

THE ROLE OF IT IN INTERNAL INVESTIGATIONS



Dr. James F. Pastor, Ph.D., J.D.

LIABILITY LIMITATION

- You should consult the legal advisor for your firm or agency before taking police or security actions based on the materials provided and/or the opinions of law expressed in this unit of instruction.
- What is legally permissible varies on the particular circumstances of the situation. This training session is only designed to acquaint the attendee on broad legal/security concepts and procedures. It is not intended to act as policy or procedure for your institution.

INVESTIGATIONS

Prior to engaging in any investigation, one must be familiar with the applicable legal standards related to investigations:

Probable Cause Requirement

Exceptions to Probable Cause

Legislative Restrictions

(Wiretap Act & Stored Communications Act)

Discovery Issues

Probable Cause Requirement

Probable cause consists of such facts and circumstances as would lead a reasonably prudent person in a similar situation to believe the plaintiff guilty.

Eddie Brown, v. Sears Roebuck and Co., 297 A.D.2d 205, 746 N.Y.S.2d 141 (New York, 2002)

Probable Cause Requirement

Relevancy of Probable Cause to investigations:

- a) Demonstrates legal standard for arrest (plus search & seizures), and
- b) Isolates the company and its investigator from civil liability

EXCEPTIONS TO PROBABLE CAUSE REQUIREMENT

- a) ***Search incident to arrest:*** Allows search of arrestee and the area immediately around him/her after affecting a lawful arrest.
- b) ***Emergency:*** Allows a prompt inspection (or search) based on a compelling urgency, such as a bomb threat.
- c) ***Plain view:*** Allows seizure of contraband when lawfully in the place to observe the contraband.
- d) ***Found property:*** Allows taking property into possession, consistent with the business practices of the entity, for the purpose of minimizing liability, returning the property to its proper owner, or clearing the environment of discarded items.
- e) ***Inventory:*** Allows taking evidence into custody as part of a proper investigation.

KEY EXCEPTION

- f) *Consent*: Allows search another's property, based on either actual or implied consent.
- Consent is typically found in:
 - (1) Company policy/manual
 - (2) Contracts or bargaining unit agreements
 - (3) Computer notices
 - (4) Signage
 - (5) Instrument or consent form
 - (6) Verbal acknowledgement (audio/video/air)

REASONABLE EXPECTATION OF PRIVACY (REP)?

- If employee has no expectation of privacy, then consent is not necessary
- It is deemed IMPLIED or even IRRELEVANT
- “monitoring is largely an assumed practice, & thus, we think a disseminated computer use policy is entirely sufficient way to defeat any [privacy] expectation that an employee might harbor” (*U.S. v. Ziegler*, 9th Circuit, 2006)

Ways to limit or negate REP

1. Computers owned by company
2. Computers not used for personal reasons
3. Company has right to monitor EE usage
4. Company has right to store & review e-mails & other info contained on computer
5. Company has right to disclose contents of computer to 3rd parties (child porn)

LEGISLATIVE RESTRICTIONS

- WIRETAP ACT- prohibits the interception, recording, & disclosure of “any wire, oral, or electronic communication,” unless an exception is shown
- STORED COMMUNICATIONS ACT- prohibits unauthorized access to “the contents of a communication while [it is] in electronic storage,” unless an exception is shown
- KEY EXCEPTIONS- Business Extension & Consent

BUSINESS EXTENSION EXCEPTION

- Generally cannot monitor or record telephone communications
- Can monitor statistical aspects of telephone data, such as origin & destination of calls, call duration, & number of outgoing calls
- To monitor **content** of calls, the ER must have:
 - (1) Reasonable business purpose (enforcing no private calls policy)
 - (2) Methods & scope of interception must be reasonable (record entire conversation?)

CONSENT EXCEPTION

- Company policy stating call monitoring (for particular business purpose)
- Applicable notices or warnings to EE
- Periodic tones indicating monitoring or recording
- Bottom Line: EE has no REP (deemed to have consented to monitoring or recording)

Bottom Line Recommendation

- Investigative reports should articulate how probable cause or specific exception(s) was determined
- a) Be specific; develop the facts in a sequential manner
- b) Allow an objective, detached person (such as a judge) to understand how the investigative leads build together to constitute probable cause
- c) If an exception is to be used, name the exception (and cite company policy, if applicable) and establish how it is relevant

DISCOVERY PRINCIPLES

- Assume information from investigation is “discoverable”
- Attorney should directly engage investigator
- Accomplished by “Confidential Memorandum” from attorney (w/letterhead)
- Citation should include “Attorney Work Product” or “Attorney-Client Privilege” assertion

DISCOVERY PRINCIPLES

- Remember Discovery rules only relate to “possession or control.”
- If you do not have “possession or control” then you do not have to produce requested item.
- If you take notes then later transcribe report, it may be OK to discard notes or other information once the report is completed.
- Unless subject to court order, you typically can conduct your investigation along customary business practices and personal stylistic techniques (organized, get rid of extraneous information or material).

QUESTIONS



Dr. James F. Pastor, Ph.D., J.D.

312-423-6700

www.securelaw.info