

ON THE FRONT LINES
OF WORKPLACE LAW™

Employee Privacy: Balancing Freedom and Monitoring



Danielle H. Moore

858-597-9616

dmoore@fisherphillips.com

Why is this an issue?

In a Survey of Employees, Key Findings Included:

75% of employees accept employer computer monitoring

16% of employees are “glad” employers monitor computer activities

9% of employees were “mad” about being monitored

Survey Conducted by Spectrosoft, May 23, 2013

Why is this an issue?

In a Survey of Employees, Key Findings Included:

49% of employees said employers monitored their computer activities

69% of employers that have Internet policies monitor employees

15% of employers that do not have Internet policies monitor employees

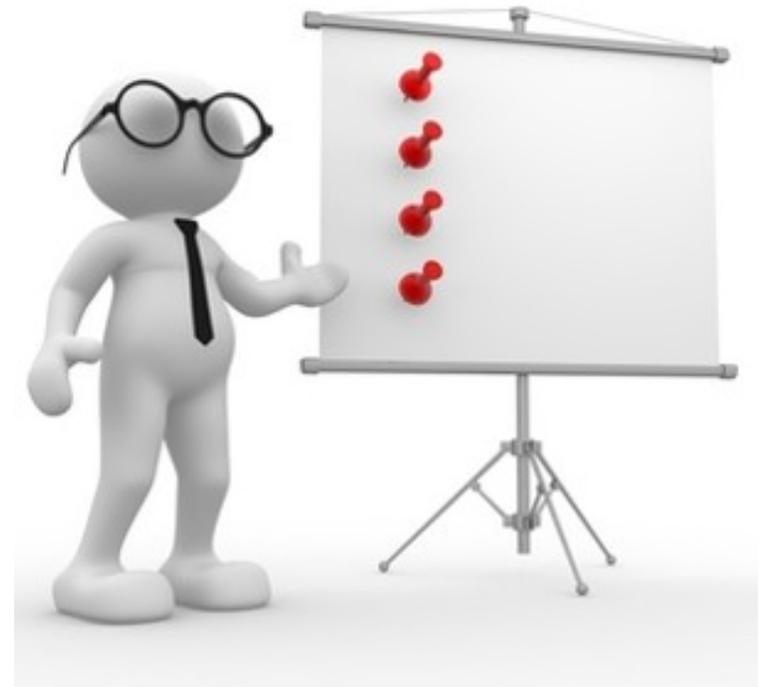
Survey Conducted by Spectrosoft, May 23, 2013

Reality of Today's Workplace

- Employers need to monitor performance, equipment use, and confidential information
- Yet, employees have privacy rights
- Today things are more complicated because employees use their own electronic devices (cell phones, laptops, etc.) for work
- How do you balance?
 - Does it matter if it is a work computer vs. personal?
 - Company provided laptop?
 - Home computer with VPN access?

What we will cover:

- Employee Privacy Rights
- Employee monitoring
 - Video cameras
 - Computers
 - Phones
- Personal devices - BYOD
- Social Media
- Prevention – along the way



Employee Privacy Rights



Employees' Right to Privacy:

- No protection afforded by U.S. Constitution
 - Protection afforded by state Constitution
 - EX: CA – Article 1, section 1, gives each citizen an "inalienable right" to pursue and obtain "privacy."
 - Protection provided by common law, statutory protections and private agreement:
 - Torts, such as in intrusion upon seclusion
 - Employment Agreements
 - Employee Handbooks
 - Collective Bargaining Agreements
- *NOT COVERED – Drug testing, personnel records*

Employees' Right to Privacy:

- The Electronic Communications Privacy Act of 1996 (ECPA)
- The Fair Credit Reporting Act (FCRA)
- The Americans with Disabilities Act (ADA)
- The Family and Medical Leave Act (FMLA)
- The Health Insurance Portability and Accountability Act (HIPAA)
- The Genetic Information Nondiscrimination Act (GINA)
- Section 503 of the Rehabilitation Act
- State off-duty conduct/other state and federal statutes
- Criminal and credit background check statutes and EEOC guidance

Employee Monitoring

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search ID: mshn136

"Bad news, Stevens. While monitoring your email I discovered that you're monitoring my email."

Employee Monitoring

1. Videotaping
2. Property Searches
3. Computers
4. Cell Phones



Monitoring - Video Surveillance

Hernandez v. Hillsides, Inc.

