

Privacy Issues in Recruiting and Managing your Workforce

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Outline

- Privacy Concerns in Recruiting – Generally
 - Human Rights concerns
 - References
- Criminal Record Checks
- Privacy Concerns in Managing the workforce
 - Surveillance
 - Drug and Alcohol Testing

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Privacy Concerns in Recruiting - Generally

- Human Rights concerns
- Cyber-sleuthing
 - Google, Facebook, MySpace, Classmates
 - Depends whether information available to public
 - Google vs. Facebook
 - Reliability of information?

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Privacy Concerns in Recruiting - Generally

Reference checks

- Personal information – related to employment
- Get consent to collect, use information
- Provide proof of consent to former employers

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Criminal Record Checks

- Can you ask for it?
- What can you ask for?
- How do you get it?
- When do you get it?

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Criminal Record Checks

- Can you ask for it?
 - New hires – yes
 - Current employees – maybe
- Ongoing checks at regular intervals throughout employment?

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Criminal Record Checks

- What can you ask for?
 - *Human Rights Code* - “record of offences”
“record of offences” means a conviction for,
 - (a) an offence in respect of which a pardon has been granted under the *Criminal Records Act (Canada)* and has not been revoked, or
 - (b) an offence in respect of any provincial enactment;

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Criminal Record Checks

- What can you ask for?
 - ~~pardoned offences~~
 - ~~provincial offences~~
 - federal offences?
 - pending charges?
 - vulnerable sector search?

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Criminal Record Checks

- What can you ask for?
 - Only relevant criminal charges, or all charges?
 - PIPEDA
 - privacy legislation in Alberta, British Columbia and Quebec

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Criminal Record Checks

- How do you get it?
 - New process – December 2009 RCMP directives
 - “clear” or “not clear”
- “not clear” can mean:
 - the individual has a criminal record that would prevent hiring
 - the individual has a criminal record, but the convictions have no relation to the job
 - the individual has NO RECORD at all
 - there has been an error

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Criminal Record Checks

- How do you get it?
 - When result of “not clear” is reported, the Employee has to go to local police station to be finger printed
 - The fingerprints will be used to verify identity so wrong info is not sent
 - The employee can provide written consent to the Police so the results are sent directly to Employer

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Criminal Record Checks

- When do you get it?
 - Can take up to 120 days – that’s 4 months!
 - What do in the interim?

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Criminal Record Checks

- Existing employees
 - How to implement requirement for existing employees
 - union or non-union
- Should you be asking for periodic criminal reference checks throughout employment?

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Criminal Record Checks

- What do you do with the information?
 - hiring stage
 - current employees

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Managing the workforce

- Surveillance
- Drug testing

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Managing the workforce - Surveillance

- Balance of interest
- Whether surveillance reasonable
- Privacy Commissioner four-part test
 1. Demonstrably necessary
 2. Likely to be effective meeting that need
 3. Loss of privacy proportional with that need
 4. Existence of a less intrusive way of achieving goal

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Managing the workforce - Surveillance

- Video surveillance – striking the right balance
 - Must show bona fide safety or security justification for the surveillance
 - e.g. when trained on security points rather than work areas
 - e.g. when turned on only during working hours

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Managing the workforce - Surveillance

- Global Positioning Systems (GPS)
 - Considered Less Invasive Than Video Surveillance
 - Balance:
 - Employer's interest in improving productivity
 - Invasiveness of the system
 - Limits in Implementing GPS monitoring systems
 - Employer should give notice of its employment management purpose
 - Employer should limit extent to which it uses GPS for employment management purposes (workplace privacy)
 - e.g. GPS could be used as route planning and management, but not for employee management

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Managing the workforce – Drug testing

- Drug and Alcohol testing
 - Risks
 - Human Rights Code
 - Privacy Commission
 - Arbitrators
 - Courts

Managing the workforce – Drug testing

- Prima Facie Infringement
- Must justify as reasonably necessary
- Safety-sensitive positions

Entrop and Imperial Oil (2000)
Ont. Crt. Appeal

- reasonable cause
- accident/near miss
- return to work
- random alcohol
 - safety sensitive only
- no random drug testing

Managing the workforce – Drug testing

- advance notice – employment contract/policy
- necessary for purpose
- least intrusive means
- discretion in response
- human rights considerations

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