CONDUCTING INVESTIGATIONS IN THE WORKPLACE

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I. Search and Seizure

A. Applicable Laws

1. 4th Amendment

The 4th Amendment to the U.S. Constitution provides that citizens shall be free from unreasonable search and seizure. In the employment context, the Supreme Court has held that "public employer intrusions on the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by a standard of reasonableness under all the circumstances." **O'Connor v. Ortega, 480 U.S. 709 (1987).**

2. Federal and State Communication Laws

Electronic communications are protected and regulated by a number of federal laws: Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sec. 2510-2525 (the "Wiretap Act"), Stored Wire Communications Act, 18 U.S.C. Sec. 2701, et seq., Electronic Communications Privacy Act of 1986, 18 U.S.C. 2510-3126, and Communications Decency Act, 47 U.S.C. Sec. 201, et seq.

Title III of the Wiretap Act prohibits the "interception" of covered wire and oral communications subject to two exemptions: (1) the prior consent exemption (an unambiguous consent by one party to a communication that a specific type of communication may be intercepted constitutes a consent to the interception of that type of communication), and (2) the service provider exemption (telephone companies and employers who provide wire communication services may monitor calls for service checks). An additional exception has been recognized by the courts and is characterized as the business extension exception (telephone extension equipment which is provided in the normal course of business may be used for ordinary business purposes to intercept business communications).

Iowa Code Section 727.8 prohibits the tapping of telephones and other communication devices but contains an exception for conversations which are recorded by a person "who is openly present and participating in or listening to a communication".

Iowa Code Chapter 808B prohibits the interception of both wire and oral communications. Oral communications are defined as communications uttered by a person exhibiting an expectation that the communication is not subject to interception, under conditions justifying that expectation.

3. Federal Drug Testing Law

The Omnibus Transportation Employee Testing Act of 1991 requires every covered employer to conduct pre-employment/pre-duty, reasonable

suspicion, random and post-accident alcohol and controlled substances testing of each applicant for employment or employee who is required to obtain a Commercial Drivers' License (CDL).

Note that Iowa Code Section 730.5, the Iowa drug testing law, has been amended and no longer applies to public employers (see Iowa Code Section 730.5(1)(d)). Also, this section does not apply to tests conducted on employees required to be tested under federal statutes or regulations.

4. Federal and State Polygraph Examination Laws

Under both federal and state law, employers are prohibited from requesting or requiring that employees submit to polygraph examinations, except in the selection of peace officer and corrections employees. If an employee requests to be given a polygraph exam, the employer should require that the request be made in writing and that it should be verified as voluntary. In addition, the employer should not administer or cause the test to be administered because that would be a violation of Iowa Code Section 730.4(2)(b).

In **Veazey v. Communications & Cable of Chicago, Inc., 194 F.3d 850 (7th Cir. 1999)**, the Court ruled that the employer's request that Veazey produce a voice exemplar of him reading a transcript of a threatening voicemail message amounts to a lie detector test under the Employee Polygraph Protection Act. In a disclaimer, the Court stated: "Our holding in this case does not mean that a tape recorder invariably must be considered a 'lie detector' under the EPPA. A tape recorder would not fall within the statutory definition if it was not used in conjunction with another device that assists in the gauging of a person's truthfulness." **194 F.3d at 860**.

5. Americans with Disabilities Act

Applicants for employment may be required to submit to a medical examination only after an offer of employment has been made. Post-offer medical exams are valid only if all entering employees in a job category are subjected to the examination regardless of disability and the required confidentiality of medical records is observed. Information obtained regarding the medical condition or history of the applicant must be collected and maintained on separate forms and in separate medical files.

In Guidance issued on July 27, 2000, the EEOC took the position that, regardless of whether or not they are disabled, employees may be required to submit to a medical examination (physical or psychological) only if the examination is "job-related and consistent with business necessity".

6. Fair Credit Reporting Act

The Fair Credit Reporting Act (15 U.S.C. Sec. 1681 et seq.) Governs the acquisition and use of a wide range of information gathered by "consumer reporting agencies" on job applicants and employees. In an opinion letter issued on March 5, 1999 (the Vail Opinion Letter), the Federal Trade Commission stated that the FCRA applied to investigations conducted for employers by outside agencies. In summary, the opinion concludes that when investigations are conducted by individuals or entities outside of the employer's operation, the reports prepared are subject to the provisions of the Fair Credit Reporting Act including notice to the affected employee and the obligation to provide a copy. This opinion letter (referred to as the "Vail letter" because it was requested by attorney Judi Vail) has provoked considerable response from employers. Although the FTC has provided suggestions for compliance (see U.S. Law Week, Vol. 68, No. 13, pp. 2203-2204), the Commission has not withdrawn or amended the letter. The FCRA does not apply to investigations of employees conducted directly by the employer and may not

apply to investigations conducted by an attorney which are subject to attorney-client privilege.

