

*South Shore Chamber of Commerce*

## **Employers, Employees and Privacy: Changing Boundaries and Evolving Trends**

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*Presented by*

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## **Overview**

- I. Employee Screening, Background Checks and References (Slides 3-41; TAB A)
- II. Monitoring Employee Conduct in the Workplace (Slides 42-51; TAB B)
- III. An Employer's Obligation to Safeguard Confidential Information of Employees and Others (Slides 52-66; TAB C)
- IV. Evolving Trends: To What Extent May an Employer Investigate and/or Rely Upon Conduct Outside the Workplace? (Slides 67-84; TAB D)
- V. Closing Thoughts / Questions & Answers

## I. Employee Screening, Background Checks and References

## Applications & Interviews

- Permissible Inquiries Under 151B/TitleVII/ADA/ADEA
  - MCAD Reference Chart Regarding Permissible Inquiries, 804 CMR 3.02
- Inquiries by Affirmative Action Employers / Voluntary Disclosures by Employees

## Applications & Interviews (cont.)

- Criminal Convictions: Under M.G.L. c. 151B, s. 4(9), employer may not inquire about:
  - arrest, detention, or disposition for any violation of law in which no conviction resulted;
  - first conviction for any of the following: drunkenness, simple assault, speeding, minor traffic violation, affray, or disturbance of the peace;
  - misdemeanor conviction where date of conviction or completion of period of incarceration resulting therefrom (whichever is later) occurred five (5) or more years prior to date of application, unless applicant has been convicted of any offense in the five (5) years immediately preceding date of application.

## Applications & Interviews (cont.)

- Criminal Convictions (cont.): Employment application must contain disclaimer pursuant to M.G.L. c. 276, s. 100A:

“An applicant for employment with a sealed record on file with the commissioner of probation may answer ‘no record’ with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a sealed record on file with the commissioner of probation may answer ‘no record’ to an inquiry herein relative to prior arrests or criminal court appearances. In addition, any applicant for employment may answer ‘no record’ with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution.”

## Applications & Interviews (cont.)

- Employer may not use polygraph (lie detector) test as a condition of employment (M.G.L. c. 149, s. 19B).
- Application must include the following statement:

“It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability.”

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## Applications & Interviews (cont.)

- “Risky Business”
  - Gender (unless BFOQ)
  - Marital Status (including widowed, divorced, etc.)
  - Maiden Name
  - Spouse’s Name
  - Names, Ages of Children
  - Childcare Arrangements
  - Date of Birth
  - Dates of Education
  - Height, Weight (unless BFOQ)
  - Color of Eyes/Hair
  - Citizenship
  - Availability for Weekend Work (unless required by job)

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## Drug / Alcohol Testing

- Massachusetts Right to Privacy Act  
(M.G.L. c. 214, s. 1B)

“A person shall have a right against unreasonable, substantial or serious interference with his privacy.”

- Employer’s legitimate business interests balanced against employee’s reasonable expectation of privacy.
- Reasonable suspicion vs. random testing vs. pre-employment testing.
- Employers can be liable where claimed invasion of privacy is both unreasonable and either substantial or serious.

## Drug / Alcohol Testing (cont.)

- Folmsbee v. Tech Tool Grinding & Supply, Inc., 417 Mass. 388 (1994)

- Random drug testing program (urinalysis and visual inspection) upheld given employer’s legitimate business need and dangerous working environment. Court noted several procedural safeguards including advanced notice, universal testing of all employees, and offer of rehabilitation for first time offender.

