

 **TULLY RINCKEY** PLLC
ATTORNEYS & COUNSELORS AT LAW

 **15th Annual EXCEL Conference** 

**Managing Expectations of Privacy
in the Workplace**

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The Right to Privacy

"Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. . . ."

"The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment."

- United States Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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Presentation Highlights

- Constitutional privacy rights
- The Privacy Act of 1974
- The Rehabilitation Act of 1973
- Americans with Disabilities Act (ADA)
- Health Insurance Portability and Accountability Act (HIPAA) of 1996
- Federal wiretap legislation
- Relevant Supreme Court decisions

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Constitutional Privacy Rights

- The Fourth Amendment
Federal employees have the right to be secure in their person, property (including their job), papers (which now includes personal emails as described later in the presentation), and effects from unreasonable searches and seizures by their government employer.



Constitutional Privacy Rights

- The Fifth Amendment
 - Federal employees cannot be compelled by the federal government to incriminate themselves in conduct investigations with potential criminal undertones.



Miranda v. Arizona, 384 U.S. 436 (1966)

- Employees have a right to remain silent, including a right to refuse to answer questions about their alleged criminal misconduct, and a right to have counsel present when questioned.



Constitutional Privacy Rights

- The Fifth Amendment
 - If an employee is compelled to answer questions about misconduct, the government thus provides the employee "use immunity" from criminal prosecution for that misconduct, as long as the employee tells the truth in the investigation.
 - At that point, the employee can only face administrative discipline, such as job suspension or removal, after due process.
 - See 5 U.S.C. § 7501 *et seq.*; 18 U.S.C. § 1001; *Garrity v. New Jersey*, 385 U.S. 493 (1967); and *Kalkines v. U.S.*, 473 F.2d 1391 (Ct. Cl. 1973).

Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 546 (1985)

- Employees have a constitutionally protected property right to their continued employment, which cannot be taken by the government under the Fifth Amendment without due process of law.



NLRB v. J. Weingarten Inc., 420 U.S. 251 (1975)

- Unionized federal employees have a right to union representation at investigatory interviews by management, even in non-criminal matters.



**The Administrative Procedures Act (APA),
5 U.S.C. § 555**

- (b) "A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative."

**The Privacy Act,
5 U.S.C. § 552a**

- Protects the privacy of information about a person that is contained in the federal government's systems of records.
- Intentional or reckless violations of the Privacy Act are criminal misdemeanors.
 - Violating terms could end the career of federal managers
 - Agencies subject to unlimited compensatory damages
 - See generally, *Dong v. Smithsonian Institution*, 125 F.3d 877 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 922 (1998)

Privacy Act, 5 U.S.C. § 552a

- Regardless of the type of EEO claim, the complaint and the ROI are protected from disclosure under the Privacy Act, 5 U.S.C. § 552a.
 - See *Dong v. Smithsonian Institution*, 125 F.3d 877 (D.C. Cir. 1997), *reh'g denied*, No. 96-503 (1997), *cert. denied*, 524 U.S. 922 (1998)

**The Privacy Act,
5 U.S.C. § 552a(e)(2)**

- Federal agencies and managers should gather information about the investigation directly from the target employee.
- May require questioning the target employee first before questioning other witnesses about the target employee's alleged misconduct.



Investigating EEO Complaints

- Hence, when investigating EEO complaints, agencies must gather information regarding them "to the greatest extent practicable directly from the [alleged discriminating officials (ADO)]"
- and their failure to do so may lead to awards of unlimited compensatory damages to the ADOs.
 - See 5 U.S.C. § 552a(e)(2)(g)

The Privacy Act

- Exceptions to the Privacy Act
 - Information in agency systems can be made available to complainants and their attorneys through the discovery process of court cases, EEOC complaints, MSPB appeals and grievances, including the past disciplinary records of federal managers who propose or take disciplinary or other concrete personnel actions against federal employees.
 - See OPM's Privacy Act Routine Use regulations, 61 Fed. Reg. 3,6919, 3,6921-22 (Jul. 15, 1996) (final regulations as of Sep. 13, 1996).

Rehabilitation Act and ADA

- In addition to the Privacy Act, both statutes:
 - Prohibit the improper collection and distribution of private employee medical information.
 - Protections apply regardless of whether the employee is disabled.
 - If violated, federal agencies are subject to liability, including, in some cases, compensatory damages.
 - See, e.g., *Andrews v. U.S. Postal Service*, EEOC Appeal No. 01A24085 (Dec. 22, 2003)

HIPAA & HITECH Act

- Federal laws that protect the privacy of patient records, including prior medical conditions, previous claims experience, and genetic information.