- ❖ Secret videotaping of employees' office to ascertain who was accessing a company computer to view pornographic websites after hours.
- ❖ Plaintiffs were employed by private nonprofit residential facility for neglected and abused children including victims of sexual abuse.
- ❖ Concern that culprit might be a staff member who worked with the children so Director installed hidden camera in office without notifying Plaintiffs who worked in it.
- ❖ Camera never operated during business hours and did not monitor Plaintiffs.
- ❖ Plaintiffs sued for invasion of privacy.

Monitoring - Video Surveillance

Hernandez v. Hillside, Inc.

- ❖ CA Supreme Court found no invasion of employee privacy holding even if an intrusion into zone of privacy it was not “highly offensive and sufficiently serious to constitute a privacy violation.”
 - Surveillance was drastically limited in nature and scope.
 - Surveillance exempted plaintiffs from its reach.
 - Employer was motivated by strong countervailing concerns with protecting the children.
- ❖ But recognized applicability of the constitutional right to privacy to an employment situation involving secret videotaping.
- ❖ Cautioned that under different facts they may have reached a different conclusion.

Monitoring - Video Surveillance

Take Away Tips:

- Consider location
 - No restrooms, locker rooms, changing areas
- Use notice - signage
- Watch for deterring union activity
- What about secret video taping?

Monitoring - Property Searches

❖ Property Searches:

- Policy?
- Purpose?
- Reasonable suspicion?



Monitoring - Workplace Computers

Holmes v. Petrovich Dev't. Co., LLC

Employer found emails exchanged between employee and her attorney regarding lawsuit against employer exchanged using the employer's email and computer systems

California appellate court held that such communications were not protected by the privilege because:

employee's exchange of e-mail communications with her attorney were not confidential because

- (1) the e-mails were sent from her company work computer, and
- (2) the company maintained a policy (which the employee was aware of and acknowledged) that e-mails from company computers were not private communications and could be monitored and reviewed by the company.

Monitoring - Workplace Computers

Alamar Ranch, LLC v. County of Boise

No. CV-09-004-S-BLW, 2009 U.S. Dist. LEXIS 101866

(D. Idaho, Nov. 2, 2009)

“It is unreasonable for any employee in this technological age ... to believe her communications via work-issued equipment and email addresses would be confidential and not subject to monitoring.”

Monitoring - Workplace Cell Phones

City of Ontario v. Quon

- SWAT team member with police department given a pager so that he can constantly be on call.
- Given a general policy regarding the ability of the police department to monitor emails/texts.
- Quon went over the limits repeatedly – audit performed
- Employer reviewed text messages and found sexually explicit material
- Is there an expectation of privacy? Court says no.
- Defense – manager assured Quon that texts were not reviewed
- Illustrates the importance of well-written policies.



Monitoring - Workplace Computers & Phones

Take Away Tips:

- Check and know your policy and make sure to enforce
- Clearly outline to employees what can be monitored by employer
- Train your managers not to unwind your policy
- Consider what is the employee's expectation of privacy?

Personal Devices & Bring your Own Device Policies or Practices



Modern Technology - Personal Devices

- Blurred lines between work and home
- Bring Your Own Device - Employees can use their own personal electronic devices to connect to the company's network.
- Reality – Regardless of a policy, or even dealership consent, sales associates are giving out their cell phone numbers to customers, and/or managers are checking emails at home.
- By authorizing employees to use their own devices for work, and subjecting such devices to monitoring and investigation, employers risk violating **employee privacy rights** related to such devices

Personal Devices

What are employees doing with their own devices during the day?

- Accessing the company's network
 - Checking emails and calendars
 - Accessing company data
 - Reviewing confidential materials
 - Downloading company documents
 - Calling customers
 - Working during off hours
- Using it for personal purposes
 - Playing Angry Birds
 - Watching movies
 - Keeping their kids occupied
 - Taking and sending pictures
 - Social media
 - Texting

Personal Devices

Benefits –

- Costs: employees pay the cost of the device and possibly the service; tech support; lost equipment
- Efficiency, productivity, accessibility
- Employee satisfaction, flexibility

Personal Devices

Problems –

- Lack of control
- Company data, trade secrets protection
- Wage – Hour claims, OT, reimbursement
- Heightened privacy, but still need to monitor
- Retrieval at termination



Personal Devices - Key Questions

Between the Employer and Employee, Who:

- ✓ Owns or Controls the Data on the Personal Device?
- ✓ Has a Right to Inspect Data on these Devices?
- ✓ Has an Obligation to Preserve Data on these?
- ✓ Devices that are Relevant to a Lawsuit?

