Corporate Exposure: Employee Privacy

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The subject of employee privacy has become an increasingly heated one within all organizations. Is what the employee does off the job any business of the employer? Should your genetic makeup prevent you from being considered for employment? And can the employer use this information to develop organizational policies and procedures?

Not surprisingly, lawsuits abound over this issue. The question becomes one of legality—because there is no insurance available that will defend or satisfy any lawsuit against an organization if the suit stems from a violation of the law.

The Company's Argument

Organizations argue that in the good name of safety and health (and possibly the containment of health care costs) they are interested in knowing something about employees' off-the-job behaviors. An example: smoking habits. Some have argued on the basis of statistics that smokers have higher illness rates, as well as increased absenteeism. Although these findings have recently been challenged, some companies have nonetheless developed policies that prohibit the hiring of smokers.

Is this discriminatory? Some states have argued that using this type of information as a basis for employment decisions is illegal. No one has questioned the employer's right to maintain a smoke-free environment—but to reach into the off-duty habits of employees may be going too far. Another issue is the Americans with Disabilities Act (ADA), which goes into effect this month. As I understand it, smoking is addictive, like some other drugs; thus, it is possible that smoking could actually be classified as a disabling condition. If so, using such criteria as whether a potential employee smokes as a hiring determinant may be discriminatory—and thus illegal.

You Are What You Eat...

Less obvious, but perhaps more discriminatory, is when an employer considers an applicant's blood pressure, cholesterol levels, or weight among the hiring criteria. Often, genetic factors will influence these measurements; as such, the employer may be accused of discriminating against certain groups.

The issue of genetic factors goes beyond a predisposition for high cholesterol. Do companies have the right to screen for genetic abnormalities when hiring? Although 5 percent of *Fortune* 500 companies use genetic profiling for screening and monitoring employees, at least four states have passed laws prohibiting employers from discriminating based on genetic information. North Carolina specially prohibits discrimination against people carrying the gene for sickle cell anemia, which affects only blacks. Some have argued that those carrying genes for such diseases should be protected under ADA; a bill pending in Congress would prohibit the release of genetic information without cause.

Where does the organization draw the line between the right to know—as a means of developing prudent, reasonable, fair guidelines—and outright discrimination against specific groups? A number of insurance companies have refused to sell health coverage to people who have AIDS, or even those who have tested HIV positive. Is this policy discriminatory? It certainly has a significant impact on one segment of the population. We will have to wait for the courts to decide on this practice.

What Do the Courts Say Now?

It appears that two important factors will weigh heavily on your case should you find your company involved in an employee privacy lawsuit. The first is unequivocal, proven, factual, uncontestable, purposeful good intent. That means you need to be honest with yourself and be certain you can demonstrate your well-intended efforts and be able to prove your objectives. It may be difficult to support a policy to refuse to hire smokers if you have within your current employee ranks a number who do smoke. Such a policy could be construed as discriminatory because it affects only new-hires.

The second issue is whether you involve all of your employees in these types of decisions and criteria guidelines. If your operation is unionized, have you gained the union's approval of your plans? If you can demonstrate that your employees concur with your strategy (without fear of retribution) and sincerely support your endeavors, this will help in your defense.

The Real Harm

Remember, often the court award for damages is the *least* expensive portion of the lawsuit. The negative publicity, the cost of your time, legal defense, and the growing number of punitive damage awards are the most harmful results. Punitive damages are issued to punish an organization for the wrong it has done. They are not covered by insurance. It is not unheard of to incur covered losses of $5000 in personal damages but to be assessed in excess of $1 million in punitive damages.

In summary, there are no guarantees and nothing can completely immunize your organization from being sued, but well-intended efforts that are fully supported by the workforce should help deter most unfounded complaints.

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