HIPAA & HITECH Act (continued)

- In 2011, HHS announced its first-ever HIPAA/HITECH Act penalty, a whopping \$4.3 million imposed against Cignet Health of Prince George's County, Maryland.
 - Two days later, HHS announced that a large Massachusetts hospital had agreed to pay \$1 million to avoid a penalty proceeding, which involved the physical removal of protected health information (PHI) from a covered entity's premises by an employee of the hospital's outpatient practice who took home, for work purposes, paper records containing the PHI of 192 patients.
 - On her way into work on the subway, the employee placed the documents, bound by a rubber band, on the seat next to her and forgot them there when she exited the train. The records never were recovered.

Federal Wiretap Laws

- Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*
 - Prohibits the willful interception of telephone communication by means of any electronic, mechanical or other device without an applicable exemption.
- Requires at least one party to the conversation be aware of and consent to recording.
- Some state statutes require consent of both parties.
- Violations can result in criminal liability for the recorder.

Federal Wiretap Laws

- Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510:
 - Makes it a crime to improperly access wire, oral or electronic communications while in transit
- Also known as the Stored Communications Act, 18 U.S.C. § 2701-12
 - Protects communication held in electronic storage, most notably email messages stored on computers
- In some instances, these statutes allow the federal government to access emails without a warrant.
 - See USA Patriot Act, 115 Stat. 272 (2001)

Personal Use of Office Equipment

- How do the above-described rules apply in the real world of federal government-employee electronic privacy?
 - Office of Personnel Management has issued a policy allowing federal employees to use government office equipment, including computers and telephones, for a certain amount of personal use.
 - However, OPM's Personal Use of Government Office Equipment Policy expressly warns federal employees that they do not have the right to privacy when using any government equipment, including Internet and e-mail services.

OPM's Policy

- Furthermore, OPM's policy states that an employee's use of government office equipment, for whatever purpose, is not secure, private or anonymous, and that the government may monitor or record an employee's use of government office equipment.

OPM's Policy (continued)

- Under that policy, which has been adopted federal government-wide, limited personal use of government office equipment is authorized only during non-work time. In addition, such personal use is authorized only if:
 - 1) it involves minimal additional cost to the government;
 - 2) does not reduce productivity or negatively affect the official duties of any employees;
 - 3) the employee is authorized to use the equipment at issue for official purposes; and
 - 4) the communication is legal and appropriate.

OPM's Policy (continued)

- Violating that policy can lead to employee discipline up to and including termination.
 - See 5 U.S.C. § 7501 et seq.; OPM Personal Use of Government Office Equipment Policy (June 2000).
- However, a couple of recent court decisions potentially muddy the waters as to whether an employee's workplace electronic privacy rights are actually broader than what OPM would like them to be.

City of Ontario v. Quon
130 S. Ct. 2619 (June 17, 2010)

- Allowed the government to search and punish a government employee for “text” messaging on government-issued smart phones.
- The Court reserved for future cases a decision as to whether and under what circumstances a government employee has a constitutionally protected reasonable expectation of privacy in electronic communications on an employer’s communications equipment.

U.S. v. Warshak,
2010 WL 5071766, 2010 U.S. App. LEXIS 25415
(6th Cir. Dec. 14, 2010)

- Held that government searches of personal email inboxes require a search warrant. To do otherwise violates a person’s Fourth Amendment rights.
- A person has a “reasonable expectation of privacy in his emails.”



NASA v. Nelson, 131 S.Ct. 746 (Jan. 19, 2011)

- In *Nelson*, the Supreme Court affirmed the Constitutional “Right to Informational Privacy.”
- The Supreme Court found that federal background checks and security clearance investigations implicate “a privacy interest of Constitutional significance,” but that the requests for personal information therein were reasonable and the information would be protected under the Privacy Act without the need for a search warrant.
- Writing in concurrence, Justice Scalia said the Court’s opinion “will dramatically increase the number of lawsuits claiming violations of the right to informational privacy.”

Anonymity option for aggrieved complainant's in informal EEO complaints under 29 C.F.R. § 1614.105(g),

- "The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter."

My advice...

- Complainants should inform the Alleged Discriminating Official(s) (ADO)/Responsible Management Official(s) (RMOs) of the informal FFO complaint upon filing it with FFO Counselor.
- Satisfies the "knowledge" element of the "knowledge timing test" to establish a retaliation case.
- Request that all communications be included in the EEO Counselor's Report or the Report of Investigation (ROI).

EEOC Discovery

- Parties to an EEOC case can properly object to each other's Discovery Requests
 - to the extent that they seek information that is not relevant to the issues in this litigation, and/or not reasonably calculated to lead to the discovery of relevant or admissible evidence.
 - to the extent they are unreasonably vague, overly broad, repetitious, unduly burdensome, or purport to require the disclosure of information beyond the scope of permissible discovery under the EEOC's applicable regulations, Management Directive (MD) 110, Acknowledgment Order, and/or the instructive authority of the Federal Rules of Civil Procedure.