Personal Devices

What Does “Control” Really Mean?



The *San Juan Cable Case*:

- An employer failed to preserve emails from the **personal** email accounts of three managing officers
- A federal court found “control” by the employer
- The lost emails were in the employer’s control because it *“presumably knew its managing officers used their personal email accounts to engage in company business, and thus its duty to preserve extended to those personal email accounts.”*

Personal Devices

What Does “Control” Really Mean?



University of Phoenix Case:

- An employer failed to preserve a thumb drive owned and used by its managing director
- A federal court found “control” by the employer
- The employer “*had control over the thumb drive when it went missing*” because even though the managing director had personal possession of the thumb drive, his employer had the authority and ability to ask him to preserve the documents and things in his possession .”

Personal Devices

What Does “Control” Really Mean?

The Perez v. Shippers Transport Case:

- ❑ Dispatcher testified his practice was to delete all of his text messages on a daily basis, and no one ever instructed him to preserve any text messages
- ❑ Use of text messaging was too widespread for the employer to claim it was unaware of the practice
- ❑ Employer failed to even ask any employees whether they engaged in texting for work



Personal Devices

What Does “Control” Really Mean?

The Perez v. Shippers Transport Case:

- ❑ U.S. DOL lawsuit accusing shipping employer of FLSA violations
- ❑ Court sanctioned employer for failing to adequately preserve ESI, including text messages
- ❑ At deposition, dispatcher testified he exchanged work-related text messages with drivers on a daily basis on their mobile phones



Personal Devices - Email

Stengart v. Loving Care Agency, Inc., 990 A.2d 650 (2010)
[New Jersey](#)

Personal e-mails composed on company-owned computers -
court ruled on two key issues:

- 1) there should be a "reasonable" [expectation of privacy](#) in personal e-mails on company computers, and
- 2) that [attorney–client communication privileges](#) and privacy should not be violated.

Personal Devices - Email

Stored Communications Act

- Federal statute prohibiting intentional, unauthorized access to private electronic communications (i.e., Facebook or Gmail)
- Creates privacy expectation in private electronic communications

Personal Devices - Email

Pure Power Bootcamp, Inc., et. al. v. Warrior Fitness Boot Camp, LLC

759 F. Supp. 2d 417 (S.D.N.Y. 2010)

- Employer logged into employee's Hotmail account employee had used during work hours and on work computer
- Employee left username and password on the workplace computer
- Court found violation of the Stored Communications Act



Social Media & Privacy



Social Media - Game Changer

- Hiring?
- Discipline?
- Investigations?
- Can I use it?
- Is all social media equal?



Social Media - Hiring

❖ An Employer Cannot:

- Require disclosure of username or password of social media
- Require applicant to access personal social media
- Require applicant to divulge any personal social media

❖ Caution: Reviewing public social media creates risks that it will appear decisions were made based on unlawful, discriminatory reasons

What are employers looking for on social media?

- ❖ If candidate presents himself/herself professionally (65%)
- ❖ To see if the candidate is a good fit for the company culture (51%)
- ❖ To learn more about the candidate's qualifications (45%)
- ❖ To see if the candidate is well-rounded (35%)
- ❖ To look for reasons not to hire the candidate (12%)
 - Posting provocative/inappropriate photos?
 - Alcohol or drug use?
 - Bad mouthing previous employers?
 - Making discriminatory comments related to race, gender, religion, etc.?
 - Lying about qualifications?

Careerbuilder.com (Nationwide survey conducted by Harris Interactive in February and March 2012)



Mary Jane

They say you can't drink or smoke the good stuff at work!!! What they don't know won't hurt em'. **Mood:** sneaky 🤪 at 6:42 PM Jun 3

[view more](#)

View My: [Photos](#) [Videos](#)

21 / Female
Dallas, Texas, US
Last Login: 6/8/2009

Online Now!

www.myspace.com/478715749

[Send Message](#)

[Add Comment](#)

Interests

General



Music

your only as strong as
the tables you dance on
THE DRINKS YOU MIX
& the friends you roll with.



Movies

Half Baked, The Friday movies, Dazed and Confused. Really, anything that makes high better.

Status and Mood

Mary Jane They say you can't drink or smoke the good stuff at work!!! What they don't know won't hurt em'.

Mood: sneaky 🤪 at 6:42 PM Jun 3

Mary Jane Partying till I have to go to work!!!!

Mood: drunk 😊 at 6:38 PM Jun 3

Mary Jane has joined MySpace!

