

What is “privacy”?

- ▶ **“1a:** the quality or state of being apart from company or observation : SECLUSION
 - b:** freedom from unauthorized intrusion
 - one's right to *privacy*
- ▶ **2a:** SECRECY
 - b:** a private matter : SECRET
- ▶ **3 archaic :** a place of seclusion”



Privacy Definition & Meaning - Merriam-Webster

What is private for me as Employee?

- ▶ Medical information?
- ▶ Phone calls?
- ▶ Computer surfing?
- ▶ E-mails?
- ▶ Can I be videotaped?
- ▶ Social media?
- ▶ Searches?



Questions regarding Your Medical Information

- Are you required to provide medical info as employee?
- You are out sick for 2 days and your boss wants to know what is wrong with you—are you required to explain?
- Must you provide a doctor's note for sick absence?
- When do you need to fill out Family Medical Leave Paperwork?



Your Medical Information

- You are not required to provide details concerning your illness if you are out less than **3 days according to County Policy**
- You may be required to provide a doctor's note **IF** your department has a policy requiring all employees in your situation to do so
- If you are absent due to illness 3 days or more (either your illness or a family member) you are required to fill out Family Medical Leave paperwork and provide a Medical Certification signed by a medical professional



Family and Medical Leave Act

- Who gets copies of the FMLA Medical Certification?
HR keeps this private and separate, not required to provide to dept.
- What does FMLA do?
Protects your job for up to 12 weeks a year
- But I have PLENTY of Paid Time accrued! Do I still need to apply for FMLA?

Yes, you are always required to apply for FMLA, regardless of how much paid time you have accrued. FMLA runs concurrent with other types of leave.



When do you need to give Medical Information?

- You must provide medical documentation if you request an ADA accommodation to help you do your job
- You must provide medical information if you are out on Workers' Comp
- If you are out for an extended period, may your department tell co-workers about your status or condition?



Your Medical Information

- ▶ No. County is obligated to protect your private medical info (ADA, FMLA and HIPAA)
- ▶ All medical info provided to HR is kept separate from personnel file
- ▶ **But if you share medical info voluntarily with co-worker, no expectation of privacy**
- ▶ Information provided to County is subject to subpoena for Workers' Comp or other lawsuits



Medical info might be subject to disclosure if public interest involved

- Matson v Bd. of Education (2011) Court said teacher did not have right to keep Government from disclosing her fibromyalgia condition. Teacher took multiple leaves, but was seen conducting orchestra on sick days. School Board posted investigation results per their policy.
- Court held no violation of privacy. Condition not like AIDS or severe psychological disorder that would give rise to privacy right and the public interest override.



Be sure to be clear as to whether you need to take time for personal reasons or illness!



"THAT'S WHAT I LIKE ABOUT YOU, ABRAMS, YOU DON'T LET A LITTLE ILLNESS KEEP YOU OFF THE JOB."

Drug Screening

- ▶ Random drug screens for public safety positions are legal
- ▶ Reasonable Suspicion Tests are authorized when circumstances warrant under County Drug Free Workplace Policy
- ▶ What creates “reasonable suspicion”?
- ▶ Your behavior (slurring, smell of alcohol, red eyes, unkempt, acting odd)

Reasonable Suspicion Checklist, Page 1

Name of Observed Employee _____
 Location _____
 Time _____ a.m. _____ p.m. Date _____

When there is reasonable suspicion that an employee at work is unfit for duty, the supervisor or manager observing the behavior as well as another supervisor/manager as witness, if possible, must complete the checklist below. Where "Other" is checked, please describe: _____

Observation Checklist

Walking: _____ Hocking on _____ Stumbling _____ Unable to walk
 _____ Unsteadily _____ Staggering _____ Draying
 _____ Falling _____
 _____ Other _____

Standing: _____ Swaying _____ Feet wide apart _____ Unable to stand
 _____ Rigid _____ Slugging _____ Sagging at knees
 _____ Other _____

Speech: _____ Whispering _____ Slurred _____ Shouting _____
 _____ Hoarse _____ Stuttering _____ Slow _____
 _____ Harsh _____ Mute _____ Slow _____
 _____ Other _____

Demeanor: _____ Cooperative _____ Calm _____ Talkative _____ Polite
 _____ Sarcastic _____ Sleepy _____ Crying _____
 _____ Slurring on job _____ Argumentative _____ Excited _____
 _____ Other _____

