

IT'S NONE OF YOUR BUSINESS—
A GUIDE TO FEDERAL EMPLOYEES'
PRIVACY

Joseph V. Kaplan, Esq.
Passman & Kaplan, PC

EEOC EXCEL AUGUST 2014

This Session Will Cover:

- The Significant Privacy Act Causes of Action:
 - Wrongful Disclosure
 - Wrongful Collection
 - Access to / Amendment of Records
- Collection and Disclosure of Medical Information
- Searches of Government Offices and Equipment
- Drug testing (briefly)

The Privacy Act Causes of Action

Wrongful Disclosure



Disclosure Cause of Action

The Privacy Act regulates the collection, maintenance, use, and dissemination of an individual's personal information by federal government agencies. Agencies are generally prohibited from disclosing any information contained in a “**system of records**” without consent from the individual about whom the information pertains.

Radack v. Dept. of Justice, 402 F.Supp.2d 99, 104-05 (D.D.C. 2005) (Kennedy, J.) (internal citations omitted); *accord Doe v. Dept. of Justice*, 660 F.Supp.2d 31, 41 (D.D.C. 2009) (Huvelle, J.).

Disclosure Cause of Action-- Elements

A plaintiff must show that

- (1) the disclosed information is a ‘record’ contained within a ‘system of records’;
- (2) the agency improperly disclosed the information;
- (3) the disclosure was ‘willful or intentional’;
- (4) the disclosure had an ‘adverse effect’; and
- (5) ‘actual damages’ resulted.

See Feldman v. Cent. Intelligence Agency, 797 F.Supp.2d 29, 38, (D.D.C. 2011) (Howell, J.); *accord Doe v. Dept. of Justice*, 660 F.Supp.2d 31, 51 (D.D.C. 2009) (Huvelle, J.).

Disclosure Cause of Action--Elements

NOTE:

Elements 3-5 also apply to the “Collection of Information” cause of action discussed below.

Disclosure Cause of Action--SOL

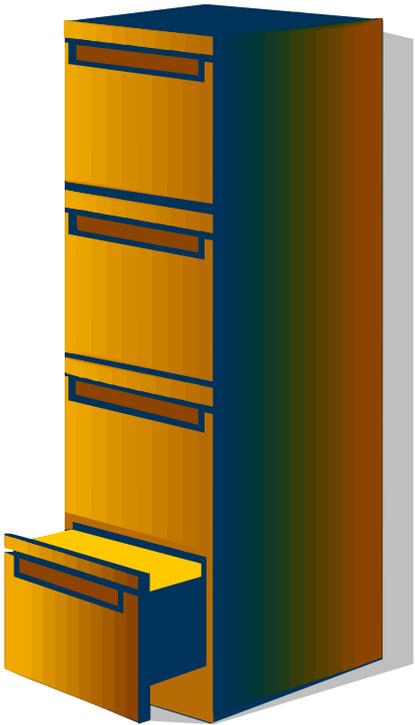
The Privacy Act statute of limitations is “two years from the date on which the cause of action arises.”

See 5 U.S.C. § 552a(g)(5).

“[T]statute of limitations begins to run when ‘the plaintiff knows or should know of the alleged violation’”.

See Tijerina v. Walters, 821 F.2d 789, 797-98 (D.C.Cir. 1987).

Element (1): 'record' in a 'system of records'



- Definitions are at 5 U.S.C. §§ 552a(a)(4,5).
- A “record” must be:
 - About an individual
 - Maintained by an agency
 - Contain the individual’s name, personal identifier number (e.g. SSN), or other individual identifier (e.g. fingerprint, voiceprint, photograph)
- A “system of records” must :
 - Allow retrieval of information by name of individual or its equivalent
 - Under the control of an agency

Element (1): 'record' in a 'system of records'

- Not every piece of paper in an agency filing cabinet is a 'record' in a 'system of records'
- In practice, whether these definitions are met is often a question of fact.
- Examples:
 - Employee time cards are a record. *Quinn v. Stone*, 978 F.2d 126 (3rd Cir. 1992).
 - Case tracking database searchable by employees' initials not a 'system of records', since system was about cases and not individuals. *Tobey v. NLRB*, 40 F.3d 469 (D.C.Cir. 1994).