## Drug / Alcohol Testing (cont.)

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- Webster v. Motorola, Inc., 418 Mass. 425 (1994)
  - Random drug testing program cannot be unreasonably intrusive and there must be a significant nexus between employee job duties and the harm feared.
  - Nature of employer's business and employee's job duties are relevant factors for court to consider.
  - Random testing of employee who drives company car upheld; random testing of "technical writer" not upheld.
- Rodrigues v. EG Systems, Inc., 639 F. Supp. 2d 131 (D. Mass. 2009) – Testing for use of nicotine

## Drug / Alcohol Testing (cont.)

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- Substance abuse issues in specific workplaces:
  - Transportation (DOT Regulations)
  - Certain Federal Contractors (Drug Free Workplace Act of 1988 – does not authorize drug testing)

## Medical Inquiries, Physical Exams, and Other Tests

- Definitions:
  - Medical inquiries and physical examinations, including psychological tests – Assess physical or mental health.
  - Physical agility tests and strength tests – Measure one’s general strength/stamina, and/or ability to perform specific physical tasks.
  - Cognitive tests – Assess reasoning, memory, perception, and knowledge of particular functions.
  - Personality and integrity tests – Assess the degree to which a person has certain traits or dispositions and/or tries to predict conduct or behavior.
  - Sample job tasks – Assess performance and aptitude on job-related tasks primarily through simulations.

## Medical Inquiries, Physical Exams, and Other Tests (cont.)

- Uniform Guidelines on Employee Selection Procedures (EEOC)
  - Is the selection criterion job-related and consistent with business necessity?
  - Is there a less discriminatory alternative available?

## Medical Inquiries, Physical Exams, and Other Tests (cont.)

- ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (EEOC)
- EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the ADA
  - Disability-related inquiry or medical examination only after conditional job offer.
  - Must apply to all individuals in same job category (following conditional offer of employment).
  - Current employees: inquiry or medical exam must be job-related and consistent with business necessity. Must be based on reasonable belief and objective evidence.
  - Duty to provide a reasonable accommodation applies to application and testing process.

## Medical Inquiries, Physical Exams, and Other Tests (cont.)

- M.G.L. c. 149, s. 19A: “Any employer requiring a physical examination of an employee shall, upon request, cause said person to be furnished with a copy of the medical report following the said examination.”
- M.G.L. c. 151B, s. 4(9A): Generally illegal to inquire on application about voluntary/involuntary admission for mental health treatment, and/or to reject applicant who refuses to provide such information.

## Medical Inquiries, Physical Exams, and Other Tests (cont.)

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### Resources:

- Uniform Guidelines on Employee Selection Procedures (EEOC)
- ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (EEOC)
- EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the ADA

*Links to all of the above materials can be found at:*  
[www.mhtl.com/employmentlawupdate2010](http://www.mhtl.com/employmentlawupdate2010)

## Credit Checks: Fair Credit Reporting Act (FCRA)

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- Three Categories of Reports:
  - Consumer Report
  - Investigative Consumer Report
  - Third Party Investigation of Employee Misconduct Under “Safe Harbor”

## FCRA: Consumer Reports

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“any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for: ... (b) employment purposes ...”

## FCRA: Investigative Consumer Report

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“a consumer report or portion thereof in which information on a consumer’s character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends or associates of the consumer ... or with others with whom he is acquainted or who may have knowledge concerning any such items of information ... such information **shall not include** specific factual information on a consumer’s credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.”

## FCRA: Consumer Reporting Agency (CRA)

“any person which, for [remuneration] ... regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.”

## FCRA: Excluded Communications

- FCRA excludes several specific types of communications that are **very narrowly** construed and defined (seek legal guidance). FCRA may not apply where:
  - report covers only transactions between employee/applicant and person making the report (dissemination limited to person making the report or other persons related by common ownership or affiliated by corporate control);
  - report is communication of any kind between persons related by common ownership or affiliated by corporate control where employee/applicant is given opportunity to opt out before information is initially communicated; or