Actions: _____ Hostile _____ Fighting _____ Profanity _____ Droney
 _____ Threatening _____ Hyperactive _____ Erratic _____ Calm
 _____ Repeating communication _____
 _____ Other _____

Eyes: _____ Bloodshot _____ Watery _____ Drowsy _____ Dilated
 _____ Cloudy _____ Closed _____
 _____ Other _____

Face: _____ Flushed _____ Pale _____ Sweaty

Appearance/Clothing: _____ Neat _____ Untidy _____ Messy _____ Dirty
 _____ Shirts on clothing _____ Heavy odor _____ Partially dressed
 _____ Body ornament areas _____
 _____ Other _____

Breath: _____ No alcoholic odor _____ Faint alcoholic odor _____ Alcoholic odor _____
 _____ Sweat/sungent tobacco odor _____ Heavy or strong breath spray _____
 _____ Other _____

Movements: _____ Fumbling _____ Jerky _____ Nervous _____
 _____ Slow _____ Normal _____ Hyperactive
 _____ Other _____

Drug Screening

- ▶ Your work conduct deteriorates dramatically
- ▶ You are suddenly frequently absent or late
- ▶ You are arrested for DUI or drugs
- ▶ A credible report is made to that you have a drug or alcohol problem



Drug Screening

- ▶ You are required as a condition of employment to submit to random or reasonable suspicion drug testing
- ▶ County policy of “zero tolerance” mandates termination for positive drug test result
- ▶ Information as to drug test result is confidential unless subpoenaed or litigation but can be relayed to unemployment office if benefits applied for



Genetic Information

- GINA (Genetic Information Nondiscrimination Act) prohibits discrimination by employers and insurers based on an employee's genetic information (includes genetic tests of family members, or any info about disease, disorder or condition of any family members)
- Cannot base employment decisions on employee's genetic info, medical insurer cannot adjust premiums (cannot reassign to less desirable position)
- Doesn't affect FMLA or ADA

Monitoring at Work

- County may monitor use of phones, computers, and other equipment owned by the County at any time, per policy.
- ECPA (Electronic Communications Privacy Act) prohibits interception or disclosure of wire, oral and electronic communications, but
 - business exception if in ordinary course
 - consent exception
 - service provider exception if equipment owned by County



Workplace Monitoring

- 4th Amendment of Constitution guarantees the right to be free from unreasonable search and seizure.
- Court applied to electronic workplace surveillance by government employers in O'Connor v Ortega, 480 US 709 (1987) BUT
- If notice of monitoring policy, intrusion into privacy is will be upheld if balanced against business necessity and efficiency



Workplace Searches

- ▶ Under Ortega case, employee's office may be searched by employer when:
 - reasonable grounds to suspect the search will turn up evidence of work related misconduct
 - search is necessary for work related purpose such as finding a file.



When in doubt, consider yourself monitored!



Kevin had a funny feeling that his boss was monitoring his emails

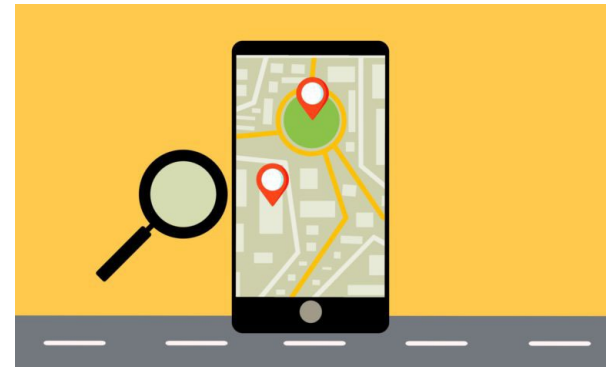
How does monitoring work?