7. Common Law Right of Privacy
Under Iowa law, a person who intentionally intrudes upon the seclusion of another in a manner which would be highly offensive to a reasonable person is liable for the resulting harm to the interest of the other person. **Winegard v. Larsen, 260 N.W.2d 816 (Iowa 1977).**

The common law principles with regard to privacy also protect individuals from public disclosure of private facts, from publicity place a person in an unreasonable "false light", and from appropriation of their name and likeness.

B. Definition of a Search

1. A search is any intrusion into an area in which a person has a reasonable expectation of privacy.

2. A search may conducted tactually or manually, orally, auditorily, electronically, or using olfactory senses.

3. Under the plain view doctrine, observation of an item in plain view is not a search. As applied to police searches, the plain view doctrine requires that the police be lawfully in the position from which they view the object, that the object's incriminating character be immediately apparent, and that the police have a lawful right of access to the object.

4. A consensual search does not violate the 4th Amendment if the consent is voluntarily given without coercion. There is no absolute requirement that individuals be advised that they have the right to refuse consent. In **Poulos v. Pfizer, 1996 Conn. Super. Lexis 1732 (Conn. Super Ct. 1996),** the Court held that a consent given under threat of termination of employment was not effective.

C. Searches of Desks, Lockers, and Employer-Provided Work Spaces

1. Desks

In **O'Connor v. Ortega, 480 U.S. 709 (1987),** the United States Supreme Court held that a government psychiatrist had a reasonable expectation of privacy in his desk and file cabinet because he did not share them with his co-workers and he had numerous personal items in them. The Court stated that a standard of reasonableness applied to searches of a desk and a file cabinet and that the standard involved a consideration of whether the search was justified in its inception and whether it was reasonable in its scope. The Court noted that the expectation of privacy may be reduced by
"actual office practices and procedures, or by legitimate regulation."

However, the court in **Williams v. Philadelphia Housing Authority, 826 F. Supp. 952 (E.D. Pa. 1993)** held a search of a desk was found not to violate that 4th Amendment because the employee had been told to clear his desk before taking a leave of absence and the supervisor's search of his desk was necessary to maintain an efficient and productive workplace.

2. Lockers

The U.S. Postal service provides lockers to many of its employees and does so subject to a policy and signed waiver indicating that the lockers are subject to random inspection at any time. Under these circumstances, the court in **American Postal Workers Union v.**

U.S. Postal Service, 871 F.2d 556 (6th Cir. 1989) found that the search of the lockers was lawful because employees had no expectation of privacy.

Locker searches in **U.S. v. Speights, 557 F.2d 362 (3rd Cir. 1977)** were found to be unlawful because the lockers were secured with private locks and there was no prior practice of searching lockers with private locks.

3. Other Employer-Provided Work Spaces

Video camera surveillance of a general work area was not an unreasonable search because employees had no expectation of privacy. **U.S. v. Reilly, 7 I.E.R. Cases 665 (E.D.Pa. 1992).**

A search of an office, desk, or credenza was not violative of the 4th Amendment when there were extensive security measures in place, including constant office searches, surveillance for compliance with security procedures, and employment of trained security personnel. **Schowengerdt v. U.S., 944 F.2d 483 (9th Cir. 1991).**

D. Searches of Employee Property

1. Vehicle Search

Searches of personal vehicles belonging to correctional officers employed at a prison were constitutional where there were done while the vehicles were parked on the prison grounds and where the searches were done on a uniform or systematic basis. Other searches could be made only on the basis of reasonable suspicion. **McDonnell v. Hunter, 809 F2d 1302 (8th Cir. 1987).**

2. Briefcase Search

In preparation for a move of offices, employees were told to remove all confidential documents from their desks. An employee left his briefcase in the office and his supervisor checked it to make sure that it did not contain any confidential documents. Since the search was motivated by the need to prepare for the move and not to find evidence of wrongdoing against the employee, the court held that the evidence from the search was admissible. **Finkelstein v. State Personnel Board, 218 Cal. App.3d 264 (1990).**