Element (2): improper Agency disclosure



“Disclosure” is **not** limited to physically releasing documents. A disclosure also occurs when **information** derived from a Privacy Act system of records is disclosed **verbally**, even if the physical documents are not directly released.

See Doe v. U.S. Postal Service, 317 F.3d 339 (D.C. Cir. 2003); *Krieger v. Fadely*, 211 F. 23d 134 (D.C. Cir. 2000); *Bartel v. Federal Aviation Administration*, 725 F.2d 1403, 1408-09 (D.C.Cir., 1984); *Chang v. Dep't of the Navy*, 314 F. Supp. 2d 35, 41, 41 fn.2 (D.D.C. 2004); *Pilon v. Dept. of Justice*, 796 F.Supp. 7, 12 (D.D.C. 1992) (Greene, J.); *Fitzpatrick v. Internal Revenue Serv.*, 665 F.2d 327 (11th Cir. 1982).

Element (2): improper Agency disclosure

- Did the subject individual consent to the disclosure?
- Does the disclosure fall into one of the twelve enumerated exceptions?
- If any exception applies, then the cause of action fails.

Element (2): improper Agency disclosure

Twelve enumerated exceptions in the statute (5 U.S.C. §§ 552a(b)(1-12)).

Most important exceptions:

- Exception 1: the “need to know” exception
- Exception 2: FOIA disclosures
- Exception 3: the “routine use” exception
- Exception 7: law enforcement exception

Element (2): improper Agency disclosure

Exception 1: disclosures “to those officers and employees of the agency which maintains the record *who have a need* for the record in the performance of their duties”

a/k/a the “need to know” exception

Exception 1: “need to know”

Disclosures can be made to assist in an investigation to individuals whose duties make it appropriate for them to conduct such investigations, such as personnelists or agency counsel.

See Howard v. Marsh, 785 F.2d 645, 648 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 581 (1986); *cf. Boyd v. Snow*, 335 F.Supp.2d 28, 38 (D.D.C. 2004) (Collyer, J.).

Exception 2: FOIA disclosures

- Disclosures “required under section 552 of this title”, a/k/a FOIA
- Primarily traditionally ‘public information’
- Courts split on whether an agency must have an actual FOIA request in hand first

Exception 7: law enforcement

Disclosures “to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a **civil or criminal law enforcement activity** if the activity is authorized by law, and if the **head of the agency or instrumentality** has made a **written request** to the agency which maintains the record **specifying the particular portion desired** and the **law enforcement activity for which the record is sought;**”

Exception 3: ‘routine use’

- Exception 3: disclosures “for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;”
- Perhaps the most important exception

Exception 3: 'routine use'

- Most Privacy Act notices contain many routine uses
- Need to address each routine use in analyzing disclosure claims.
- Check the specific contemporaneous Privacy Act notice for that 'system of records' for the relevant list

Exception 3: ‘routine use’ – An Example:

Sample Routine Uses from EEOC/GOVT-1 (2011 edition)

- a. To disclose pertinent information to the appropriate federal, state, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where the disclosing agency becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation.
- b. To disclose information to another federal agency, to a court, or to a party in litigation [...] when the government is a party to the judicial or administrative proceeding. [...]
- e. To disclose, in response to a request for discovery or for appearance of a witness, information that is relevant to the subject matter involved in a pending judicial or administrative proceeding. [...]

Element (3): ‘intentional or willful’ disclosure

- The violation must be so ‘patently egregious and unlawful’ that anyone undertaking the conduct should have known it ‘unlawful.’
- The plaintiff must prove that the offending agency acted ‘without grounds for believing [its actions] lawful’ or that it ‘flagrantly disregarded’ the rights guaranteed under the Privacy Act.”

See Laningham v. Navy, 813 F.2d 1236, 1244 (D.C.Cir. 1987).

- The legislative history of the Privacy Act indicates that the “intentional or willful” standard is “only somewhat greater than gross negligence”. “The standard does not require the official to set out purposely to violate the Act.”

Tijerina v. Walters, 821 F.2d 789, 799 (D.C.Cir. 1987); *accord Waters v. Thornburgh*, 888 F.2d 870, 876 (D.C.Cir. 1989).

Element (4): ‘adverse effect’ and ‘actual damages’

- To recover damages under the Privacy Act for wrongful disclosure of records, a plaintiff must show both that she suffered some “**adverse effect**” from the disclosure, and separately that this adverse effect rose to the level of “**actual damages**” compensable under the Privacy Act.