Mood: good 😊 at 2:05 PM Jun 2

[View More](#)

Activity Stream

Jun 05

Mary Jane Asher added a new photo to the My Photos album.



Social Media - Discrimination Rules Still Apply

- ❖ Same discrimination rules apply
- ❖ Ignorance is bliss
- ❖ Not knowing about protected categories is the best defense in failure to hire cases
- ❖ Software may be tracking which Facebook pages are reviewed by hiring managers

EMPLOYMENT SCREENING TOOL?

The image shows a LinkedIn profile for Karen 'Luchka' Gieselman. The profile includes a photo of a woman with brown hair, a necklace, and sunglasses on her head. Below the photo are links for 'View Photos of Me (65)' and 'Edit My Profile'. The profile name is 'Karen 'Luchka' Gieselman' with tabs for 'Wall', 'Info', 'Photos', and '+'. An 'Edit Information' link is visible. The 'Basic Information' section lists: Networks: UNC Alum '06; Sex: Female; Birthday: April 27; Hometown: Columbia, SC; Relationship Status: Married; Political Views: Tree-Loving Conservative; Religious Views: Christian. Red arrows point from the text 'RACE' to the photo, 'Religion' to 'Christian', 'Political Views' to 'Tree-Loving Conservative', and 'Marital Status' to 'Married'.

View Photos of Me (65)	View Photos of Me (65)
Edit My Profile	Edit My Profile
Basic Information	Basic Information
Networks:	UNC Alum '06
Sex:	Female
Birthday:	April 27
Hometown:	Columbia, SC
Relationship Status:	Married
Political Views:	Tree-Loving Conservative
Religious Views:	Christian

EMPLOYMENT SCREENING TOOL?

Education and Work

Grad School: UNC '06
J.D., Law
College: Eckerd College '03
Political Science, International Relations
High School: Eastview '00

National Origin

Basic Information

Sex:
Birthday:
Hometown:
Children:
Parents:
Siblings:
Relationship Status:

Age

Relationship Status: Single
Interested In: Men
Looking For: Dating
A Relationship
Networking

Sexual Orientation

Familial Responsibility

Social Media - Avoiding the Hiring Pitfalls

- ❖ Be selective in the platform you use
- ❖ If using social networking for screening, be consistent and use it for everyone
- ❖ Consider giving notice in writing that you search internet or social networking sites
- ❖ If search reveals information that plays a part in hiring decision, keep copy of information and consider giving candidate opportunity to address the information
- ❖ Don't ask for social media password or other log-in credentials
- ❖ Do not try to gain access to a candidate's profile by asking an employee who is friends with the candidate to show you the profile (potential privacy issue)
- ❖ Do not send a friend request without disclosing the real reason for the request.
- ❖ If you choose not to hire based on what you learn, print and keep

Social Media – Discipline & Termination

A GOLDMINE OF INFORMATION FOR EMPLOYERS

- ❖ The internet, and social networking sites in particular, present a goldmine of information for employers looking to monitor the workforce

EXAMPLES...



DISCIPLINE ISSUE NO. 1 – Halloween Party

❖ An intern at a bank sent his boss the following e-mail:

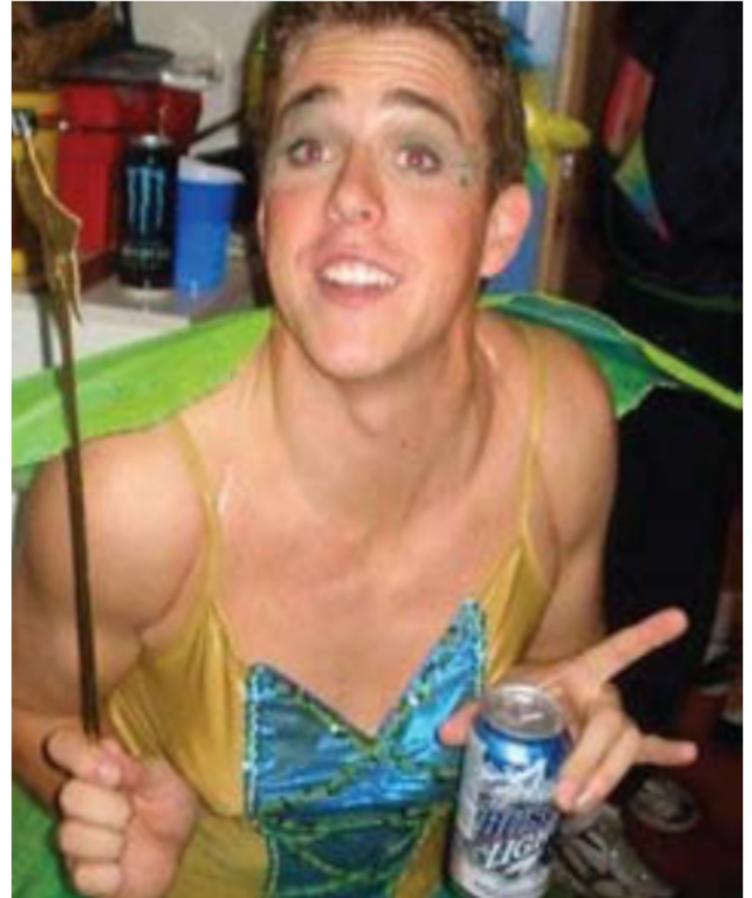
- “I just wanted to let you know that I will not be able to come into work tomorrow. Something came up at home and I had to go to New York this morning for the next couple of days. I apologize for the delayed notice.”