## FCRA: Excluded Communications (cont.)

- report is made to prospective employer for purpose of procuring employee or employment opportunity, (and is used for no other purpose), by person regularly involved in such procurement, where:
  - employee/applicant gives prior consent to nature and scope of report before any information is collected;
  - employee/applicant gives prior consent before information is provided to employer;
  - employee is provided written confirmation of such consent within 3 business days;
  - person providing report does not make inquiries that would violate equal opportunity laws;
  - person providing the report notifies employee/applicant in writing of his/her right to know nature and substance of information in file; and
  - person providing the report discloses such information to employee/applicant within 5 business days of receiving such a request.
- Investigation of employee misconduct under safe harbor provisions

## FCRA: Obtaining Consumer Reports

- Prior to obtaining report on employee/applicant, employer must:
  - Provide a clear and conspicuous written disclosure to the employee/applicant, in a document that consists **ONLY** of that disclosure, that a consumer report may be obtained for employment purposes;
  - Obtain written authorization from employee/applicant permitting the procurement of a consumer report; and
  - Obtain employee/applicant's separate written consent if employer seeks to obtain medical information through consumer report.

## FCRA: Additional Requirements for Obtaining Investigative Consumer Reports

- Within 3 days of requesting report, employer must advise employee/applicant: (a) that an investigative consumer report, including information as to his/her character, general reputation, personal characteristics and/or mode of living may be made; (b) that he/she has the right, for a reasonable time after receipt of disclosure, to a “complete and accurate disclosure of the nature and scope of the investigation;” and (c) that he/she has the right to a written summary of rights under FCRA.
- Employer must certify compliance with disclosure obligations to CRA before CRA will undertake investigation.
- If employee/applicant requests disclosure of nature/scope and/or rights under FCRA, employer must make such disclosures, in writing, and must mail/deliver within 5 days of date of employee/applicant request or date that investigative report was first sought, whichever is later.

## FCRA: Adverse Action

### Adverse Action Based on Consumer Reports:

- applies to any information in consumer report, even if that information is not “negative”
- applies even where adverse action is only partially based upon information in consumer report

### Employer Requirements Before Taking Adverse Action:

- provide the employee/applicant with a copy of the report; and
- provide written notification of the employee/applicant’s rights as prescribed by the Federal Trade Commission

## FCRA: Adverse Action (cont.)

### Employer Notification to Employee/Applicant of Adverse Action

- advise the employee/applicant of the decision;
  - provide the employee/applicant with the name, address and telephone number of the CRA;
  - advise the employee/applicant that the CRA did not make the adverse decision and is unable to explain that decision; and
  - provide the employee/applicant with notice of his/her right to: (i) obtain a free copy of his/her consumer report from the CRA (within 60 days); and (ii) dispute the accuracy or completeness of any information in that report with the CRA.
- Note: Different requirements apply where employer takes adverse action based on information obtained from another entity affiliated by common ownership or corporate control, and to third party reports of employee misconduct under safe harbor provisions.

## FCRA: Third Party Investigations of Employee Misconduct

- Fair and Accurate Credit Transactions Act of 2003 (FACTA) provides a “safe harbor” for investigations of employee misconduct by third parties. Where report qualifies:
  - Do not need prior consent of employee
  - Do not need to disclose full report prior to adverse employment action
  - After taking adverse action, employer must disclose a summary of the nature and substance of the investigation. (Need not disclose witness identities)

## FCRA: Third Party Investigations of Employee Misconduct (cont.)

- To qualify for safe harbor:
  - Report is made in connection with investigation of suspected misconduct relating to employment, or compliance with applicable law, regulation, rules of self-regulatory organization, or preexisting written policy of employer.
  - Investigation cannot consider employee's credit status.
  - Disclosure of report limited to: employer; agent of employer; applicable government agencies and officers; applicable regulatory organization; or as otherwise required by law.

