washington Inventory Serv., 37 F.3d 310, 311-12 (N.D. Ill. 1993), the court held that the discharge of an employee for dating a co-employee did not violate Illinois' public policy favoring "the union of men and women through marriage" nor did it constitute marital status discrimination under the Illinois Human Rights Act.

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GOVERNMENT AGENCY EMPLOYMENT LAW SITES

Government Agency	Website
Americans with Disabilities Act	**www.usdoj.gov/crt/ada/pubs/ada.txt**
Department of Labor (U.S.) ("DOL")	**www.dol.gov**
DOL: Employment and Training Administration	**www.doleta.gov**
DOL: Employment Laws Assistance (for small businesses and workers)	**www.dol.gov/elaws**/
DOL: Office of Federal Contract Compliance	**www.dol.gov/dol/esa/public/ofcp_org.htm**
DOL - Pension and Welfare Benefits Administration	**www.dol.gov/dol/pwba**
DOL - Veterans Employment and Training Service	**www.dol.gov/dol/vets**
	http://www.dol.gov/elaws/
DOL: Wage and Hour Division	**www.dol.gov/dol/esa/public/whd_org.htm**
Department of Justice, U.S. Disability Rights Section	**www.usdoj.gov**
Equal Employment Opportunity Commission (EEOC)	**www.eeoc.gov**
Federal Mediation and Conciliation Service	**www.fmcs.gov**
Federal Trade Commission	**www.ftc.gov/ftc/consumer.htm**
Immigration and Naturalization Service	**www.ins.usdoj.gov**
National Labor Relations Board (NLRB)	**www.nlrb.gov**
Occupational and Safety Health Administration	**www.osha.gov**
Office of Federal Contract Compliance	**www.dol.gov/esa/public/ofcp_org.htm**
	http://www.dolgov/dol/pwba

Texas Comptroller of Public Accounts	www.cpa.state.tx.us
Texas Commission on Human Rights	http://welcome.to/tchr
Texas Workforce Commission	www.twc.state.tx.us
Texas Workers' Compensation Commission	www.twcc.state.tx.us

WEBSITES THAT PROVIDE CASE LAW

Entity	Website
Findlaw Labor and Employment Law	www.findlaw.com
Hieros Gamos Labor Law	www.hg.org/employ.html
Legal Engine	www.legalengine.com
LII Labor Law Materials	www.law.cornell.edu
Law News Network Employment Law Center	www.lawnewsnetwork.com/practice/employmentlaw/
Online Law Library	www.fplc.edu/ollie.htm
Nolo Legal Encyclopedia	www.nolo.com/encyclopedia/index.html
WWW Virtual Law Library	www.law.indiana.edu/law/v-lib

LABOR AND EMPLOYMENT FORMS SITES

Forms	Website
FMLA Forms	www.dol.gov/dol/esa/fmla.htm
IRS Forms (W04, SS-4, etc.)	www.irs.ustreas.gov/prod

U.S. GOVERNMENT DOCUMENTS & PUBLICATIONS

Entity	Website
Government Printing Office	www.gpo.gov
Government documents	www.loc.gov
Government documents	www.fedworld.gov

MISCELLANEOUS

Entity/Database	Website
ADA Document Center	**janweb.icdi.wvu.edu/kinder/**
ADA Technical Assistance Program	**www.adate.org/**
Advocacy, Inc. (Disability)	**www.advocacyinc.org**
ERISA Information from BenefitsLink.com	**www.benefitslink.com/erisa/index.html**
HR Internet Guide	**www.hr-guide.com**
Layoff Updates	**www.hrlive.com**
Small Business Admin: US Business Advisor	**www.business.gov**
Texas Association of Business	**http://tabcc.org**
Texas Civil Rights Project	**www.igc.org/tcrp**
Texas Government Site	**www.state.tx.us**
United States Chamber of Commerce	**www.uschamber.org**
U.S. Government Federal workers' site	**www.workers.gov**
W-4 assistance	**www.paycheckcity.com**

CONGRESSIONAL SITES

Entity	Website
Committee on Education and the Workforce	http://edworkforce.house.gov
Health, Education, Labor & Pensions Committee	http://www.senate.gov/committees