E. Interception of Communications

1. The Consent Exemption

The consent exemption has been interpreted in a number of cases: **Deal v. Spears, 980 F.2d 1153 (8th Cir. 1992)** (liquor store owner began taping employee telephone calls after he told an employee that, due to excessive telephone usage, he might install a pay phone or monitor calls; this notice was not sufficient to constitute consent); **Watkins v. L.M. Berry & Co., 704 F.2d 577 (11th Cir. 1983)** (notice to employees that sales calls would be monitored was sufficient only for the monitoring of business calls and for the monitoring of personal calls to the extent necessary that the call was not a business call); **Griggs-Ryan v. Smith, 904 F.2d 112 (1st Cir. 1990)** (if the employee gives prior consent and the consent is not limited, then consent will be implied for subsequent communications); and **James v. Newspaper Agency Corp., 591 F.2d 579 (10th Cir. 1979)** (monitoring was protected where the employer openly installed a monitoring system to give employees training and instruction on telephone techniques and notified all employees that monitoring would take place).

2. The Business Extension Exception

The business extension exception has also been interpreted in a number of cases. This exception permits monitoring of employee telephone calls without employee consent provided the monitoring is conducted in the "ordinary course of business", a phrase which has been narrowly defined by the courts. In addition to the **Deal, Watkins,** and **James** cases cited above, these other cases have involved the business extension exception: **Briggs v. American Air Filter Co., 630 F.2d 414 (5th Cir. 1980)** (eavesdropping by a manager on a salesman's call was within the ordinary course of business because the salesman was conversing with a competitor to whom he may have been divulging company secrets); **Epps v. St. Mary's Hospital, Inc. , 802 F.2d 412 (11th Cir. 1986)** (the recording of phone conversations of two employees was within the exemption because the conversation took place during business hours, between co-employees, and contained disparaging remarks about their supervisors; **Simmons v. Southwestern Bell Telephone Co., 452 F.Supp. 392 (W.D. Ok. 1978)** (monitoring employee telephone calls from work-only extensions for purposes of quality control was permissible under the Wiretap Act); and **Abel v. Bonfanti, 625 F.Supp. 263 (S.D.N.Y. 1985)** (recording of personal conversations on extension lines was illegal because it had no legitimate business purpose).

F. Searches of Electronic Mail, Voice Mail, and the Internet

1. Electronic Mail

The court in **U.S. v. Maxwell, 42 M.J. 568 (U.S.A.F.Ct. App. 1995)** found that the employee had a reasonable expectation of privacy in his private e-mail messages.

One federal court of appeals has held that stored e-mail is protected by the Stored Wire Communications Act. **Steve Jackson Games, Inc. v. U.S. Secret Service, 36 F.3d 457 (5th Cir. 1994).**

The interception of an employee's e-mail message to a supervisor was not a common law invasion of privacy even though the company had promised employees that the e-mail system was confidential. **Smyth v. Pillsbury Co., 914 F. Supp. 97 (E.D. Pa. 1996).**

2. Voice Mail

The court in **Payne v. Norwest Corp., 911 F.Supp. 1299 (D.Mont. 1995) aff'd in part, rev'd in part, 113 F.3rd 1079 (9th Cir. 1997),** held that the Wiretap Act did not apply to an employee's own voice mail messages which he tape-recorded at his office.

3. The Internet

In **U.S. v. Simons, 206 F.3d 392 (4th Cir. 2000)** the Court held that an established policy of monitoring internet use negated any expectation of privacy.

G. Medical Examinations

1. Physical Examinations

In **Porter v. U.S. Alumoweld, 125 F.3d 243 (4th Cir. 1997)**, the Fourth Circuit upheld the discharge of an employee who refused to submit to a functional capacity evaluation following surgery for a workplace injury. Porter suffered a work-related injury and provided Alumoweld with a unconditional release to return to work from his doctor. Because his own physician was not able to provide Alumoweld with a complete functional capacity evaluation, the Company advised Porter that he would have to submit to a functional capacity evaluation by another physician. He refused to do so and was

fired. Since Porter's job required lifting and pulling and since he had problems performing his job even prior to surgery, the Court found that the fitness for duty exam was job-related and consistent with business necessity. **125 F.3d at 247.**

2. Psychological Examinations

Courts in two other cases considered the issue of medical examinations required by employers due to the aberrant behavior of employees. In both **Cody v. CIGNA Healthcare of St. Louis, 139 F.3d 595 (8th Cir. 1998)**, and **Sullivan v. River Valley School District, 197 F.3d 804 (6th Cir. 1999)**, the courts approved the employer's requirement of a psychological examination.

