The Rights of Employees

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When the United States became a nation more than 200 years ago, the Founders formulated a Constitution that structured the new society as a majoritarian democracy. They later added a Bill of Rights to protect individuals from the tyranny of the majority. But in the 18th century, when the Constitution and Bill of Rights were ratified, the government was viewed as the only major threat to individual rights.

The Founders could not have imagined back then that, one day, concentrations of corporate power would exist on a scale rivaling, and in some cases exceeding, governmental power.

Today, most Americans are more vulnerable to having their rights violated by their employers than the early Americans were to having their rights violated by the government. Yet because the Constitution does not limit their authority, private employers are free to violate the civil liberties of their employees. Nationwide, the American Civil Liberties Union receives more complaints about abuses by employers than about abuses by the government:

* In California, a job applicant was denied a job because he refused to answer questions about his sex life on a "psychological test." At least million job applicants are required to take such tests every year.

* In Pennsylvania, an employee was fired because he pointed out serious safety defects in his employer's products At least 200,000 Americans are unjustly fired every year.

* In Indiana, an employee was fired because she smoked cigarettes in her own home. At least 6,000 American companies now attempt to regulate off-duty smoking and other private behavior.

The ACLU believes that such abuses can only be prevented by extending, into the private workplace, the protections guaranteed in the Bill of Rights. Certainly, we recognize that employers have every right to expect workers to do their jobs. But employees are also entitled to the same freedoms on the job that they enjoy off the job.

Here are the ACLU's answers to some questions frequently asked by the public about the rights of American employees.

If the Constitution doesn't apply to the private workplace, what does?

The vast majority of American employees, of whom there are 100 million in all, are governed by a doctrine called "employment at will." This doctrine, a relic of 19th century anti-labor laws, gives employers the unfettered right to fire workers at any time, for any reason, whether grave or frivolous. Indeed, one can be fired for no reason at all. An estimated 200,000 employees at least, are unjustly fired in the United States each year.

It is the prevalence of the employment-at-will doctrine that empowers employers to impose unwarranted urine tests and intrusive "personality" and "integrity" tests on their employees. The power to fire at will permits employers to suppress their employees right to free speech.

Are there *any* laws that protect employees' rights?

There are federal and state laws that prohibit discrimination against individuals on the bases of race, religion, sex, national origin, age and disability. However, these laws require only that employees be treated equally. Employers are, therefore, free to do whatever they wish to their employees as long as they do so in a non-discriminatory manner.

A few other federal and state laws provide some protection against specific abuses, such as urine testing, polygraph testing and retaliation against whistle blowers. But these laws are extremely limited. The fundamental human rights of free expression, privacy and due process are still largely unprotected in the American workplace.

Does the employment-at-will doctrine apply to all employees?

No. There are three broad categories of employees who are not governed by employment at-will:

Government employees: Federal, state and local government workers are protected by the Fifth and Fourteenth Amendments, which prohibit the government from depriving any person of "life, liberty or property" without due process of law. These employees are considered to have a property interest in their jobs, and the right to due process places significant restrictions on arbitrary dismissals unrelated to job performance. Some additional protection is provided by federal, state and local civil service laws.

Union members: Virtually all collective bargaining agreements between labor unions and employers stipulate that unionized employees can be fired only for just cause, and only after a hearing before a neutral arbitrator. However, less than 20 percent of American workers belong to unions today, since union membership has been declining for years.

Contract employees: Senior executives, performers, athletes and some other well-situated employees, whose numbers are so small as to be insignificant, work under individual employment contracts that provide protection against unjust dismissal.

What can be done about the problem of unjust dismissals?

The ACLU believes that the outmoded and unfair employment-at-will doctrine should be abolished. Over the years, the many attempts made to challenge employment at-will in the courts have produced a few narrow exceptions to the rule, but these exceptions have helped very few of the people unjustly fired from their jobs. The ACLU and other organizations advocating employee rights are actively promoting in state legislatures, model statutes that encompass the following basic principles:

* Employees can be fired only for just cause.

* "Just cause" means that: the employee's offense adversely affected his or her job performance; the rule or standard violated by the employee was known to the employee; and the infraction was serious enough to warrant termination.

* Every employee faced with termination is entitled to a hearing that includes the right to confront witnesses, the right to present evidence, the right to have adequate representation (either an attorney or other type of counsel), and the right to an impartial decision maker.

Can employers legally search their employees' lockers, desks and urine looking for contraband?

The Fourth Amendment, which protects the privacy of citizens from "unreasonable searches and seizures," gives some protection to public sector employees against their employers' prying eyes. In general, a government employer cannot search the person or belongings of an employee in the absence of any suspicion that the particular employee has done something illegal. With respect to urine testing for drugs, however, the U.S. Supreme Court has ruled that government employees can be required to take such tests, even if the employer does not suspect drug use, if the person's job is "safety sensitive," or involves carrying weapons or having access to classified information.