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## FCRA: Disposal of Consumer Report Information and Records

- Employer must “properly dispose” of consumer report information and records and take “reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.” 16 CFR 682.3
  - Examples of “reasonable measures”:
    - Shredding
    - Contract with certified disposal company

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## Credit Checks: Massachusetts Consumer Credit Reporting Act (M.G.L. c. 93, ss. 50-68)

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- Definitions and Requirements Essentially Parallel FCRA

## CORI: Availability

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- Criminal Offender Record Information (CORI) is available to Massachusetts employers approved to receive such information under a grant of authority from the Criminal History Systems Board (CHSB) under M.G.L. c.172, ss. (b) or (c).
- CORI certified employer may still make inquiries regarding criminal record during application process subject to requirements of M.G.L. c. 151B, s. 4(9) & c. 276, s. 100A.

## CORI: EOHHS-Funded Employers

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- Effective July 1, 2009 for covered employers funded by Executive Office of Health and Human Services (EOHHS): “no initial employment application form may ask whether an applicant has a criminal record.” Employer must follow requirements of 101 CMR 15.01 et. seq. to obtain CORI and determine whether to hire employee.
- Reference to “Table of Offenses”

## CORI: Using CORI

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- CORI may only be obtained as final step in hiring process following a conditional offer of employment.
- Employer may not automatically disqualify applicant based upon results of CORI or (in most cases) based upon conviction for a certain offense. Case by case determination should be made.

## CORI: Process for Making Adverse Employment Decision Under 803 CMR 6.11

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- Employer must provide applicant with copy of CORI and copy of CHSB information on correcting a criminal record before making adverse employment determination.
- Employer must inform applicant of potentially adverse determination, identify which part of CORI record supports such determination, and provide applicant with opportunity to dispute accuracy and relevance of such information.
- If additional information is received from CHSB, employer must review this information with applicant.
- Employer must document process.

## CORI: New Developments

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- Additional training requirements (803 CMR 3.01)
- Verification of applicant identity with government-issued identification (803 CMR 3.05)
- Identity theft protection: “CHSB Identity Theft File Number” (803 CMR 2.03 & 3.02)

## CORI: Information Security

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- Access to and dissemination of CORI information is restricted to approved employer representatives who have executed Non-Disclosure Statement.
- CORI information must be retained separate from personnel file and must be locked.
- Employer may retain only one (1) copy of CORI.
- CORI may be retained up to three (3) years to defend against employment discrimination action.

## Getting References

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- Can Be Difficult or Impossible to Obtain
- Reasons to Try
- Legal Theories
  - Negligent Hiring/Retention
  - Duty to Protect Employees/Consumers/Clients
- Have Applicants Sign a Release
- Reciprocate

## Giving References

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- Have a Policy and Stick to It
  - Examples:
    - Provide no references
    - Verify name, last title and date of employment only
    - Provide references only when there is signed consent
- Train Managers and Supervisors to the Policy
- Centralize Reference Giving

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## Giving References (cont.)

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- Require Current Signed Release
- Verify Recipient and Instruct Him/Her to Maintain Confidentiality of Information Provided
- Limit Disclosure to Verifiable Objective Information

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## Giving References (cont.)

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- Stick to the Facts
- Tell the Truth
- Avoid any Disparaging Remarks
- Avoid Hearsay and Rumor
- Do Not Volunteer Information But Do Not Omit Material Information – Completeness Issue

## II. Monitoring Employee Conduct in the Workplace

## Monitoring Employee Use of Employer's Electronic Communication Technology

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- E-mail
- Voicemail
- Telephones
- Internet
- Computers
- Text Messages

## Mass. Right to Privacy Act

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- M.G.L. c. 214, s. 1B:

“A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.”
- Balance between employer's legitimate business interests and employee's reasonable expectation of privacy.

## Mass. Right to Privacy Act (cont.)

- Restuccia, et. al. v. Burke Technology, Inc., Middlesex Superior Court, C.A. No. 95-2125, 1996 WL 1329386 (August 13, 1996): Employees may have an expectation of privacy in e-mail communications in absence of explicit policy putting employees on notice of e-mail monitoring.
- Garrity v. John Hancock Mutual Life Ins. Co., No. 00-12143-RWZ (D.Mass. 2002): Employees terminated for receiving sexually explicit e-mail did not have causes of action for invasion of privacy, unlawful interception of wire communications or other claims. Employer had explicit policy, reminded employees of policy, and notified employees of periodic situations in which other employees were disciplined under the policy.