See, e.g., Doe v. Dept. of Justice, 660 F.Supp.2d 31, 49 (D.D.C. 2009) (Huvelle, J.).

- Without both, no damages—but maybe attorneys’ fees and costs.

Element (4): ‘adverse effect’ and ‘actual damages’

What remedies?

“...an amount equal to the sum of—

- actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000; and
- the costs of the action together with reasonable attorney fees as determined by the court.”

See 5 U.S.C. § 552a(g)(4).

Damages under the Privacy Act are not capped.



Element (4): ‘adverse effect’ and ‘actual damages’

The Supreme Court recently clarified, the standard for “actual damages” requires the plaintiff to show “special damages” such as pecuniary damages. Emotional distress is *not* an “actual damage.”

Federal Aviation Admin. v. Cooper,
132 S. Ct. 1441, 1451, 1451 fn.6 (2012).



Collection of Information Cause of Action

(The Hidden Secret of the P.A.)



Collection of Information Cause of Action

Federal agencies are required to collect information to the greatest extent practicable **directly from the subject individual** when the information **may result in adverse determinations** about an individual's rights, benefits, and privileges under Federal programs.

See 5 U.S.C. § 552a(e)(2).

Collection Cause of Action

Tip:

Collection of Information cases
are usually about “greatest extent
practicable”

Collection Cause of Action— Element 1

Agency has **no discretion** to not seek information from the subject:

The point of the provision, however, is *not* to give the *agency* the option of choosing which source—the subject of the investigation or some third party—would provide the most accurate information; rather, it reflects the congressional judgment that the best way to ensure accuracy in general is to require the agency to obtain information “directly from the individual whenever practicable.”

See Waters v. Thornburgh, 888 F.2d 870, 874-75 (D.C. Cir. 1989)

Collection Cause of Action— Element 1

Concerns over whether the subject individual would react negatively to the inquiry do **not** excuse agencies from the requirement that they collect information from the subject individual.

“[C]oncern over Plaintiff's possible reaction to an unpleasant rumor does not warrant a violation of the Plaintiff's privacy interests.”

Dong v. Smithsonian Institution, 943 F. Supp. 69, 73 (D.D.C. 1996) (Kessler, J.), *rev'd on jurisdictional grounds* 125 F.3d 877 (1997).

Collection Cause of Action— Element 1

- The agency collecting the information need not be the agency making the adverse determination.

See Dickson v. Office of Personnel Management, 828 F.2d 32, 37-39 (D.C. Cir. 1987).

- The agency collecting the information need not directly contemplate an adverse decision. All that is required is that an adverse decision could hypothetically result from the information collected.

See Kassel v. Veterans Administration, 709 F. Supp. 1194, 1203 (D.NH. 1989) (Devine, C.J.).

Collection Cause of Action— Element 1

When must the subject individual
be contacted?

Unless an exception
applies, FIRST!



Objective Evidence

- Objective evidence is fixed evidence of a tangible, unalterable nature (e.g. a hard-copy ticket from the board of law examiners showing a bar applicant's attendance at a bar exam).
- Agency must seek objective evidence from the subject first.
- If objective evidence received from the subject is sufficient to answer the agency's question, then the **agency must stop**.

See, e.g., Waters v. Thornburgh, 888 F.2d 870, 873 (D.C.Cir. 1989).

Subjective Evidence

- Subjective evidence is non-tangible evidence (e.g. witness testimony)
- Chief exception is if the subject individual possesses the ability to engage in **intimidation** of other relevant witnesses:
 - Tax auditor—witnesses were people the auditor could audit
 - School principal—witnesses were employees at that school

See Cardamone v. Cohen, 241 F.3d 520, 527-28 (6th Cir. 2001); *Hudson v. Reno*, 130 F.3d 1193, 1196, 1205 (6th Cir. 1997); *Brune v. Internal Revenue Serv.*, 861 F.2d 1284,1288 (D.C.Cir. 1988).

Law Enforcement/Intelligence Exception?