- Employers today have ability to retrieve emails, determine websites visited, even follow actual keystrokes made on equipment.
- Monitoring ability is enhanced when internet access is through the employer's network, as with the County
- Includes instant messaging and other communications to you from outside sources
- Phone use is easily monitored via records
- Security cameras are present in many County areas



How does Monitoring Work

- Software can intercept, analyze and archive all communications on network, including email, chat sessions, file sharing and internet browsing
- Employees who use workplace network to access personal email accounts are not protected and are subject to monitoring
- GPS tracking systems are increasingly in use in County vehicles



Workplace Privacy

- Needs of the employer generally outweigh individual privacy
- Burden of proof upon employee to show “invasiveness”.
- If no reasonable expectation of privacy, no 4th amendment protection
- But see Doe v. Luzerne Co. No 10-3921 (3d Cir 2011) male deputy violated female co-workers expectation of privacy when he videotaped her partially nude getting decontaminated for fleas for “training purposes”

Monitoring at Work

- ▶ Courts generally uphold monitoring, if there is no expectation of privacy in communication. No expectation if equipment owned by County and:
 - prior notice of policy to monitor
 - security issues and positions of trust and responsibility require confidentiality
 - condition of employment to agree

Monitoring at Work

- Applies to all types of electronic devices, and voice, text and typed messaging. City of Ontario v. Quon (June 2010) court upheld search of police officers personal messages on government owned pager.
- Stored Communications Act provides penalties for anyone who “intentionally accesses without authorization a facility through which electronic communication service is provided” 2008 case held that employer violated SCA and did not properly access. Employees were complaining about work online, supervisor demanded username and password, workers were fired after viewing.
- Doesn't apply if management is given copy of online communications

Is Horry County Watching me?



What type of comments may result in termination?

- Hickok v. Iowa Employment Appeal Board, trooper used work computer to circulate an email of mugshots showing African American suspects with tee shirts supporting President Obama. Hickok described the suspects as “s---heads” and said it was “nice to know that lowlifes are getting involved in politics”.
- Court upheld termination few months later after trooper ignored last chance warning, left derogatory joke about Blacks, Hispanics and Muslims on admins’ desk, showed a video on his laptop entitled “Wetback English.”

Secret Monitoring

- ▶ Wright v. Town of Zebulon, Court said ok to secretly monitor conversations NC officer had in patrol car to see if leaking info to drug dealers
- ▶ Public safety concerns, public trust principles and consumer privacy laws create high threshold for public employees

Careful! The walls might have Eyes!



How about leaked info?

- ▶ Smith v. Borough of Dunmore, (2011) PA fire captain sued after council member leaked info to newspaper about his suspension due to lack of fire academy training.
- ▶ Court said disclosure proper because involved public safety and matter of public concern



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Town employees fired for gossip



Communications outside Work

- Social Media—do you have a Facebook, Myspace or personal blog?
- Social network or blog postings are often disclosed to management by co-workers
- Is it possible to be fired for posts on social media if the posts occur outside of work?
- Off duty conduct and communications. When is my job at risk as a result of off-duty conduct or communications?

Is Off-Duty Conduct Private?

- Not if it negatively affects the workplace environment or the County, *unless*
- It is a communication that is engaged in with other workers legitimately discussing workplace conditions, considered *protected concerted activity* by the NLRB
- First Amendment protection of free speech limited to matters of public concern.
- If off-duty communications are subject of complaint, employee who does not cooperate with internal investigation to provide evidence of the nature and/or substance of the communications may be subject to disciplinary action including termination.

Criminal Misconduct

- General County policy suspension until positive resolution of matter after arrest for criminal misconduct.
- Rare exceptions may allow employee to work while matter pending if Administrator finds alleged offense does not pose danger to County or public or relate to job.
- Feola v. Carroll, (2008) Court upheld termination of officer acquitted of a felony, but convicted of a misdemeanor of endangering welfare of minor. Court said conduct demonstrated lack of moral integrity.

What kind of Off-Duty comments are out of bounds?

- Courts have upheld termination of employees for spreading rumors East v. Clayton Co., employee was fired after spreading a rumor that the Chief was fired for misusing funds.
- May be disciplined, including termination for communications outside of work that are not protected under Section 5 of Guidelines if:
 - Embarrasses the County
 - Portrays County negatively
 - Causes unharmonious relationships with co-workers or the public

How about Social Network posts?