❖ His boss responded the next day:

- “Thanks for letting us know – hope everything is ok in New York. (cool wand)”

DISCIPLINE ISSUE NO. 1 – Halloween Party

- ❖ **His boss also attached a photo from the intern's Facebook page**
- ❖ **The boss blind copied the entire bank on his reply so that they would all know that the intern skipped work to go to a Halloween party**



Funny... But -

- Privacy Issues?
- Protected Leave Issues?
- Remember Your Role As HR Professional

DISCIPLINE ISSUE NO. 2 – Consistency

- ❖ **If employers use social media to discipline or terminate an employee, you must be consistent**
- ❖ **Case in point – Delta Airlines flight attendant blogger**



DISCIPLINE ISSUE NO. 2 – Consistency

- ❖ Delta dismissed a female flight attendant after discovering “inappropriate” photographs of the employee in her Delta uniform posted on her blog**
- ❖ The flight attendant sued Delta alleging, among other things, sex discrimination because Delta purportedly failed to discipline male employees who maintained blogs containing similar content**

DISCIPLINE ISSUE NO. 3 – Coercion

Pietrylo, et al. v. Hillstone Rest. Group

No. 06-5754, 2009 U.S. Dist. LEXIS 88702 (D. N.J., Sept. 25, 2009)

- Password-protected chat forum and blog for employees
- Management requested access to the blog
- Employees terminated based on content found on blog
- Jury found in favor of employees and a violation of the Stored Communications Act



DISCIPLINE ISSUE NO. 4 – Retaliation

- ❖ Employers may not discipline employees in retaliation for protected activity
- ❖ Certain forms of disparaging speech may be protected



Three D, LLC (Triple Play), 361 NLRB No. 31 (2014)

Two employees fired after owner viewed Facebook post by one, and “Like” by another. NLRB found protected concerted activity and a violation of the NLRA.

DISCIPLINE ISSUE NO. 5 – Off Duty Conduct

- ❖ **California and approximately 27 other states prohibit discrimination based on lawful off-duty conduct**
- ❖ **Off-duty conduct, even though embarrassing, may not be used to disciplining an employee unless it falls within certain types of conduct**
- ❖ **Off duty conduct subject to discipline:**
 - **Unlawful conduct**
 - **Publishing trade secrets / confidential info.**
 - **Misrepresentations regarding the business**
 - **Inappropriate use of company name/logo**

DISCIPLINE ISSUE NO. 4 – Off Duty Conduct

❖ Off duty conduct potentially not subject to discipline:

- Alcohol consumption
- Promiscuous behavior
- Unpopular political views
- Bad talking the employer



Social Media - Investigations

The *Ehling* Case:

- An employee-nurse sued for wrongful termination
- The employee's Facebook page was set for "Friends" only, which included some co-workers, but no managers
- One "Friend" captured screen shots of the plaintiff's wall and emailed them to managers
- The managers never asked for screen shots



Social Media - Investigations

The *Ehling* Case:

- The plaintiff's argument:
the Stored Communications Act applies to non-public Facebook settings and there was an improper access here because of the "Friends" only setting
- The Court held that the Facebook wall posts were covered by the Stored Communications Act but ... the SCA's authorized-user exception applied because a "friend" voluntarily emailed the screen shot to a manager without any request or coercion
- Motion for summary judgment was granted



FINAL EXAMPLE:

Facebook (3) | Wilma Martin - Windows Internet Explorer

http://www.facebook.com/profile.php?id=10000061034067&v=wall

File Edit View Favorites Tools Help

Facebook (3) | Wilma Martin

facebook Search Home Profile Find Friends Account

Wilma Martin

Wall Info Photos +

What's on your mind?