- Some provisions of the Privacy Act are subject to exemption for law enforcement or intelligence records under 5 U.S.C. §§ 552a(j, k), if the Agency has invoked that exception in their published Privacy Act notice in the Federal Register.
- Always check the relevant Privacy Act notice to see if 5 U.S.C. §§ 552a(j, k) has been invoked.
- Caselaw is currently unclear as to whether this applies to (e)(2) collection cases.

Cf. Velikonja v. Muller, 362 F.Supp.2d 1, 4-6,19-24 (D.D.C. 2004) (Huvelle, J.).

Access to Records / Amendment of Records Causes of Action



Access to Records

Agencies are required to allow individuals to access and review any records concerning information from any of the agency's Privacy Act systems of records—but only concerning themselves. 5 U.S.C. § 552a(d)(1).

Access to Records

- If the agency refuses to provide access, the requestor can file suit, seeking injunctive access to the records, plus attorneys' fees and costs—but no damages. 5 U.S.C. §§ 552a(g)(1)(b); (g)(3).
- Two year statute of limitation for suits. *See* 5 U.S.C. § 552a(g)(5).

Access to Records

- This access provision is subject to exemption for law enforcement or intelligence records under 5 U.S.C. §§ 552a(j, k), if the Agency has invoked that exception in their published Privacy Act notice in the Federal Register.
- Always check the relevant Privacy Act notice to see if 5 U.S.C. §§ 552a(j, k) has been invoked.

Amendment of Records

- Agencies are required to allow individuals to request amendment of any Privacy Act records regarding them. 5 U.S.C. § 552a(d)(2).
- Amendments are limited to information believed to be “not accurate, relevant, timely, or complete.” 5 U.S.C. § 552a(d)(2)(b)(i).

Amendment of Records

- This amendment provision is subject to exemption for law enforcement or intelligence records under 5 U.S.C. §§ 552a(j, k), if the Agency has invoked that exception in their published Privacy Act notice in the Federal Register.
- Always check the relevant Privacy Act notice to see if 5 U.S.C. §§ 552a(j, k) has been invoked.

Procedure for Amendment of Records

- Initial request for amendment are made to the agency. 5 U.S.C. § 552a(d)(3).
- Response required in 10 working days. 5 U.S.C. § 552a(d)(2).
- If the request for amendment is rejected, the requestor can then seek higher-level review within the agency. *Id.*
- If that reconsideration request is denied, then the case can be appealed into court. 5 U.S.C. §§ 552a(d)(3); (g)(1)(a).

Procedure for Amendment of Records

In addition, the agency must provide the requestor with the ability to lodge a 'statement of disagreement' in the Privacy Act-covered records themselves with the inaccurate record, which the agency is required to provide to anyone who accesses the inaccurate records along with the records themselves. 5 U.S.C. § 552a(d)(4).

MEDICAL INFORMATION

What Can the Government Request?
To Whom Can the Government Release?



Restrictions Generally

The collection, use and disclosure of medical information is restricted by the Privacy Act, as well as other statutes such as the Rehabilitation Act (affecting persons with disabilities) and the Genetic Information Nondiscrimination Act (GINA).

When Can the Government Request Medical Info

- In general, managers may not request medical info. But specific exceptions apply. These exceptions must be pursuant to some specific statute or regulation.
- Examples:
 - Requesting Family Medical Leave Act (FMLA) leave
 - Requesting reasonable accommodations for a disability
 - Supporting a request for sick leave

Job Applicants

- Before a job offer is made, agencies may not require if the applicant needs a reasonable accommodation to do the job, unless the applicant volunteers that information or the disability is obvious.
- Only after a job offer has been extended to an applicant may the agency ask if reasonable accommodation is needed -- but only if all incoming employees are asked the same question, or the new employee volunteers that he she is disabled, or if the disability is obvious.

See 29 CFR §1630.14 (a); EEOC Enforcement Guidance; Reasonable Accommodation (October 2002) at §12; and EEOC Enforcement Guidance: Pre-employment Disability-Related questions (October 1995).

Sick Leave and FMLA

- Management may ask for a doctor's note to justify the use of sick leave, especially if the leave request is for more than three days, or if the employee is on the restriction. (5 CFR § 630.405 (a)).
- A FMLA request for leave based on an employee's own medical condition, or a relative's medical condition, must be substantiated by a medical certificate. (5CFR § 630.1208).
- The agency is restricted to requesting only the information needed to substantiate the reason for the requested FMLA leave. (5CFR § 630.1208(c)).