- GA case, Marshall v. Savannah, Court upheld termination of firefighter after posting scantily clad photos on MySpace. “fresh out of the shower” bare shouldered. Employee also insubordinate.
- County has disciplined for postings, including photos of others with inappropriate comments (mug shots with commentary, sexual remarks)

Freedom of Information Act

- SC FOIA 30-4-10 broad disclosure obligation to disclose all public records
- Public records broadly defined and includes all types of communications that are “of public interest”
- Includes personnel files of public employees and disciplinary records (except for personal info like SSN or DL)
- Includes compensation paid to employees as follows:
 - exact compensation for all employees paid \$50,000 or more
 - for less than 50,000 the compensation range for the position, in \$4,000 increments

Freedom of Information Act

- Only items County allowed to exempt:
 - trade secrets
 - information concerning an employee's private life as opposed to public function (i.e. social security number, residential address, etc)
 - law enforcement records that may identify informants, pending investigations, info that could endanger the life, health or property of another person
 - contracts for sale of property until after sale
- County does not produce records of *former* employees unless legitimate public interest expressed by requester

Freedom of Information Act

Personal emails on County computers

- Tiberino v. Spokane County (2000) Employee fired for misusing her office computer for personal emails (467 out of 551 messages personal)
- Media requested copies of emails
- Tiberino sued to prevent disclosure, Court held that the emails were public records, but exempt from disclosure, only the fact of the emails was of public interest, not contents
- Butler v. City of Hallendale Beach (2011) Court stated that personal emails were not public records since they weren't sent in connection with City business
- Narrow holding, FOIA broad law requiring disclosure

Freedom of Information Act and Subpoenas

- County is required to provide copies of personnel files when served with subpoena
- No obligation on part of County to alert you to FOIA request or disclosure or subpoena that concerns you
- If you believe you may be subject of FOIA, direct inquiry to County PIO to confirm
- If you think a subpoena may be served to County regarding your personnel file, contact Human Resources to request notification if a subpoena is served

How about disclosure of Consumer info received in County business?

- General obligation of Public Trust requires that public employees protect private information obtained from citizens
- Horry County Privacy and Identity Theft Protection Policy—on internet and intranet
- SC Financial Identity Fraud and Identity Theft Protection Act
- HIPAA laws apply to Fire/Rescue department members, who must use extra care to protect medical info

HC Privacy/Identity Theft Protection Policy

- Goal of protecting privacy and security of personal information that identifies citizens
- Applies to Social Security Numbers, Driver's License numbers, debit or credit card info, checking or banking info, passport info, digital signatures, etc. (PPI)
- Departments will not collect this info unless required by law or necessary to perform job
- County will protect all PPI info collected

HC Privacy/Identity Theft Protection Policy

- Inadvertent or improper disclosure or breach of PPI by County will be disclosed and remedied
- Employees who improperly disclose such info subject to discipline up to termination
- All departments should routinely review their policies and practices to ensure that they are not needlessly collecting protected info and that info collected is kept secure and confidential

HIPAA Laws

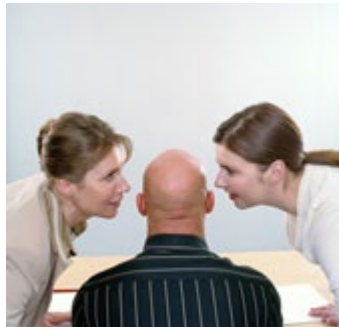
- Applies to medical information of consumers obtained by employees of Fire/Rescue
- County has written policy and procedures
- Protects private health information (PHI)
- Right to request access to and copy their medical records and to request revisions
- Right to request restriction on uses and disclosures about treatment or health care operations
- May restrict disclosures to family members
- May request right to receive communications of PHI by alternate means or locations

HIPAA LAWS

- Citizen may request an accounting of disclosures made by the County
- May file complaint with South Carolina Department of Health and Human Services if believe rights are violated
- County must make efforts to limit use and disclosure of PHI
- County must designate employees with need to know and make reasonable efforts to limit access of each employee to PHI

HIPAA Violations

- ▶ Employees have been terminated and sued for disclosure of information in patient's medical records (woman's face recognized in surgery video, med records read by wannabe suitor in hospital, info about woman contracting STD from affair posted on social network site)



Conclusion

- Guard patient, employee and citizen information!
- Do not disclose personal information of citizen or patient unless necessary
- Know when you are required to provide your own private information as employee
- Do not destroy what privacy rights you may have by discussing private information with supervisors/co-workers if you are concerned about confidentiality
- Think before you post or share a permanent tweet, text, click, comment or email!