## Statutory Framework

### Electronic Communications Privacy Act (ECPA)

- Title I, 18 U.S.C. §§ 2510-12, (“Wiretap Act”): prohibits unauthorized and intentional “interception” of wire, oral and electronic communication. Employer may monitor phone or oral communications with employee’s consent.
- Title II, 18 U.S.C. §§ 2701-11, (“Stored Communications Act”): prohibits unauthorized accessing of electronically stored communications.

### Massachusetts Wiretap Act, M.G.L. c. 272, s. 99

- Precludes interception of oral or wire communications without the consent of all parties to the communication. Applies to e-mail interception, and does contain “service provider” exception allowing employer to monitor its own systems in “ordinary course of business.”

## Statutory Framework (cont.)

### Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030

- Statute of broad application with criminal and civil penalties (including private right of action) where individuals access and/or destroy data without authorization.

### Section 230, Communications Decency Act (CDA), 47 U.S.C. § 230

- Broadly immunizes website owners (“service providers”) from liability based on content posted by third parties.

## NLRA: Section 7

Guard Publishing Co., 351 NLRB 1110, 1114 (December 16, 2007), enf. granted in part, denied in part 571 F.3d 53 (2009).

- Employees do not possess a statutory right to use employer’s e-mail system for Section 7 purposes.
- Employer policy prohibiting use of e-mail system for “non job-related solicitations” is facially valid.
- Employee use of employer-provided e-mail for union activity will be scrutinized for discriminatory application of policy. Board adopts new test that “unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status.”

## Quon v. Arch Wireless Operating Co., 529 F.3d 892 (9th Cir. 2008)

- U.S. Supreme Court granted certiorari in December 2009. Will consider whether: (1) police department search of personal text messages sent and received by police lieutenant on department-owned pager violates Fourth Amendment (search and seizure); and (2) whether wireless provider violated SCA by providing city with transcripts of text messages.
- Public sector case – applicability to private sector is open question
- Police Department did not have policy specific to text messaging, but did have comprehensive policy warning that use of e-mail and computers was not confidential, could be monitored and that all website access would be recorded and periodically reviewed.

## Developing Policies: Internet Usage and E-mail

- Spectrum ranging from “business purposes only” to full usage for personal purposes
- Many employers develop policy detailing that Internet / e-mail are primarily for business purposes, but permit “incidental” personal use on non-working time that does not involve illegal or potentially offensive/harassing conduct.
- Uniform enforcement is key

## Developing Policies: Monitoring Electronic Communications

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- Explicit notice to employees is key – no expectation of privacy in any communications made, transmitted, or received on employer-provided electronic equipment.
- Employer-owned equipment vs. non-employer-owned equipment
- Ensure compliance with applicable law (e.g., Mass. Wiretap Act)
- Uniform enforcement is key (e.g., Section 7)

### **III. Employer's Obligation to Safeguard Confidential Information of Employees and Others**

# Data Security Law & Regulations

- Massachusetts Data Breach Notification Law  
(MGL c. 93H)
- Massachusetts Data Destruction Law  
(MGL c. 93I)
- Massachusetts Data Security Regulations  
(200 C.M.R. 17.00)

# Massachusetts Data Breach/Destruction Law

- What is “Personal Information” under the law?

**(First Name *or* First Initial) + Last Name**

**&**

**Social Security # *or* Driver’s License # *or* State-Issued ID Card # *or*  
Credit Card # *or* Debit Card # *or* Financial Account #**

## Confidentiality of Medical Information

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- Americans with Disabilities Act
- M.G.L. c. 151B
- Family and Medical Leave Act

## The HIPAA Privacy Rule

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The Health Insurance Portability and Accountability Act's ("HIPAA") Privacy Rule generally requires that covered entities implement standards to protect and guard against the misuse of individually identifiable health information ("IIHI").

