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Top Ten Employment Privacy Mistakes and How to Avoid Them

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Top Ten Employment Privacy Mistakes

- **PIPA, B.C. – Purpose of the Act**

“The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of individuals to protect their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances”.

Top Ten Employment Privacy Mistakes

- **PIPA, AB. – Purpose of the Act**

“The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable”.

Top Ten Employment Privacy Mistakes

- **PIPA, B.C.**

“**employee personal information**” means personal information about an individual that is collected, used or disclosed solely for the purposes reasonably required to establish, manage or terminate an employment relationship between the organization and that individual, but does not include personal information that is not about an individual’s employment

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- **PIPA, Alberta**

“**personal employee information**” means, in respect of an individual who is an employee or a potential employee, personal information reasonably required by an organization that is collected, used or disclosed solely for the purposes of establishing, managing or terminating

- (i) an employment relationship, or
- (ii) a volunteer work relationship

between the organization and the individual but does not include personal information about the individual that is unrelated to that relationship

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- **Scenario 1: It's Never Too Late for Love**

Question 1: Should the Company purchase the system? If not – why not?

If so – what suggestions do you have prior to implementation?

Top Ten Employment Privacy Mistakes

1. It's Not What You Do – It's How You Do It

“Long after people have forgotten what you said, they remember how you made them feel.”

Deborah Folka, Communicating Tough News in Tough Times,
www.dlfcommunications.com

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Two Hotels Example: “Biometric Scan of Employees OK for Payroll Purposes in Some Circumstances ... but Not in Others”

General Briefing for the Special Committee to Review the *Personal Information Protection Act*, May 29, 2007, D. Loukidelis, Information and Privacy Commissioner for British Columbia

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Two Hotels Example (cont'd)

Three Considerations:

1. Sole purpose for collection, use or disclosure is to establish, manage or terminate the employment relationship.
2. Purpose is reasonable.
3. Collection, use or disclosure of employee personal information is reasonably required for that purpose.

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Case 1: Employer had not explained why system being implemented. Employee felt ignored and complained to OIPC. Hotel verified that biometric system only being used to verify identity for payroll and security, and hotel agreed to more comprehensive notification to employees. Result: implementation allowed.

Case 2: Hotel implemented hand scanning system without notifying employees or union. Purpose for biometric system was employer's desire to be an industry leader in technology. Result: no implementation permitted.

Top Ten Employment Privacy Mistakes

When dealing with people expect the unexpected...everyone's reaction may be different.

Top Ten Employment Privacy Mistakes

2. Don't Use a Sledgehammer when a Butter Knife will Do!

Be sensitive to the special nature of the employee/employer relationship:

“The contract of employment has many characteristics that set it apart from the ordinary commercial contract....This power imbalance is not limited to the employment contract itself. Rather, it informs virtually all facets of the employment relationship....The vulnerability of employees is underscored by the level of importance which our society attaches to employment....Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.”

Wallace v. United Grain Growers (1997 – SCC)

Top Ten Employment Privacy Mistakes

- **Scenario 1: It's Never Too Late for Love**

Question 2: Would you install the video cameras?
Why or why not? If not, what else would you do?

Top Ten Employment Privacy Mistakes

- Identify the Problem and Try to Use the Least Intrusive Means to Resolve It.
- What is the Problem? Refer to Three Considerations (above)
- Are there other less intrusive means that have been reasonably considered?
- Ensure information collected reasonably corresponds to employer's legitimate interests and communicate that to employees

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- Installation of hidden video camera in trusted manager's office amounted to constructive dismissal.

Colwell v. Cornerstone Properties Inc. (2008) (Ont. S.C.J.)

- “The accepted approach...is to balance the employer's interest against the union's or the employee's. In the case of surveillance cameras, the analysis weights the problems the cameras are intended to address against the employee's interest in not being constantly surveilled and, in this case, not having her or his image recorded. When weighing the balance of interests, one needs to consider the seriousness of the problem the employer is addressing, the effectiveness of cameras in addressing that problem and the availability of other methods of addressing the problems.”

William Neilson Dairy and Teamsters, Local 647 (2009, Ont.)

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- OPC Guidance on Covert Video Surveillance in the Private Sector (Based on federal private sector privacy law)
- PIPA (BC) - Collection without consent permitted where reasonable to expect that consent would compromise availability or accuracy of personal information AND the collection is reasonable for an investigation or proceeding AND collection is reasonable for establishing, managing or terminating employee relationship.

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- **Scenario 1: It's Never Too Late for Love**

Question 3: Would you ask for criminal and credit record checks of new employees? Why or why not?

Question 4: Would you implement a periodic criminal records and credit check for existing employees? Why or why not?

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- Applicant for Admin. Asst./ Receptionist position had to do credit check as part of application process. Was not hired and complained.
- Finding: Collection of personal credit information not reasonably required to establish this particular employment relationship.

SAS Institute (Canada) Inc. (A.I.P.C., 2005)

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- Employer policy required police record checks for new employees in “positions of trust”. Incumbents in positions to have police record check every 5 years. Employer provided advance notice to Union and individual letters to potentially affected employees.
- Purpose was to determine if individual had any criminal charges or convictions that could indicate an unacceptable risk in performing the duties of the position.
- Policy deemed reasonable for positions that have an ongoing or significant relationship with vulnerable people, but not in circumstances where position merely has “potential” to be alone with a vulnerable person.