In **Cody**, the plaintiff was a nurse who was required to make on-site quality of care reviews of physicians' offices. Cody's job required her to travel into some neighborhoods which she considered dangerous. Cody claimed to suffer from depression which she said was exacerbated by traveling in dangerous neighborhoods. She told a supervisor about her concerns and about her visit to a psychologist. Within two days of the meeting with her supervisor, Cody began behaving strangely: she talked about carrying a gun, she sprinkled salt in front of her cubicle to keep away evil spirits, she stared off into space for an hour at a time, and she drew pictures of sperm. CIGNA placed her on "paid leave of absence with her return to work contingent upon undergoing a psychiatric evaluation". **139 F.3d at 597.** Cody did not submit to a psychiatric evaluation and was terminated.

Sullivan v. River Valley School District, 197 F.3d 804 (6th Cir. 1999), involved a tenured teacher who, from 1977 to 1995, had no performance or disciplinary problems. However, beginning in January of 1995 and continuing through June of that same year, Sullivan engaged in behavior which caused the superintendent to require him to submit to mental and physical fitness-for-duty exams. Among his behaviors were the following: in a meeting with the school board, he "shoved papers in the faces of the individual board members"; he disclosed confidential information regarding a student grade and a grade change to a local newspaper; he criticized the faculty sponsor of a student government group using language deemed inappropriate by the administration; he refused to meet with the superintendent regarding these incidents; and, when meeting with the school board, he threatened school board members saying "You'll be sorry for this" and "You will regret this". **197 F.3d at 808-809.**

The superintendent recommended to the board that Sullivan be required to undergo mental and physical fitness-for-duty exams. In making his recommendation for the exams, the superintendent relied upon input which he had received from a psychologist from whom he had solicited advice concerning Sullivan's behavior.

Noting Sullivan's concern that employer's could abuse the right to require employees to submit to medical exams, the Court also observed that the employer's right to require an exam was limited by the requirements that the exams be job-related and consistent with business necessity. The Court stated: "[F]or an employer's request for an exam to be upheld, there must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job. An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be some genuine reason to doubt whether that employee can 'perform job-related functions'". **197 F.3d at 811.** In adopting this standard, the court also rejected Sullivan's suggestion that "medical examinations could only be ordered if an employee has requested accommodation or if an employer has objective evidence that the employee poses a threat to himself or to others." **197 F.3d at 812.** Finding no evidence to prove that the school district regarded him as disabled, the Court rejected Sullivan's ADA claims.

H. Drug Tests

1. Safety Sensitive Positions

In **Skinner v. Railway Labor Executives Ass'n., 489 U.S. 602 (1989)**, and **National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)**, the Supreme Court

upheld the drug testing of employees who were in safety sensitive positions.

In **Aubrey v. School Board of Lafayette Parish, 148 F.3d 559 (5th Cir. 1998),** the court upheld a school policy of randomly testing school employees who were in contact with the students.

2. Non-Safety Sensitive Positions

In **Knox County Education Association v. Knox County Board of Education, 158 F.3d 361 (6th Cir. 1998)**, the court upheld a school board policy that required drug testing all candidates for school jobs. The court also upheld the board's policy of drug testing employees based on a reasonable suspicion standard. In this case, both testing standards were clearly stated in the employment agreements used by the school board.

The Court in **Loder v. City of Glendale, 927 P.2d 1200 (Cal. 1997)**, held that drug testing of all job applicants was not a violation of the 4th Amendment but also held that drug testing of employees as a condition of promotion or transfer was a violation of the 4th amendment.

I. Workplace Surveillance

1. Approved

Video surveillance of employees has been approved in settings in which the employees have no expectation of privacy, such as in the portion of a police station which was not private (**Thornton v. University Civil Service Merit Board, 507 N.E.2d 1262 (Ill. 1987)**), in a jewelry department storeroom (**Fazo V. Nordstrom, No. 702345 (Ca. Super. Ct. 2/5/93)**), outdoors (**Jeffers v. City of Seattle, 597 P.2d 899 (Wash. 1989)**), in a locker room where employees could be seen by other employees walking into a storage area (**Thompson v. Johnson Community College, 930 F.Supp. 501 (D. Kan. 1996)**), or in a jailhouse room where inmate money was transferred (**Sacramento County Deputy Sheriffs Assn. County of Sacramento, 51 Cal. App 4th 1468, 59 Cal. Rptr.2d 834 (3d Dist. 1996)**).