EEOC Discovery (continued)

- Parties to an EEOC case can properly object to each other's Discovery Requests
 - to the extent they purport to require the disclosure of documents or information that are **protected from discovery by the attorney-client and/or work product privileges**, or that are otherwise immune or protected from disclosure.
 - to the extent they seek documents or information outside of the party's knowledge, possession, custody, or control after a reasonable search for the info.
 - insofar as they seek information regarding individuals other than the Complainant or regarding events other than those contained in the complaint in the case.

EEOC Depositions

- The purpose of a deposition is to learn everything the deponent knows about the facts of the case
- The witness's sworn answers will be recorded by the court reporter
- If the deponent answers a deposition question, it will be assumed that s/he heard and understood the question
- If the deponent answers a deposition question, it will be assumed that s/he knows the answer to the question asked

EEOC Depositions (continued)

- Questions are to be answered before taking any breaks
- The deposer can ask if the deponent spoke with anyone regarding the last question asked during the break
- The deponent will be asked if there is any reason why s/he cannot give full and complete answers to the questions asked

EEOC Depositions (continued)

- The Deponent will be asked if s/he is taking any medication that might impact his/her ability to recall facts or to tell the truth
- Deponents are not to discuss their deposition testimony with anyone other than agency counsel
- Deponents will be asked what they did to prepare for their deposition
- Whether they reviewed any documents
- Whether they brought any documents with them to the deposition. If so, a copy will be placed in the transcript record

EEOC Depositions (continued)

- Did Deponent speak with anyone in preparation for this deposition? If so, with whom? What specifically was said by you/them?
- Are you aware that my client disputes that fact?
- **Only basis to instruct a deponent not to answer is objection based on attorney-client privilege.**
- So you would agree then that there is a dispute as to that fact between my client and the Agency, correct?
- Get's buy in on the existence of disputes of fact in cases subject to summary judgment procedures.

DC Rules of Professional Conduct for Lawyers

- **Rule 3.6—Trial Publicity**
- A lawyer engaged in a case being tried to a judge or jury shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of mass public communication and will create a serious and imminent threat of material prejudice to the proceeding.

DC Rules of Professional Conduct for Lawyers

Rule 3.6—Trial Publicity

• **Comment**

[3] Because administrative agencies should have the prerogative to determine the ethical rules for prehearing publicity, this rule does not purport to apply to matters before administrative agencies.

FOIA and EEOC Decisions

- 5 U.S.C. § 552(a)(2)(E) says that “To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion.

Privacy Act, 5 U.S.C. § 552a

- Subsection (a)(4) says “the term “record” means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history”
- “and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.” [not position title].

Privacy Act, 5 U.S.C. § 552a (continued)

- Subsection (a)(5) states that “the term ‘system of records’ means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.”

Privacy Act, 5 U.S.C. § 552a (continued)

- (b) Conditions of Disclosure. - No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be –
 - (1) 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;
 - (2) required under FOIA;
 - (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

Privacy Act, 5 U.S.C. § 552a (continued)

- (d) Access to Records. - Each agency that maintains a system of records shall –
 - (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof
 - (2) permit the individual to request amendment of a record pertaining to him and promptly, either –
 - (i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or
 - (ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal;

Privacy Act, 5 U.S.C. § 552a (continued)

- (d) Access to Records (continued). - Each agency that maintains a system of records shall –
 - (3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency;
 - (4) in any disclosure, containing information about which the individual has filed a statement of disagreement clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed.

Privacy Act, 5 U.S.C. § 552a (continued)

- (e) Agency Requirements. - Each agency that maintains a system of records shall –
 - (5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

Privacy Act, 5 U.S.C. § 552a (continued)

- (e) Agency Requirements. - Each agency that maintains a system of records shall –
 - (8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

Privacy Act, 5 U.S.C. § 552a (continued)

- (g)(1) Civil Remedies. - Whenever any agency:
 - (d) fails to comply with any other provision of this section in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Privacy Act, 5 U.S.C. § 552a (continued)

- (g)(4) Civil Remedies:
 - (4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of -
 - (A) 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
 - (B) the costs of the action together with reasonable attorney fees as determined by the court.
 - (5) An action to enforce any liability created under this section may be brought in the district court of the United States . . . **within two years** from the date on which the cause of action arises

Privacy Act, 5 U.S.C. § 552a (continued)

- (i)(1) Criminal Penalties. - Any officer or employee of an agency [or a federal contractor], who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information
- and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000.
- (2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than \$5,000.

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Questions?

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