



EAVESDROPPING ON PRIVATE EMPLOYEE TELEPHONE CONVERSATIONS GETS EMPLOYER IN TROUBLE



Mary Dee Allen
"The detor had complained about being abused by the plaintiff over the phone, and the employer ultimately terminated the plaintiff for these actions."

In a recent federal court ruling, a terminated bill collector sued her employer for age and sex discrimination, but also contended that federal and state wiretap laws were violated as well as her common-law right to privacy. Dukes v. ADS Alliance Data Systems, Inc., 25 IER Cases 733 (S.D. Ohio 2006). The debtor had complained about being abused by the plaintiff over the phone, and the employer ultimately terminated

the plaintiff for these actions. During the investigation, the employer refused to allow the plaintiff to listen to the tape recordings of the conversations, as the employer monitored such calls. In the course of the litigation, however, the plaintiff gained access to the tape recordings, and found that several private telephone conversations with her husband were also monitored, and contended that such monitoring violated the federal Electronic Communications Privacy Act, 18 U.S.C. Sections 2510-2522, and also the common-law right of privacy in Ohio.

The defendant employer did not deny that it intentionally intercepted the plaintiff's private conversations, but contended that the laws were not violated because of the "consent exception." That is, the employer contended the interception of the plaintiff's private conversations with her husband were not actionable as she gave prior consent to the interception. In this regard, the employer cited provisions in its employee handbook, as well as "acknowledgment" forms used by the employer which expressly provided

in various places that the employer will "periodically monitor and tape phone calls with our customers to improve our associates' telephone skills and job performance."

The court rejected the defense, ruling for the plaintiff on both the federal statutory claim and the state common-law claim for privacy. The court ruled the private conversations at issue were not calls with customers, and that management knew that the plaintiff was on the line with her husband, inasmuch as they on at least one occasion broke into the conversation and scolded the plaintiff for work-related matters she was discussing with her husband. Thus, the court found that the plaintiff's consent was limited to the periodic recording and monitoring of her calls with customers, but the consent did not apply to private conversations with her husband. The defendant employer argued that even if the plaintiff did not give her express consent to the interceptions of her private calls with her husband, that she had given her implied consent. While the court found the "consent exception" can apply to include consent that is either expressed or implied, on the facts the court found that circumstances did not indicate that the party had knowingly agreed to the surveillance in an expressed or implied manner. That is, there is no evidence indicating that the plaintiff knew that the at-issue phone lines were monitored "at all times" (as opposed to just "periodically" and "between associates and customers").

Editor's Note - The federal wiretap laws as well as state privacy laws are very complicated as to when and how an employer can lawfully monitor private conversations of its employees. Further, even though an employer has a lawful reason for a discharge, the plaintiff may state a valid cause of action against the employer on the grounds of these wiretap laws. Advice of counsel is necessary to set up monitoring policies and practice.

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COCA-COLA CASE REMINDS EMPLOYERS OF CONFIDENTIALITY POLICIES AND PROCEDURES



A high-profile criminal case against a Coca-Cola employee in Atlanta should remind all employers of the necessity of confidentiality policies and procedures. Ironically, the employer, Coca-Cola, has a mythology of success on the idea of a "secret formula" for its drink, but that particular formula was not involved in the present case. On February

Fredrick J. Baker
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9, a jury in federal court in Atlanta convicted the administrative assistant for Coke's Global Brand Director at its Atlanta headquarters of trying to sell confidential Coke documents and sample test products for \$1.5 million to an undercover FBI agent posing as a Pepsi Cola go-between. The defendant was

prosecuted under the federal Corporate Espionage Act. The plot was exposed last year after Pepsi executives received the solicitation and turned it over to Coke executives, who called the FBI.

Editor's Note - This high-profile Coca-Cola decision should be a "wake-up" call to employers concerning confidentiality policies and procedures. The defendant in the Coke case claimed that she took secret materials in her pocketbook home to complete her daily work assignments rather than to steal them, and had it not been for the fortuity of Pepsi reporting the matter to Coke, corporate espionage may have been successful. Some employers may not realize that their success in preventing such acts of espionage and disloyalty may turn on whether they have adequate confidentiality policies and procedures. In other words, outside of the trade secret laws, which are narrowly defined, the employer may be limited in its causes of action against a current or former employee who takes confidential materials. Most employers recognize this need by having published confidentiality policies. However, it is not enough to have a policy itself, unless the employer actually acts to keep its sensitive materials confidential. Sensitive documents, for example, should be marked confidential, and kept under lock and key with limited access.

An example of the necessity of appropriate policies and procedures occurs when a departing employee attempts to take confidential materials and use it in connection with other employment, such as sensitive customer and pricing lists and the like. The success of the employer preventing such actions as both a practical and a legal matter may depend upon whether the employer has an appropriate confidentiality policy, and has actually acted to keep the materials as confidential as practical.

LEGAL ASPECTS OF HEALTH AND WELLNESS PROGRAMS



HOWARD B. JACKSON

"A wellness program is 'voluntary' as long as an employer neither requires participation nor penalizes employees who do not participate."

In addition to designing a program that is practically effective, there are legal issues to address.