Reasonable Accommodation

- When an employee requests reasonable accommodation for a disability, the agency is entitled to request medical information unless the disability is obvious.
- The agency can only request such information as needed to demonstrate the existence of the disability, the functional limitations and of the necessity for the accommodation.
- Agencies may not ask for an employee's full medical file or for information not related to the disability requiring accommodation.

See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship (Oct. 2002).

Fitness for Duty Exams

An agency may only require an employee to undergo a medical examination in the following circumstances:

- When the employee's position has medical standards or physical requirements;
- When an employee has applied for or is receiving workers' compensation; or
- When an employee is reassigned as part of a reduction in force position that has medical standards physical requirements which differ from those of the employee's current position.

See 5 CFR § 339.301

Medical Exams

- An agency may *offer* a medical examination in situations where it needs medical documentation to make an informed decision, including on performance and conduct issues; such medical exam cannot be compelled.
- Where an employee's medical condition exhibits a danger to self or to others, the employee can be indefinitely suspended until receipt of acceptable medical information indicating fitness for duty, as long as the agency had an objective basis for requiring the medical information.

See 5 CFR § 339.302; and *Doe v. PBGC*, 117 M.S.P.R. 579 (fn. 10) (2012).

Disclosure of Medical Information

- Confidential medical information can be disclosed to the following:
 - i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
 - (ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
 - (iii) Government officials investigating compliance with this part shall be provided relevant information on request.

See 29 CFR 1630.14(c)(1)

Disclosure of Medical Information

- Specifically, 29 C.F.R. § 1630.14(c)(1) provides, in pertinent part, that: "Information obtained . . . regarding the medical condition or history of any employee *shall ... be treated as a confidential medical record*, except that: (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations."
- The EEOC has said of § 1630.14(c)(1) that "[b]y its terms, this requirement applies to confidential medical information obtained from "any employee," and is not limited to individuals with disabilities. *Skaric, v. Janet Napolitano, Secretary, Department of Homeland Security*, EEOC Appeal No. 0120073399 (3/5/10).

Disclosure of Medical Information

- Even medical information provided in connection with an ordinary sick leave request is covered by these same nondisclosure requirements. *See Fisher v. Department of the Army*, EEOC Appeal No. 01A32251 (9/28/04).

Disclosure of Medical Information

The prohibition on the disclosure of medical information is very broad:

“The Commission's view is that this restriction applies to all medical information, even if the information is disclosed by an applicant or employee voluntarily, and even if it is not generated by a health care professional. It includes past, present, and expected future diagnoses and treatment, as well as the fact that an applicant or employee has requested or received accommodation.”

Meadows v. Department of the Army, EEOC Appeal No. 0120101541
(8/17/10).

Disclosure of Medical Information – Remedies?

- The Health Insurance Portability and Accountability Act (HIPPA) does not affect information collection or disclosure by an agency. HIPPA is focused primarily on The collection, storage and disclosure of patient information by those in the health care industry, .
- A Privacy Act claim for disclosure of confidential medical information is only available if the disclosure was from a Privacy Act-covered system of records. As discussed earlier, under the Privacy Act an employee can recover from the wrongful disclosure only if the employee suffered "actual damages."

Disclosure of Medical Information – Remedies?

Because there must be “actual damages” to prevail in a Privacy Act lawsuit, the best cause of action would be under the EEO process.

“If the agency disclosed medical information pertaining to complainant in a manner that did not conform with this regulation, then its act of dissemination would constitute a per se violation of the Rehabilitation Act, and no showing of harm beyond the violation would be necessary.”

Hampton v. U.S.P.S., EEOC Appeal No. 01A00132 (4/12/00).

SEARCHES

When Can the Government Search
My Office and/or My Stuff?

Searches: Constitutional Protections

- The 4th Amendment to the U.S. Constitution says that:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

- This has been applied to limit the searches of public employees’ offices and possession in the workplace.

Searches: Constitutional Protections

A public-sector employee can have a reasonable expectation of privacy in his effects at work, such as desk, filing cabinet and personal bags/cases. A warrantless search is permitted in relation to work-related misconduct or performance reasons. However, the search must be reasonable in its inception (i.e., there were reasonable grounds for the search) and reasonable in its scope (i.e., the manner of the search, what was searched, etc.).