Vancouver (City) and CUPE, Loc. 15 (2007) [Application of FIPPA]

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3. Make Sure You Understand and Identify the Risks Before You Act

- Consider all available information and don't make assumptions
- Tailor requests for information as much as possible
- Ensure requests for information are made in good faith
- Identify other risks (*Privacy Act*, class actions, infliction of mental distress, human rights)

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- **Scenario 1: It's Never Too Late for Love**

Question 5: What would you do? Why?

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- Use tact, sensitivity, and flexibility in dealing with employees on sick leave
- Ensure all relevant information is available and considered
- Treat employees with respect
- No cookie cutter solutions; need to customize approach based on each individual case

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“This case typifies a much bigger issue ...the communication breakdown between employees and management. Here we have the case of a valued employee with a clean record prior to the discipline imposed in November of 2005, who requires a medical leave. The Employer had some justified questions regarding the duration of the leave the Grievor would require and regarding the workplace situation that contributed to his illness in the first place. However, instead of addressing these issues in a precise and direct manner, the Employer demanded medical information which it did not require in the particular circumstances, and some of which it was not entitled to, in the case of the information regarding the Grievor’s diagnosis and treatment ... I think it is unfortunate that the parties were seemingly unable to communicate in a more direct and less bureaucratic manner. Perhaps, if they had done so, this case would not have arisen.”

British Columbia Public School Employer’s Association, School District No. 36 and BCTF (Bonfield) (2008)

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4. Privacy Rights are Not Absolute

- Context is important
- Employers have a right to honesty and cooperation from an employee subject to information sought being reasonably and legitimately connected to an employer's interests

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“[I]t is important to recognize that there is nothing inherent in the employee/employer relationship which vests in an employer a discretionary right to compel employees to compromise their right of privacy through the disclosure of personal medical information---an employer can only intrude upon the privacy of an employee if it has a legitimate business purpose tied to the employer-employee relationship which justifies the intrusion.

...

In the context of the benefits of sick leave and sick pay, an employer is entitled to require the employee to provide sufficient information to permit it to satisfy itself that a particular absence was for a *bona fide* sickness or disability. The enquiry must be reasonable.”

Victoria Times – Columnist and Victoria Newspaper Guild, Local 223 (1986)

Top Ten Employment Privacy Mistakes

“Most people have a robust sense of the information about them that is relevant, appropriate, or proper to particular circumstances, situations, or relationships. When information is judged appropriate for a particular situation it usually is readily shared; when appropriate information is recorded and applied appropriately to a particular circumstance, it draws no objection. People do not object to providing to doctors, for example, the details of their physical condition, discussing their children’s problems with their children’s teachers, divulging financial information to loan officers at banks, sharing with close friends the details of their romantic relationships. For the myriad transactions, situations and relationships in which people engage, there are norms-explicit and implicit-governing how much information and what type information is fitting for them. Where these norms are respected I will say that contextual integrity is maintained; where violated I will say that contextual integrity has been violated.”

Helen Nissenbaum, cited in *Balancing Privacy & Openness: Internet Publication of Tribunal Decisions* by D. Loukidelis, Information and Privacy Commissioner for British Columbia, September 22, 2009

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- Employers have the right to expect reasonable attendance at work
- Employee-employer relationship is based on contract – employer is entitled to ensure it is getting “benefit of its bargain”
- Employer may expect candour and cooperation from employee – subject to respecting employee’s privacy rights
- Employers rights must be exercised fairly and reasonably – this is context specific and depends on the common law, statutes and regulations, contracts, and nature of the employment relationship

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5. Find the Real Problem and Solve It

- Many privacy complaints and access requests are not really about privacy
- Gather available information before jumping in to solve the problem

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6. Have a Comprehensive Technology Use Policy

- Explain what “no reasonable expectation of privacy” means in your policy
- Where does the employee leave the “digital trail” (computers, blackberries, cell phones, voicemail, pagers, security card entry/exit, VPN access).
- What does the policy say and what is actually done?

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- **Scenario 2: Tetris Troubles**

Question: What lessons can be learned from this scenario?

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- Employer installed keystroke logging software on computer of IT employee, unbeknownst to employee, to monitor productivity and use of working time.
- Finding: Less intrusive means were available for managing employee.

Parkland Regional Library (A.I.P.C., 2005)

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- Teacher with responsibility for school's computer network charged with possession of child pornography (retrieved nude picture that female student sent to male student from male student's email account). Teacher stored pictures on school's laptop. Teacher annually reminded of "Acceptable Use Agreement" which stated: "Users should NOT assume that files stored on network servers or hard drives of individual computers will be private.
- School board policy: "Information technology systems and all data and messages generated on or handled by board equipment are considered to be the property of the [employer]". Policy included explicit limitations on inappropriate use and inappropriate materials.
- Conclusion: No objectively reasonable expectation of privacy by teacher, notwithstanding that computer was password protected and only he knew password.

R. v. Cole (Ont. S.C.J. , 2009)

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7. Don't Assume that What you Do Outside of Work Doesn't Count

- If an employee posts information on Facebook, is it “private information”?
- To what extent can an employer monitor off-duty conduct? When is an employee off-duty?

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8. Be Careful in Your Communication

- Off the record is not off the record
- Did you want that email on the front page of the newspaper?

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9. Have a Privacy Breach Crisis Plan

- Are employees comfortable in reporting?
- Do you have a plan for how you would respond (e.g. privacy breach checklist on PIPA website)?
- Conduct a privacy audit to ascertain weaknesses

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10. Create a Culture of Privacy

- Educate employees through bulletins, notices and training
- Have an understandable privacy policy for customers
- Standardize security practices for all technology
- Set a good example by respecting employee privacy

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