

National Transportation Conference 2023

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Common Legal Issues

Common legal issues arising from technological changes can include:

- <u>Unilaterally imposed employer policies for employee</u> <u>surveillance & resulting discipline privacy</u>
- Layoffs
- Impact of collective agreement language concerning technological change or employee surveillance



Sources of Privacy Protections

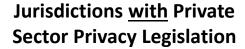
Privacy Legislation

Limits on management reserved rights

Other negotiated collective agreement language



Legislative Context



- Federal (Personal Information Protection and Electronic Documents Act)
- Québec
- British Columbia
- Alberta
- Manitoba

Jurisdictions <u>without</u> Private Sector Privacy Legislation

- New Brunswick
- Newfoundland and Labrador
- Nova Scotia
- Ontario
- Prince Edward Island
- Saskatchewan



Overview

- Courts and arbitrators generally recognise that employees have a reasonable expectation of privacy in the workplace, albeit not absolute
- Balancing employee privacy & employer management rights:
 - Dangerous workplace safety sensitive roles?
 - Reasonable objective?
 - Reasonable measure?
 - Less intrusive alternatives?
- Arbitrability
 - Unilateral employer policies are always grievable
 - KVP test applies in discipline cases

PIPEDA – Legal Test

PIPEDA: Section 5(3):

An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

Reasonableness test – *PIPEDA* and equivalent provincial legislation

- (1)The degree of sensitivity of the personal information at issue?
- Is the measure demonstrably necessary to meet a specific need?
- (3) Is it likely be effective in meeting that need?
- Is the loss of privacy proportionate to the benefit gained? (4)
- Is there a less privacy-intrusive way of achieving the same result? (5)

OPCC PIPEDA Case Summary #2004-281; Canadian Pacific Railway Company v. TCRC (Picher) (2010)

PIPEDA – Legal Test – Steps 1 & 2

- Step 1 The degree of sensitivity of the personal information at issue?
 - What is being collected, used or disclosed? Sensitivity and amount.
 - Does the measure involve a loss of liberty or personal autonomy?
 Collection of biometric data? Collection of bodily samples?
- Step 2 Is the measure demonstrably necessary to meet a specific need?
 - Identify the purpose of the surveillance.
 - Is there a real, specific problem in the workplace or only a hypothetical or potential problem?
 - E.g., in the transportation sector, safety is always going to be a legitimate employer objective.

PIPEDA – Legal Test – Steps 3 & 4

Step 3 - Is it likely be effective in meeting that need?

- Is the proposed policy likely to resolve the specific problem identified in Step 1?
- E.g., does it *actually* address the safety-related issue?

Step 4 - Is the loss of privacy proportionate to the benefit gained?

- This requires a "balancing of interests"
- E.g., constant video surveillance may not be proportionate to a goal of increased efficiency/productivity, but may be proportionate to addressing a real safety requirement when balanced against a risk of serious accident.

PIPEDA – Legal Test – Step 5

Step 5 – Is there a less privacy-intrusive way of achieving the same goal?

- Has the employer considered alternatives?
- Would these alternatives accomplish the same purpose?
- Are there methods of limiting the intrusiveness of the proposed measure in its use?

KVP – Discipline Principles

- The employer's rule cannot be inconsistent with the collective agreement.
- The rule cannot be unreasonable reasonableness test under PIPEDA.
- The rule must be clear and unequivocal.
- The rule must be brought to the attention of employees before the company can act on it.
- The employee must be notified of the consequences of failure to abide by the rule.
- A rule must be consistently enforced by the company from the time it is introduced.

Lumber & Sawmill Workers' Union, Local 2537 v KVP Co (1965) (Ont Arb)

Some Transport Sector Examples

- "DriveCam", "SmartDrive" programs in-cabin & forwardfacing cameras & microphone; continuous recording with information being retained upon a triggering event (e.g., accident)
- Continuous audio and/or video recording including offduty
- GPS tracking; onboard device monitoring
- Drug & alcohol testing policies
- Access to driving records

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Recommendations

- We generally do <u>not</u> want to endorse and accept the reasonableness of employer policies. Push back.
- If a new policy is proposed or introduced, gather information. Consider the following factors:
 - Has the employer stated a need or purpose?
 - Has the employer demonstrated that need?
 - Does the policy and/or technology really serve that need?
 - Can the employer address its need in some other way?
 - Did the employer consider less intrusive alternatives?
- Bargain employee surveillance protections.
 - Unless there are explicit collective agreement protections, surveillance recordings can generally be used to support discipline. Consider bargaining collective agreement limits on the use of surveillance to justify discipline.