2. Not Approved

Video surveillance of a private office was found to be a violation of the 4th Amendment (**U.S. v. Taketa, 923 F.2d 665 (9th Cir. 1991)**).

J. Sample Workplace Privacy and Search Policy

See attached **Sample Policy.**

K. Conducting the Search

1. Identify the policy, rule, directive, or statute which is believed to have been violated. If none exists, identify the misconduct, the threat to the safety of persons, the threat to property, or the threat to the orderly operation of the workplace which is the cause for the search.

2. Whenever possible, use more than one person to conduct the search. If there will be a physical search of an employee's body, then one of the persons should be of the same gender as the employee.

3. Determine immediately whether the object of the search is subject to alteration, destruction, or removal. If it is, then take steps to preserve the status of the object even if

the search cannot be completed.

4. Determine the method and the projected scope of the search. Identify the legal basis which supports the chosen the method and scope of the search. The test applied by the courts is a test which balances the interest of the employee in maintaining privacy against the legitimate interest of the government in intruding upon that privacy. The greater the intrusion upon an employee's privacy, the greater the governmental interest that will be required to justify the intrusion.

5. Where it is appropriate to do so, announce the search to the employee and request consent to the search.

6. Execute the search in a manner which preserves the dignity of the employee to the greatest degree possible. If possible, conduct the search at a time when there will be no casual observers around. Minimize the public attention that surrounds the search. Conduct all physical searches outside of the view of anyone other than the searchers. Treat personal property with respect and protect it from damage.

7. If the employee refuses to cooperate with the search, obstructs the search, leaves the premises, or removes or destroys the object of the search, advise the employee that his or her action is grounds for disciplinary action, including termination of employment. If, after being warned, the employee continues the inappropriate conduct, consider calling the police and having the employee escorted from the premises. If the employee leaves the premises without being directed to do so, do not attempt to prevent the employee's departure. If the employee leaves the premises and takes the object of the search with him or her, consider calling the police to have the object seized.

8. If a search is attempted but not completed due to employee misconduct, prepare a written report of the matter including a detailed description of all conversation and actions. The report should be dated, signed, and witnessed.

9. If a search is completed, make a written record of the search. A sample form is attached in the checklist.

L. Search and Seizure Checklist

See attached **Search and Seizure Checklist.**

M. Preserving Evidence and Maintaining a Chain of Custody

1. If the evidence is small enough, it should be placed into an envelope or container. The container should be marked with a notation of what it contains. The notation should be signed and dated. If appropriate, the container should be sealed, and the seal should be made or marked in a way that will provide evidence of tampering.

2. If the evidence is not small enough to be place in an envelope or container, then it should be marked with a note that is signed and dated and placed into a secure storage area. Every entrance into the storage area should be recorded and should include the name of the person who entered the area, and the date and time of entry.

3. An evidence log should be prepared for any object which is seized. If it is necessary to examine the evidence, then the examination should be made in the presence of a witness and an entry should be made on the log.

4. A chain of custody must be created from the moment that the object is seized. The custodian must be noted in the evidence log. Any time that there is a change in custody,

an entry to that effect must be made in the evidence log.

5. If there is any possibility that the evidence may deteriorate or be altered by the passage of time, then the evidence should be photographed or a copy otherwise made and preserved. The photograph or other record should be signed, dated, and witnessed.

6. If there is any dispute regarding the right of the government to seize the evidence, then the evidence should be photographed or a copy otherwise made and preserved. The photograph or other record should be signed, dated, and witnessed.

II. Investigatory Interviews

A. Employee's Right to Representation

1. General Principles

The right of public employees to representation in meetings with their employers is derived from the statutory guarantee of the right of employees to act in concert for mutual aid and protection. This right is found in Section 7 of the National labor Relations Act and Section 8(3) of the Iowa Public Employment Relations Act.

2. Representation by a co-worker or Union representative

In **NLRB v. Weingarten, Inc., 420 U.S. 251 (1975),** the United States Supreme Court held that employee insistence upon union representation at an investigatory interview which the employee reasonably believed might result in the imposition of disciplinary action was protected concerted activity.

