Privacy in the Workplace

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1. Do I have a right to privacy in the workplace?

   You have a right to privacy under U.S. Constitution's 4th Amendment and the California Constitution. Whether your privacy right has been *violated* depends on whether you have a protected privacy interest and what your employer is trying to find out about you.

   To bring an invasion of privacy claim in California, you must show:

   - A legally protected privacy interest;
   - A reasonable expectation of privacy; and
   - A serious invasion of the privacy interest.

   After you have shown the 3 elements above, the employer has an opportunity to show that his intrusion was motivated by a business reason.

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2. Is there a difference in my level of expectation of privacy during pre- and post-employment?

   Yes. A job applicant has a lower level of expected privacy and a current employee has a higher level of expected privacy.

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3. Can my employer ask me questions about things that I consider private information?

   There are certain kinds of pre-employment and post-employment questions employers are prohibited from asking if the questions are not truly related to the job. For example, an employer normally should not ask how many pounds you can lift if you are applying for a telephone receptionist job that does not require lifting.

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4. Can an employer ask about my criminal record?

   Yes. A potential employer is generally permitted to ask about an applicant's criminal convictions. However, under California Labor Code Section 432.7, most employers cannot ask about *arrests* that did not lead to convictions. A conviction includes felony and misdemeanor convictions.

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5. Can an employer ask to see my credit report?

   Generally yes. If an employer wishes to access an applicant's or employee's consumer credit report in order to evaluate that person for hire, promotion, or retention, the employer must give written notice to the individual that includes the source of the report and allows the person to receive a copy (at no charge). However, an employer cannot obtain a report that contains:

   - bankruptcies over 10 years old
   - suits or judgment more than 7 years
   - unfavorable eviction actions
   - tax liens more than 7 years old
   - accounts in collect more than 7 years old

- records of arrest, indictment, misdemeanor complaint, or conviction more than 7 years old.

See our Fact Sheet Credit Reports and Background Checks for more information.

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6. Can an employer ask about any disabilities?

No. An employer may not ask an applicant questions about a disability before an offer of employment is extended to an applicant. However, an employer may ask if an applicant can perform essential functions of the job with or without reasonable accommodations. The employer may also ask the applicant to demonstrate how she will perform essential functions of job with or without reasonable accommodations. After employment has been secured, an employer may ask an employee questions about the employee's physical or mental condition so long as the questions are job related.

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7. Can an employer ask about my religious beliefs?

No. An employer is prohibited from making pre-employment questions regarding an applicant's religious creed. An employer is permitted to state which shifts are required to be worked, but cannot ask questions such as if "Does your religion prevent you from working weekends or holidays?"

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8. Can a potential employer subject me to drug testing?

Yes. Employer can drug test job applicants because an applicant does not have as high an expectation of privacy as a current employee.

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9. Can my current employer subject me to drug testing?

Generally yes. A current employer may test you for drug use under some circumstances. Among those conditions is a requirement that the employer demonstrate a legitimate or important interest in requiring the drug test. If an employer tests a current employee randomly without notice, the employer's interest is not "legitimate" unless the employee is in a safety- or security-sensitive position, such as a commercial driver or a pilot, a government employee who carries a gun, a nuclear power plant worker, etc. An employee who receives prior notification has a lesser privacy expectation than the employee who has to take the test without any notice.

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10. Can my prospective or current employer require me to submit to psychological testing?

Maybe. Some employers require employees or applicants to take psychological tests that are used to screen out people whom the company may consider "emotionally unstable." However, it is unclear which of those tests is an invasion of privacy. If you are applying to become a police officer, it is less likely that a court would find the testing to be an invasion of privacy because it is reasonably related to the position. On the other hand, if you are an assembly line worker, it is more likely that a court would find the testing to be an invasion of privacy.

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11. Can my prospective or current employer require me to take an aptitude test?

It depends. Aptitude tests have not been challenged on privacy grounds, but have been held to be unlawful if they discriminate against an applicant of a particular race, age, gender or national origin. An employer must be able to validate the test and show that it is adequately job-related.

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Can my employer require me to take a polygraph test?

No. Labor Code Section 432.2 prohibits nearly all employers from requiring a polygraph test from an applicant or employee as a condition an employment.

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13. Can an employer tape record my conversations?

Not without your permission. Penal Code Section 632 prohibits the taping of telephone calls or in person discussions, as long as they are reasonably expected to be private.

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14. Can my employer subject me to searches?

It depends. Whether an employee has a right to privacy in search depends on what specifically an employer wishes to search. For example, a purse is a very personal item that is more likely to be protected than a locked desk that, in turn, is more likely to be protected than an unlocked desk or a shared desk. In addition, if the employee has notice that she may be subject to search or consents to a search, it is more likely that her privacy was not violated.

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15. Can my employer use surveillance at the work site?

Generally yes. Monitoring is generally acceptable if it is job related, such as to determine productivity. In almost all cases, an employer may install video and audio surveillance equipment in open areas of the workplace where employees could be observed by the naked eye of a supervisor. However, a video in an employee bathroom or a changing room is an unlawful invasion of privacy.

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16. Can an employer prohibit inter-office dating?

It depends. Company policies that prohibit dating between managers and subordinates are acceptable unless they are used as “front” for discrimination. For example, if only women are disciplined for violating the rule, then the rule may be illegal discrimination. Employers may have a tougher time showing why they need a “no-dating” policy between co-employees who are not in a supervisor-employer work relationship.

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17. Can my employer review my e-mails at work?

Generally, yes. Communication using company computers are normally not protected because the employee has no real expectation of privacy in property owned by the employer. However, under the Electronic Communication Privacy Act, the employer may not intercept e-mail directed toward an employee. But, simple monitoring of the e-mail, after the e-mail is received, is not covered by the Act, and the employer may therefore review it.

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18. Can my employer review my emails from a company computer that I use at home?

Yes. Although the computer has been issued by the company for home use, it is still a company owned computer in which the employee has no real expected privacy interest.

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Can my employer reprimand me for off duty conduct?

Generally not. Labor Code Section 96(k) prohibits an employer from demoting, suspending, or discharging an employee for “lawful conduct occurring during non-working hours away from the employer’s premises.” It is unclear precisely what “lawful conduct” means, although it is likely to include working at another job (“moonlighting”). Furthermore, even if the conduct is technically “off duty” there still might be a connection to the employer. For example, a teacher who partakes in recreational drug use outside of work might be reprimanded for his or her behavior because of his or her influence over the students.

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20. What do I do if I think I have an invasion of privacy claim?

Since an invasion of privacy claim would require you to file complaint in a state court, you should probably contact an attorney to discuss a possible case. You can contact a referral services, such as the Bar Association of San Francisco Lawyer Referral Service at (415) 989-1616 or a referral service available through http://www.lawhelpcalifornia.org.

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For further information about your employment rights, contact the Workers’ Rights Clinic.

Disclaimer

This Fact Sheet is intended to provide accurate, general information regarding legal rights relating to employment in California. Yet because laws and legal procedures are subject to frequent change and differing interpretations, the Legal Aid Society–Employment Law Center cannot ensure the information in this Fact Sheet is current nor be responsible for any use to which it is put. Do not rely on this information without consulting an attorney or the appropriate agency about your rights in your particular situation.