Workplace Privacy – Where and When?

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Recent news stories discussed a Wisconsin company that began offering employees the opportunity to have microchips implanted in their hands, with such chips being used to swipe into the building, pay for cafeteria meals, etc. These stories made me think of the myriad of concerns that could arise upon execution of such a chip implantation strategy. Will the employer be able to track the employees at all times? Who is responsible if, say, an infection arises? What happens when an employee resigns or is terminated?

Stories such as these bring employee privacy to the limelight and prompt a review of various workplace privacy concerns. While an overarching review of employment privacy issues is outside the scope of this article, the following three topics are applicable to Wisconsin employers, regardless of size or industry.

1. **Technology.** Many assume that an e-mail account or technology device is personal and private property. This is not the case, though, when the account or device belongs to an employer. Wisconsin employers can monitor and review, at any time and without notice, e-mail accounts provided to employees. Employers also can monitor and review employees' Internet usage and all devices provided by the employer. In certain circumstances, this could apply to employee-owned devices used to access employer-owned information (for example, when an employee uses a personal smartphone to check work e-mails). Employers should remind employees that e-mail accounts and devices are the property of the employer and can be accessed and searched at any time, with no privacy expectations attached. Certain limitations, though, apply in this context. For example, Wisconsin employers are prohibited from asking or requiring employees or applicants to disclose the user name or password to any "Personal Internet Account," including private e-mail accounts, social media pages, and similar accounts created and used for personal communication purposes. Importantly, while an employer cannot ask for or require disclosure of this information, any information available in the public domain or that can be accessed without a user name or password is fair game.
2. **Use or Nonuse of Lawful Products.** Fed up with rising health care costs, a machine shop owner mandates that all employees cease tobacco use immediately. He then fires a thirty-year employee over a card-game cigar. The owner is livid two weeks later when he receives the discharged employee's discrimination complaint. Such a complaint may have merit

under the Wisconsin Fair Employment Act. Employees have certain rights to use, or not use, lawful products off the employer's premises and outside of working hours. While alcohol and tobacco are commonly discussed, it also covers lawfully obtained prescription medicine, birth control products, etc. Often times, free speech considerations are implicated in these situations as well. Exceptions do exist, though. Employers can, for example, take employment action if the use or nonuse impairs the employee's ability to do the job, creates a real or perceived conflict of interest, conflicts with a reasonably related and bona fide job qualification, or violates any federal or state law. In addition, nonprofit corporations may take employment action if the use or nonuse conflicts with the entity's message. So, if the example above involved an anti-smoking nonprofit, instead of a machine shop, discharging the employee probably would be permissible.

3. **Employee Health.** Ordinarily, employee or applicant health issues are off limits to employers unless brought to the employer's attention. In such instances, the employer must then comply with all privacy mandates applicable within the specific context (for example, FMLA questionnaires). An exception exists, however, in the context of the Americans with Disabilities Act and its Wisconsin equivalent. Under both laws, an employer has an obligation to engage in an "interactive process" with an employee or applicant to determine what, if any, reasonable accommodation exists for the individual's real or perceived disability. While an employee or applicant generally brings the issue to the table, an employer cannot simply turn a blind eye or feign ignorance to apparent or obvious problems. Depending on the circumstances, an employer may need to directly address with an employee or applicant any health issues potentially constituting a disability in order to determine whether implementation of a reasonable accommodation is warranted, if one exists. Failure to do so prior to taking any adverse employment action may lead to a discrimination claim.