The right of union representation is subject to the following conditions: (1) the employee must request representation, (2) the employee must reasonably believe that the investigation will result in disciplinary action, (3) the exercise of the right must not interfere with "legitimate employer prerogatives", (4) the employer may carry on the investigation without interviewing the employee and thus give the employee "the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from having one, and (5) the employer has no duty to bargain with any union representative who may be permitted to attend the interview.

Until very recently, the NLRB took the position that employees who work in a nonunion setting are not entitled to the right of representation that is afforded by **Weingarten**. See **Slaughter v. NLRB, 876 F.2d 11 (3rd Cir. 1989).** In a reversal of Board position, the NLRB has just ruled that employees who work in a nonunion setting are entitled to the right of representation that is afforded by **Weingarten**.

Note that even if an employee in a nonunion company requests that a fellow employee attend an investigatory interview and the request is not required to be honored, the request is considered by the NLRB to be protected activity. **Sears, Roebuck & Co., 274 NLRB 230, 118 LRRM 1329 (1985).** It is important to understand what this means and what it does not mean. It means that the employer may not take any disciplinary action against the employee because the employee requested representation. It does not mean that the employer must grant the request for representation. Until a court establishes such a right, there is no right to representation in a nonunion setting. But there is a right to ask for representation.

Both the Public Employment Relations Board (**City of Cedar Falls, 80 PERB 1511 and City of Dubuque, 77 PERB 948**) and the Iowa Court of Appeals (**City of Marion v.**

Weitenhagen, 361 N.W. 2d 323 (Iowa App. 1984)) have held that the principles of the **Weingarten** case apply to public employees in Iowa who are covered by a bargaining agreement. The PER Board has yet to rule on the question of the right of a non-unionized employee to representation in investigatory interviews.

3. Representation by a Lawyer

In **TRW v. Superior Court, 31 Cal Rptr. 2d 460 (1994)**, a California court held that a defense contractor could terminate an employee for refusing to participate in an investigatory interview without his lawyer present. The court found that the employer's action did not violate the employee's rights under the 5th Amendment or his right to the assistance of counsel during a custodial interrogation.

In **Thompto v. Coborn's Inc., 1994 WL 668291 (N.D.Ia. 1994)**, an Iowa federal district court held that "public policy favors protecting a person who consults an attorney concerning a dispute with another so that the person will be counseled to maintain a cause of action only if that action is legal and just". This case involved a claim of wrongful discharge and may be signal a change with regard to recognition of an employee's right to representation by an attorney in meetings with the employer.

B. Due Process Procedures

1. General Principles

The 5th and 14th Amendments to the U.S. Constitution guarantee that individuals will be afforded due process before any property right or liberty interest will be taken from them by the State. Property rights in employment may be created by: (1) a statutory provision protecting employment from arbitrary termination, (2) a collective bargaining agreement which protects employees from arbitrary discharge, such as a "just cause" provision, (3) an employee handbook or personnel policy which protects employees from arbitrary discharge or which extends to them some contractual rights of continued employment, (4) civil service rules or ordinances which protect employees from arbitrary discharge, (5) an internal manual, such as a SOP, which protects employees with regard to disciplinary action, (6) an individual contract of employment, or (7) oral promises or representations made by the employer either with regard to disciplinary action or status of employment. A liberty interest arises from the employee's right to be free to pursue other employment and to be free from employer actions which might tend to stigmatize the employee or impair his or her ability to seek other employment.

2. Application to Investigations

Before employees are deprived of a property interest in their employment, they must be afforded due process. In **Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)**, the U.S. Supreme Court held that a person who has a property interest in their employment must be given a hearing before they are deprived of that interest. Pre-deprivation due process includes: (1) notice of the charges against the employee, (2) an explanation of the evidence in support of the charges, and (3) an opportunity to respond to the charges. This minimal due process is sufficient if the employee also has the right to a post-deprivation hearing which is more extensive in nature.

C. Privilege Against Self-Incrimination

1. General Principles

The 5th Amendment to the U.S. Constitution provides that individuals will not be compelled to give testimony against themselves. This principle applies to action taken by

the State or an entity of the State. It applies to testimony which is sought to be compelled in any criminal case. It does not apply in the employment context, provided the employer guarantees the employee that, if they make a statement, the statement will not be used against them in any criminal proceeding and they do not forfeit their constitutional privilege against self-incrimination.