Attach: [Image] [Video] [Photo] [Link] [Share]

Wilma Martin Slipped into work at 9:19 this morning and no one noticed!! whoot whoot!
July 9 at 4:58pm · Comment · Like

Wilma Martin Bored, bored, bored at work and it's only 9 am!
July 13, 2009 at 9:06am · Comment · Like

Blanche Gerbigan Wilma! What up, hot stuff?! Hope your idiot boss bought your swine flu excuse for the game!
July 9, 2009 at 10:45pm · Comment · Like · See Wall-to-Wall

Megan Winter Hey Wilma! I'll be thinking of you during your upcoming cancer treatments.
July 9, 2009 at 9:30pm · Comment · Like

Wilma Martin Skipping work for the Padres Game!!!! WOOOOOOO!
July 9, 2009 at 9:23pm · Comment · Like

Information

Relationship Status:
In an Open Relationship

Birthday:
January 1, 1975

Friends

1 friend See All

Advertisements:

- Bikram Yoga 90% Off**
Things to do in San Diego before you die. Get one huge coupon emailed to you daily. Like
- Play Pop & Drop**
Play Pop & Drop Free Here. Plus get the mywebsearch toolbar. Click to Play Now... Like
- Do you love shoes?**
Chat (0)

http://www.facebook.com/profile.php?id=10000061034067&v=wall

Internet | Protected Mode: On 105%

FINAL EXAMPLE:

Facebook | Wilma Martin - Microsoft Internet Explorer

File Edit View Favorites Tools Help

Back Forward Stop Refresh Home Search Favorites

Address <http://www.facebook.com/profile.php?id=100000061034067&ref=name#/profile.php?id=100000061034067&v=info> Go Links

facebook Home Profile Friends Inbox Wilma Martin Settings Logout Search

Wilma Martin Bored, bored, bored at work and it's only 9 am! 2 hours ago clear

Wall Info Photos +

Edit Information Create an Ad


Edit My Profile

Write something about yourself.

Information

Relationship Status:
In an Open Relationship

Birthday:
January 1, 1975

Friends

2 friends See All

Find people you know



Basic Information

Sex: Female Edit

Birthday: January 1, 1975

Hometown: Los Andes, Chile

Relationship Status: In an Open Relationship

Interested In: Women

Political Views: Libertarian Party

Religious Views: Wiccan

Personal Information

Activities: Partying Like Its 1999!

Interests: Surfing, goofing off, biking, Sleeping All Day.

Favorite Music: Rock and roll!

Favorite Movies: Girls Gone Wild!

Contact Information

Email: wcm9210@yahoo.com

Education and Work

College: San Diego State

Employer: Our Company

Position: File Clerk

Georgia Mom?


Moms in the Peach State are eligible for a free \$10k scholarship! Click here to learn more.

Pet Society


12 million people play every month, you should too! Adopt a pet, decorate its house, visit your friends. Great fun, join now!

Looking to lose weight?

Applications

Internet

SOCIAL MEDIA - Avoiding the Discipline Pitfalls

- ❖ Don't "friend" employees
 - ❖ Laker Game example
- ❖ Don't monitor employee Facebook pages, except for a legitimate investigation
- ❖ Don't "hack in" to employee Facebook pages
- ❖ If you receive social media information voluntarily, document how and why
- ❖ Take everything with a grain of salt – people present an image on social media that may not be accurate
 - ❖ Ireland example

**Finally, one last word
about trade secrets ...**



Trade Secrets & Confidential Information

Employers have privacy rights, too:

- Customer lists
- Contract information
- Supplier/vendor information
- Marketing information
- Business development strategy
- Employee personnel information
- Formulas/inventions
- Technical processes
- Financial records

- ✓ It is estimated that 70 percent of the value of an average business is held within its information systems.
- ✓ Statistics drawn from various industry sources show that losses due to trade secret thefts are estimated at more than \$150 billion a year.

Trade Secrets & Confidential Information

It is up to you to protect that information:

- Limit access to protected material - “need to know” basis
- Utilize computer controls - fire walls, passwords with multiple characters, change access codes, record or log who had access
- Limit copying/removal of sensitive information
- Shred confidential discarded documents, erase tapes thoroughly
- Utilize physical controls – restrict areas by locking offices and file cabinets
- Remind employees at termination of obligations

Questions?