Private sector employees, on the other hand, have virtually no protection against even the most intrusive practices. In all but a handful of states, an employee can be required to submit to a urine test even where nothing about the employee's job performance or history suggests illegal drug use. If the employee refuses, he or she can be terminated without legal recourse. Employees can be subjected to "sniff" searches by dogs and searches of their lockers desks, purses, and even their cars if they park in the company parking lot. Both job applicants and employees can be required to answer extremely intrusive questions about their private lives and personal beliefs on "psychological," "personality" and "integrity" tests.

The advent of computer technology has made possible even more sophisticated forms of spying in the workplace. More and more employees are being subjected to electronic surveillance through video display terminals, observation by hidden cameras installed in work areas and locker rooms, and monitored telephone calls. With few exceptions, these increasingly widespread practices are legal.

What can be done to protect the privacy rights of employees?

The ACLU believes that both state and federal legislation should b enacted to extend privacy rights to private sector employees

In recent years, some positive strides have been made. In 1988, Congress passed the Employee Polygraph Protection Act, which ended decades of "lie detector" abuse in the private workplace. The Act outlaws most random and pre-employment polygraph testing, which in past years had led to an estimated 300,000 workers per year being branded liars.

Several states--Connecticut, Iowa, Maine, Minnesota, Montana, Rhode Island and Vermont--have enacted legislation that protects employees from indiscriminate urine testing. Two states -- Massachusetts and Rhode Island--restrict paper and pencil "honesty" tests. Connecticut is the only state that has a law prohibiting "electronic surveillance, including video surveillance, of any area designed for the health and comfort of employees or for safeguarding of their possessions."

The ACLU has developed model statutes to protect employees from unfair urine testing and electronic surveillance and is actively lobbying for their passage in state legislatures throughout the country. The ACLU is also urging Congress to amend the Employee Polygraph Protection Act to over so-called paper and pencil "integrity" tests.

Can employers discriminate on the basis of employees' lifestyles?

One of the emerging issues in the American workplace is the attempt by employers to control certain private habits and proclivities of their employees that have no relationship to job performance. Fat people are victims of lifestyle discrimination and a growing number of companies are refusing to hire smokers--even those who smoke only in their homes. A few employers exclude people with high cholesterol levels, or high blood pressure, and those who engage in such risky hobbies as scuba diving and hang gliding. Others impose lifestyle restrictions: One Oregon company bars workers who fail to participate in the company's exercise program from attending company picnics; a Pennsylvania company prohibits its managers from riding motorcycles!

The driving force behind this trend is economics. Employers concerned about the escalating costs of employee health insurance are attempting to cut costs by firing and/or refusing to hire people whose lifestyles appear to place them at risk of illness or injury. But if reducing health care costs is accepted as a legitimate reason for employers to regulate the off-the job conduct of their employees, then virtually every aspect of our private lives could be subject to employer control. This would be Big Brotherism at its worst.

What can be done to prevent lifestyle discrimination?

The ACLU believes that, just as legislation has been needed to prevent other violations of civil liberties in the workplace, legislation is also necessary to prevent lifestyle discrimination. Just as federal, state and local laws exist to prohibit employment discrimination based on race, gender, ethnicity, religion and, in some places, sexual orientation, new laws are needed to protect against discriminatory practices based on employees private lifestyle preferences and habits.

At this writing, 15 states have enacted laws that restrain employers from prohibiting legal activities as a condition of employment. For example, Colorado law makes it "a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours...." Other states are considering bills that prohibit employment discrimination based on off-duty smoking. The ACLU supports these efforts.

Should employers ever have the right to discipline their employees?

Absolutely. Employers have the right to expect an honest day's work for a day's pay. They have the right to expect that their workers will not be drunk, drugged, or too fatigued to perform their jobs. They have the right

o set performance standards, and to expect those standards to be met. They also have the right to discipline and dismiss employees for just cause. Even if all the protective laws described in this briefing paper were passed in every state, employers would still retain the right to discipline and dismiss any employee whose job performance was lacking.

But wouldn't recognition of liberties in the workplace damage the American economy?

There is no conflict between free enterprise and civil liberties in the workplace. Free enterprise should not be taken to mean that every corporation is a sovereign republic unto itself, whose only law is the whim of the current CEO. Employers must be free to decide what products to make (or stop making), what factories to operate and where to locate those factories, what prices to charge, and how many workers to hire. But they can make such decisions without trampling on their employees' rights to free speech, privacy and due process.

The fact is that employers in most other Western industrialized nations, as well as in Japan, are required by law to respect the rights of their employees. Nonetheless, those employers' businesses survive and prosper. Moreover, several American employers including some of the nation's most successful corporations, already guarantee their employees' civil liberties without affecting the bottom line of profits. Those employers believe that respecting employees rights boosts morale and, thus, raises corporate performance.

It is ironic that the United States, with its long professed respect for individual rights, has not yet extended Bill of Rights protections to the largest remaining group of forgotten citizens -- American workers. It is time to right that wrong.

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