2. Specific Principles

In a series of cases, the United States Supreme Court has ruled that: (a) employees may not be required to give statements which may be used against them in a prosecution and to waive their privilege against self-incrimination, (b) employee may not be discharged for refusing to waive their 5th Amendment privileges, (c) employees may be compelled to answer questions specifically, directly, and narrowly tailored to the performance of their official duties and may be discharged for refusing to do so, if they are not required to waive their 5th Amendment privileges in any criminal proceeding, and (d) answers given by employees may be used against them in administrative proceedings. **Garrity v. State of New Jersey, 385 U.S. 493 (1967)**, **Gardner v. Broderick, 392 U.S. 273 (1968)**, **Uniformed Sanitation Men Ass'n. v. Commissioner of Sanitation, 392 U.S. 280 (1968), Lefkowitz v. Turley, 414 U.S. 70 (1973),** and **Lefkowitz v. Cunningham, 431 U.S. 801 (1977).**

3. The Garrity Warning

The typical Garrity Warning is stated as follows:

I wish to advise you that you are being questioned as part of an official investigation being conducted by the Employer. You will be asked questions specifically directed and narrowly related to the performance of your duties or your fitness for duty. You are entitled to all the rights and privileges guaranteed by the laws and the Constitution of this state and the Constitution of the United States, including the right not to be compelled to incriminate yourself. I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your duties or fitness for duty, you will be subject to disciplinary charges which could result in your dismissal from employment with the Employer. If you do answer, neither your statement nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceedings. However, these statements may be used against you in relation to subsequent disciplinary charges brought against you by the Employer.

This warning statement can and should be used with all employees, not just police officers.

4. Need for Affirmative Guarantee

The majority of the courts that have ruled on the question have held that the employer must give employees an affirmative guarantee of immunity from criminal prosecution before the employee can be compelled to answer. In other words, the warning and the guarantee must precede any questioning or else the employee may not be disciplined for refusing to testify.

5. Statements Under Oath

Employers should consider using sworn statements or affidavits when taking statements from employees. A sworn statement or affidavit is simply a statement which is taken after an oath has been administered by someone, like a notary public, who is empowered to do so. Requiring employees to swear under oath to the truth of their statements may

produce more honest statements and also sets up the employee for a charge or perjury or for disciplinary action if they lie under oath.

6. False Statements Made in an Investigation

The United States Supreme Court has reviewed adverse employment action taken against six federal government employees who were initially charged with misconduct and then were interviewed as part of the agency's investigation. The agency determined that the employees made false statements to it in the course of the investigation, and it then additionally charged the employees with making false statements.

In **LaChance V. Erickson, 118 S.Ct. 753 (1998)**, the Federal Circuit Court of Appeals held that the employees could not be punished for making false statements to the agency because they were not under oath. The Supreme Court rejected this analysis stating:

"The fact that respondents were not under oath, of course, negates a charge of perjury, but that is not the charge brought against them. They were charged with making false statements during the course of an agency investigation, a charge that does not require that the statements be made under oath. While the Court of Appeals would apparently permit the imposition if punishment for the former but not the latter, we fail to see how the presence or absence of an oath is material to the due process inquiry. . . . [W]e hold that a government agency may take adverse action against an employee because the employee made false statements in response to an underlying charge of misconduct." 118 S.Ct. At 756-757.

Arbitrators have applied a similar rule in grievance arbitration proceedings: **Furr's Inc., 88 LA 175 (Blum, 1986)**, (Arbitrator Blum upheld the discharge relying in large part upon the company's contention that the employee had "an obligation to cooperate with Management concerning any legitimate investigation and the Employer has the right to demand honesty from the employee." **88 LA at 177),** and in **Claridge Products & Equipment, 94 LA 1083 (Goodstein, 1990)** (an employee was terminated for lying to his employer in the course of an investigation. The grievant brought a tape recorder to work, and the Company found the recorder hidden in a supervisor's office, switched on to the "recording" position. When questioned, the employee claimed that he had left in the office for safekeeping. Ultimately, the employee was discharged for eavesdropping and dishonesty.)

D. Policies Applicable to Investigations

See **Sample Investigation Policy**

The following material is adapted from a paper written by Richard E. Bump, Caplan & Earnest, L.L.C., Boulder, Colorado, and Kelly Frels and Jeffrey J. Horner, Bracewell & Patterson, L.L.P., Houston, Texas. The paper is copyrighted by the National School Boards Association, 1680 Duke Street, Alexandria, Virginia 22314, and is used by permission of the NSBA. The paper can be found in "Termination of School Employees: Legal Issues and Techniques" (NSBA, 1997).

