

BULLETIN

The right to privacy in the workplace

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Does the employer have the right to use secret surveillance of employees in the interests of security?



We recently had a case in one of our hospitals where the employer was concerned that someone was using a computer to download pornography. The employer installed video cameras that secretly taped the employees 24 hours a day. Rather than take any other initial steps to address the problem, the video camera installation was the first tactic the employer used to try to identify the culprit.

Over the last decade there have been a number of cases dealing with this issue in the workplace. The jurisprudence has always defined the issue as one of conflict between the right of privacy of the individual and the right of the employer to maintain the security of its business.

The law clearly states that to secretly videotape any person is a serious violation of their privacy. But what must be determined in each individual case is whether the legitimate business interests of the employer are paramount when compared to the right of the individual to be free from unreasonable search and surveillance. The key question to be asked in each case is: did the employer *exhaust all alternative methods of resolving the security problem*, and did they *establish adequate cause to justify the search*?

Arbitrator Larsen said in a recent case, "The test involves a balance of interests, measured against the peculiar circumstances of each particular case."

For example, many of the cases that have gone to arbitration on this issue have involved the monitoring of *individual employees* who were suspected of some fraudulent action. In some of these cases the employer was able to establish, to the satisfaction of the arbitrator, that there were serious and well-founded grounds for their suspicions, sufficient to override the individuals right to privacy. In many other instances, those grounds were not found to be sufficient.

Where the video camera is filming *whole groups of employees*, however, it has been held that the onus on the employer is even stronger. The employer will be held to a strict test to justify the action. It must prove that there is a serious problem and that the surveillance is likely to assist in solving that problem. The employer must show that it has exhausted all reasonable alternatives to surveillance and that there is nothing else that can reasonably be done in a less intrusive way. Finally, it must prove that the surveillance was done in a systematic and non-discriminatory way.

The right of our members to a reasonable expectation of privacy is one that we will defend vehemently. We will not tolerate abuse of our members rights in wholesale fashion for the convenience of the employer.

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