The Americans with Disabilities Act allows employers to conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health and wellness program without having to show that they are job-related

and consistent with business necessity, as long as any medical records acquired as part of the wellness program are kept confidential and separate from personnel records. These programs often include blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening. Employees may be asked disability-related questions and may be given medical examinations pursuant to such voluntary wellness programs. A **wellness program is "voluntary"** as long as an employer neither requires participation nor penalizes employees who do not participate.

The Health Insurance Portability and Accountability Act (HIPAA) prohibits discrimination in premiums charged or benefits provided based on a health factor. Health factors include health status, medical condition (physical or mental), health claims, receipt of health care, medical history, genetic information, disability or evidence of insurability. According to recently issued final regulations, the nondiscrimination provisions of the Health Insurance Portability and Accountability Act (HIPAA) do not prevent a plan or issuer from establishing discounts or rebates or modifying otherwise applicable co-payments or deductibles in return for adherence to programs of health promotion and disease prevention. Thus, there is an exception to the general rule prohibiting discrimination based on a health factor if the reward, such as a premium discount or waiver of a cost-sharing requirement, is based on participation in a program of health promotion or disease prevention.

The new regulations define and illustrate programs that comply with the HIPAA nondiscrimination requirements without having to satisfy any additional standards (assuming participation in the program is made available to all similarly situated individuals). Such programs are those under which none of the conditions for obtaining a reward is based on an individual satisfying a standard related to a health factor or under which no reward is offered. The final regulations include the following list to illustrate the wide range of programs that would not have to satisfy any additional standards to comply with the nondiscrimination requirements:

- A program that reimburses all or part of the cost for memberships in a fitness center.
- A diagnostic testing program that provides a reward for participation and does not base any part of the reward on outcomes.
- A program that encourages preventive care through the waiver of the copayment or deductible requirement under a group health plan for the costs of, for example, prenatal care or well-baby visits.
- A program that reimburses employees for the costs of smoking cessation programs without regard to whether the employee quits smoking.
- A program that provides a reward to employees for attending a monthly health education seminar.

Only programs under which any of the conditions for obtaining a reward is based on an individual satisfying a standard related to a health factor must meet five additional requirements in order to comply with the nondiscrimination requirements.

Limit on the reward. The total reward that may be given to an individual under the plan for all wellness programs is limited to 20%. A reward can be in the form of a discount or rebate of a premium or contribution, a waiver of all or part of a cost-sharing mechanism (such as deductibles, copayments, or coinsurance), the absence of a surcharge, or the value of a benefit that would otherwise not be provided under the plan. The final regulations provide that if, in addition to employees, any class of dependents (such as spouses or spouses and dependent children) may participate in the wellness program, the limit on the reward is based on the cost of the coverage category in which the employee and any dependents are enrolled.

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LEGAL ASPECTS OF HEALTH AND WELLNESS PROGRAMS continued from page 3

Reasonably-designed. According to the final regulations, the program must be reasonably designed to promote good health or prevent disease. The “reasonably designed” requirement is intended to be an easy standard to satisfy. To make this clear, the final regulations have added language providing that if a program has a reasonable chance of improving the health of participants and it is not overly burdensome, is not a subterfuge for discriminating based on a health factor, and is not highly suspect in the method chosen to promote health or prevent disease, it satisfies this standard. There does not need to be a scientific record that the method promotes wellness to satisfy this standard. The standard is intended to allow experimentation in diverse ways of promoting wellness. For example, a plan or issuer could satisfy this standard by providing rewards to individuals who participated in a course of aromatherapy. The requirement of reasonableness in this standard prohibits bizarre, extreme, or illegal requirements in a wellness program.

At-least-once-per-year. The regulations also provide that a program does not meet this standard unless it gives individuals eligible for the program the opportunity to qualify for the reward at least once per year.

Reasonable alternative standard. Under the final regulations, a wellness program that provides a reward requiring satisfaction of a standard related to a health factor must provide a reasonable alternative standard for obtaining the reward for certain individuals. This alternative standard must be available for individuals for whom, for that period, it is unreasonably difficult due to a medical condition to satisfy the otherwise applicable standard, or for whom, for that period, it is medically inadvisable to attempt to satisfy the otherwise applicable standard. A program does not need to establish the specific reasonable alternative standard

before the program commences. It is sufficient to determine a reasonable alternative standard once a participant informs the plan that it is unreasonably difficult for the participant due to a medical condition to satisfy the general standard (or that it is medically inadvisable for the participant to attempt to achieve the general standard) under the program. Concern has been expressed that individuals might claim that it would be unreasonably difficult or medically inadvisable to meet the wellness program standard, when in fact the individual could meet the standard. The final rules clarify that plans may seek verification, such as a statement from a physician, that a health factor makes it unreasonably difficult or medically inadvisable for an individual to meet a standard.

Disclosure requirements. The fifth requirement for a wellness program that provides a reward requiring satisfaction of a standard related to a health factor is that all plan materials describing the terms of the program must disclose the availability of a reasonable alternative standard. The final regulations include model language that can be used to satisfy this requirement; examples also illustrate substantially similar language that would satisfy the requirement.

In addition to ADA and HIPAA issues, ERISA may apply to those programs that provide a medical benefit and COBRA may apply to those programs that provide medical care.

In summary, a wellness program should be voluntary (no penalty for not participating), medical information gathered through the wellness program should be kept confidential, and the rewards for participating in the wellness program should not be based on any health factor unless certain requirements in the final regulations are satisfied.



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