

TIPS FOR DRAFTING EMPLOYEE HANDBOOKS – TIP #4: AVOIDING INVASION OF PRIVACY CLAIMS

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This article is part four in a six-part series. The purpose of this series is to provide tips and identify potential pitfalls associated with the drafting of an employee handbook.

While an employee handbook serves many functions, its primary purpose from a legal standpoint is to reduce potential liability with respect to claims brought by current and former employees. Unfortunately, many employers are unwilling to commit the time and bear the expense of implementing an employee handbook (or updating an existing handbook) until after they have been sued and the absence (or poor draftsmanship) of a particular written policy has crippled their defense to an employment claim. Tip #4 addresses how including certain information in an employee handbook may help an employer defend against invasion of privacy claims.

Tip #4: Avoiding Invasion of Privacy Claims

An employer's investigation of an employee's potential misconduct can give rise to various claims relating to invasion of privacy. Employer investigations can take many forms, from physically searching an employee's desk, locker, or automobile following a complaint of stolen property, to retrieving an alleged harasser's emails and voicemails while investigating a sexual harassment complaint, to drug and alcohol testing following a workplace accident. Privacy laws differ quite a bit from state to state. Accordingly, it is important to consult with local counsel regarding state law requirements, especially with respect to drug and alcohol testing which is one of the more heavily regulated areas of employment law. With that disclaimer, there are certain measures that all employers can take to reduce their potential liability for invasion of privacy claims in virtually all jurisdictions.

Generally speaking, the gravamen of an invasion of privacy claim is an employer's infringement in some area as to which the employee had a reasonable expectation of privacy. Accordingly, policies that reduce an employee's expectation of privacy in potentially private areas are helpful in defending against invasion of privacy claims. This can be accomplished by including policies in an employee handbook that apprise employees of the employer's right and intention to search employees' personal property, monitor and access their voicemails, emails, and internet usage, and conduct drug and alcohol testing on a probable cause basis (and randomly, if permitted by

applicable state law). Once employees have been apprised of the employer's right and intention to engage in these activities, employees will be unable to credibly claim that they had an expectation of privacy in the area or information searched or monitored.^[1] It is also advisable to include in such written policies a non-exhaustive list of the legitimate business reasons for searching physical property (e.g., to locate contraband and retrieve stolen property) and monitoring electronic communications (e.g., to investigate harassment claims and guard against disclosure of trade secrets), and to limit such search and monitoring activities in practice comport with the employer's stated business justifications.

Bryan Cave LLP has a team of knowledgeable lawyers and other professionals prepared to help employers draft and update their employee handbooks. If you or your organization would like more information on employee handbooks or employment laws, please contact an attorney in the Labor and Employment practice group.

^[1] *Leor Exploration & Production LLC v. Aguiar*, 2009 WL 3097207 (S.D. Fla. Sept. 23, 2009) (employee had no reasonable expectation of privacy in emails sent on employer's computer network due to policy in employee handbook expressly advising employees of the employer's intention to monitor email communications) (slip copy).

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