O'Connor v. Ortega, 480 U.S. 709 (U.S. 1987) (plurality decision).

Searches: Constitutional Protections

- Federal employee did not have a reasonable expectation of privacy with respect to her work computers.
- The Agency's policy stated; "All information on this computer system may be intercepted, recorded, read, copied, and disclosed by and to authorized personnel for official purposes, including criminal investigations. Access or use of this computer system by any person, whether authorized or unauthorized, constitutes consent to these terms."

Plasai v. Mineta, 2005 U.S. Dist. LEXIS 7438, 2005 WL 1017806
(N.D. Tex. Apr. 26, 2005)

Searches: Constitutional Protections

- In a case where the V.A. installed covert video surveillance in the police break/locker room, “no reasonable jury could find that plaintiffs did not have a reasonable expectation of being free from covert video surveillance while in the locker-break room.

Rosario v. United States, 538 F. Supp. 2d 480, 498, (D.P.R. 2008).

DRUG TESTING

- The Supreme Court recognized three governmental interests which might, in appropriate circumstances, be sufficiently compelling to justify mandatory testing even in the absence of individualized suspicion. First, the government's interest in maintaining the integrity of its workforce was held to justify the testing of all Customs Service employees seeking transfer to positions involving the interdiction of illegal drugs. Second, the suspicionless testing of train workers, or of Customs Service employees who carry firearms, was upheld as a legitimate means of enhancing public safety. See *Skinner*, 109 S. Ct. at 1419 ("Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."). Finally, the Court stated that the government's "compelling interest in protecting truly sensitive information," could under some circumstances furnish an adequate justification for the suspicionless testing of individuals whose jobs would involve access to classified materials
- See *NTEU v. Von Raab*, 489 U.S. 656 (1989); and *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989).

Questions?



VALUABLE RESOURCES

- EEOC Enforcement Guidance: Reasonable Accommodation (October 2002), available at:

<http://www.eeoc.gov/policy/docs/accommodation.html>

- EEOC Enforcement Guidance: Pre-employment Disability-Related questions (October 1995), available at:

<http://www.eeoc.gov/policy/docs/preemp.html>

- U.S. Department of Justice, Overview of the Privacy Act of 1974, September 2012 edition, available at:

<http://www.justice.gov/opcl/1974privacyact-overview.htm>.

VALUABLE RESOURCES

- Electronic Privacy Information Center, *Litigation Under the Federal Open Government Laws* (2010 Ed.)

- And

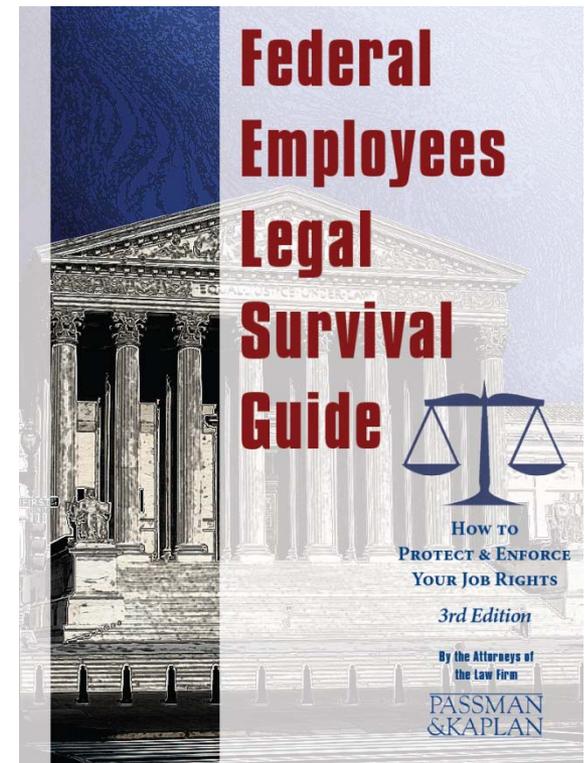
The Federal Employees

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*3rd edition due out September 2014.



The End

THANK YOU

Joe Kaplan

with Andrew Perlmutter

PASSMAN
&KAPLAN
Attorneys at Law P.C.

1828 L Street, NW

Suite 600

Washington, DC 20036

Tel: 202-789-0100

www.passmanandkaplan.com