## The HIPAA Privacy Rule (cont.)

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Covered entities may not use or disclose protected health information (“PHI”), except:

- With consent; or
- With authorization; or
- As explicitly required or permitted by the HIPAA Privacy Rule (i.e., for treatment, payment or health care operations (TPO) or fitting within certain other narrow exceptions, e.g., complying with court orders).

## The HIPAA Privacy Rule (cont.)

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- The Minimum Necessary Standard – When a Covered Entity is allowed to use or disclose PHI, it must use or disclose only the Minimum Necessary PHI to accomplish the intended purpose.
- The HIPAA Privacy Rule applies to all forms of communication (written, electronic, oral).
- PHI is protected for the life of the individual (and beyond) and as long as the Covered Entity retains the PHI.

## HIPAA – Covered Entities

- The HIPAA Privacy Rule defines “covered entities” as:
  - Health plans,
  - Health care clearinghouses, and
  - Health care providers that transmit PHI electronically.
- Not included as covered entities are:
  - Employers
  - Unions
  - Multi-employer fund trustees, and
  - Other types of insurance carriers (W/C, LTD, etc.) and service providers.

## HIPAA – What is Health Information?

- Any information, whether oral or recorded in any form or medium, that relates to:
  - the past, present, or future physical or mental health or condition of an individual;
  - the provision of health care to an individual; or
  - the past, present, or future payments for the provision of health care services to an individual

and...

## HIPAA – What is Health Information? (cont.)

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- Is created or received by a
  - health care provider
  - health plan
  - health care clearinghouse
  - *public health authority*
  - *life insurer*
  - *university*
  - *employer*

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## What is Individually Identifiable Health Information?

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- A Subset of health information
- Created or received by a
  - health care provider
  - health plan
  - health care clearinghouse, or
  - *employer*

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## What is Individually Identifiable Health Information? (cont.)

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- Identifies the individual (or there is a reasonable basis to believe the information can be used to identify the individual)
- Includes demographic information collected from an individual

## What IIHI is not PHI?

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- Education records covered by the Family Educational Rights and Privacy Act (FERPA)
- Employment records held by a covered entity in its role as an employer

## HIPAA Amendments by ARRA

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- Statutory privacy and security requirements extended to Business Associates
- Covered Entities and Business Associates are now required to notify individuals of breaches that pose a “significant risk” of harm to the individual.
- If the breach affects more than 500 individuals, must also notify:
  - Prominent media outlets in the state or jurisdiction; and
  - The Department of Health and Human Services

## Other Confidentiality Issues

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- Confidentiality of Information Contained in Personnel Records (MGL c. 149, s. 52C)
- Confidentiality of CORI Information

## **IV. Evolving Trends: To What Extent May an Employer Investigate and/or Rely Upon Conduct Outside the Workplace?**

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## **“Lifestyle” Discrimination <sup>1</sup>**

Employment decisions made based upon  
conduct off the job – how far can the  
employer go?

<sup>1</sup> The presenters wish to acknowledge the law review article [“Lifestyle” Discrimination in Employment](#), by Steven D. Sugarman, Agnes Roddy Robb Professor of Law, UC Berkeley School of Law. © 2003 by the Regents of the University of California. Reprinted from Berkeley Journal of Employment & Labor Law Vol. 24, No. 2, by permission of the Regents of the University of California

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## “Lifestyle” Discrimination: Examples of Challenged Off-Duty Conduct

- University football coach fired for partying with stripper – inconsistent with desired image
- Employee disciplined for off-color jokes told at a private retirement party for a co-worker
- Broadcasting company adopts a ban on hiring smokers
- Retailer fires employees who violate rule on dating employees from the same store

## “Lifestyle” Discrimination: Examples of Challenged Off-Duty Conduct (cont.)

- Newspaper forces resignation of columnist who had sexual relationship with a subject of a prior column
- Employer charges higher health premium to obese employees and those who smoke
- Employer excludes coverage for injuries incurred while engaged in a dangerous act (e.g., riding a motorcycle or driving an automobile “under the influence.”)

## “Lifestyle” Discrimination: Common Employer Justification

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- Company reputation
- Concern about loyalty/undue influence
- Financial concerns
- Harm to other business interests (e.g., continuity)
- “Morality” concerns

## “Lifestyle” Discrimination: Common Categories

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- Criminal behavior – related to the job or not
- Personal relationships
- Dangerous or inappropriate recreational activities
- Political views/activities
- Other lifestyle choices

## “Lifestyle” Discrimination: Criminal Behavior

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- Drug use
- Sexual activities
- Traffic offenses
- Financial (embezzling, money laundering)

## “Lifestyle” Discrimination: Personal Relationships

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- Spouse
- Date
- In a sexual relationship/significant other
- Adulterer
- Roommate
- Friend
- Known associate

## “Lifestyle” Discrimination: Recreational Activities

### “Dangerous” Activities

- Bungee jumping
- Hang gliding
- Sky diving

### “Inappropriate” Activities

- Gambling or associating with gamblers
- Mooning/public nudity
- Excessive drinking
- Use of drugs

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## “Lifestyle” Discrimination: Political Views/Activities

### Public vs. Private Sector

- Expressing public views contrary to employer’s business interest vs. duty of loyalty
- Complaints about working conditions to friends, or to government agencies
- Offensive public statements or acts – offensive to whom?
  - Going nude/mooning
  - Flag-burning
  - Advocating sex with children

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## “Lifestyle” Discrimination: Other Lifestyle Choices

- Drugs
- Alcohol
- Tobacco
- Firearms
- Obesity
- Wearing seatbelts
- Driving foreign cars
- Piercings, tattoos, body art
- Facial hair, makeup, dress

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## “Lifestyle” Discrimination: Balancing Test

Balancing of Employee Right of Privacy with  
Legitimate Employer Business Interests.



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## “Lifestyle” Discrimination: Factors to Consider

- Accuracy of the information – consider the source
- Degree of intrusion/degree of violation of legitimate expectations of privacy
- Degree of harm or potential harm to employer interests
- Closeness in time and circumstances – “freshness” of the information

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## “Lifestyle” Discrimination: Factors to Consider (cont.)

- How extreme or excessive was the behavior?
- Did the employee know the behavior was not acceptable?
- What is the impact on protected classes?
- Was the behavior legal?
- Employee record and longevity
- Morale/effect on other employees/customers
- Risk management concerns

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## “Lifestyle” Discrimination: Legislative Repercussions

- State Law Examples:
  - Lawful activity off premises during non-working hours (e.g., Colorado and North Dakota laws)
  - New York law regarding recreational activities, consumption of legal products, political activities, union memberships
- Attacks on “at will” employment

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## “Lifestyle” Discrimination: Keep Tuned for Developments

- Bottom line – nexus between the offending behavior and employer’s legitimate business interests
- Not consistent with other laws

Note: This area of the law will continue to develop and change rapidly over the next few years

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## “Lifestyle” Discrimination: Wellness Initiatives

Employer Wellness Initiatives may implicate legal issues under:

- ERISA/HIPAA Non-Discrimination Rules
- State Health Insurance Laws
- ADA Protections
- Age Discrimination

## “Lifestyle” Discrimination: Wellness Initiatives (cont.)

- Title VII / State Anti-Discrimination Laws
- Labor Laws / NLRA / Collective Bargaining Agreements
- Privacy Protections Under State and Local Laws,
  - e.g., Mass. Genetic Testing Statute
  - e.g., Mass. Health Care Reform
- Lifestyle Discrimination Laws

## V. Closing Thoughts / Questions & Answers

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