E. Structuring the Investigation

1. Interview those persons first who may not be available later, whose willingness to cooperate may diminish, or whose accurate recollection must be preserved *(e.g.*, an eyewitness).

2. Observe, photograph, and/or take control over things or locations which may not be available later or which may change.

3. Interview persons next who are perceived to have the most extensive or fundamental information (usually includes the complainant).

4. Interview those with less extensive information which is relevant but not critical.

5. Interview hostile witnesses near the end of the process.

6. Many feel it is advisable to interview the accused last.

7. In certain cases, it may be desirable to have the accuser confront the accused.

8. When using other investigative techniques, consider the following:

(a) whether the technique *(e.g.,* surveillance, undercover informant, drug/alcohol testing, sworn affidavit, search, etc.) is supported by justifiable reasons; what are these reasons; and which are the least intrusive to achieve the desired result, (b) wether the technique will supply a significant, necessary piece of evidence, (c) What will be done with the evidence, if secured, (d) whether the results of the technique are reliable, and (e) whether the technique will appear to the public and/or ultimate decision-maker to strike and maintain a fair balance between the rights of the employer and the rights of the employee, or whether it will appear to be oppressive.

F. Interviewing Witnesses

1. To put the witness at ease, consider interviewing at or near his or her area of work (one may want to do the opposite with the hostile witness).

2. Unless urgent, accommodate the person interviewed; *i.e.,* time of day/ week; interview during work hours (avoid interviews on Friday afternoon or close to the end of the workday unless it is necessary to accommodate the person).

3. Review the complainant and witnesses' personnel files as soon as possible, preferably before the interview; get a feel for the person's value system, credibility, and prior employment history.

4. Outline the questions and develop standard questions in advance of the interviews. On key questions, write them out and ask them the same way of each person. Avoid leading questions because they may result in answers which reconfirm the investigator's preconceived views.

5. Advise the witness of the degree to which the information can be kept in confidence. Generally, confidentiality can be maintained through the investigation, but confidentiality depends on the applicable law.

6. Consider using a tape-recorder instead of taking notes. If notes are taken, listen to the whole story once and then go over it again for note-taking purposes.

7. It is generally advisable to obtain a written statement from witnesses, if practicable. In so doing, whether written by the witness himself or herself or transcribed by the investigator, the following matters should be considered:

a. Concentrate on the *facts*, and avoid conclusions.

b. Statements should be prepared in the context of the first person, *e.g.,* "I saw, and he asked me to . . .. He gave me . . .."

c. Write out the narrative for signature by the witnesses. It is sometimes effective to ask the witnesses to write out a narrative in advance of the interview, then review it with them. This technique not only assures that witnesses will be available to testify and have their recollection refreshed as to what happened later, but also avoids allegations that the interviewer "put words in their mouths."

d. When a statement by a witness is to be signed, ask the person to read the statement, then confirm accuracy by asking such questions as: "Is this essentially what you said?" "Anything you would like to add or change?"

e. Get the statement signed and notarized, if possible. If the person refuses to sign, make a note that the witness refused.

f. If the employer wants to make the statement an affidavit, include a verification, *e.g.,* "Based upon my personal knowledge, the above facts are true and correct."

g. Have someone witness that the statement was taken and signed. This avoids later allegations that the person was coerced to sign, that the signature was forged, or that the interviewer put words in the person's mouth.

h. Be sure the witness has a person of the same sex to whom to complain in sexually-related cases, especially when claims of sexual harassment or alleged sexual abuse are involved.

G. Confronting the Accused

1. Plan the interview in advance. Like other interviews, the interviewer should outline or write out the questions or list the topics he or she will want to ask. This plan should not be so rigid that the investigator will risk losing spontaneity or being able to follow up with questions. The investigation plan and outline should serve as a checklist to assure that the investigator covered everything desired.

2. Complete as much of the investigation as possible beforehand. Organize and review all the evidence obtained to date.

3. Identify the key facts which require explanation.

4. Consider the time, place, and tone of the interview and the psychological dynamics.

5. Review the personnel file *in advance.* This helps evaluate a witness' penchant for truthfulness, identify previous or similar problems, and potential penalty if the investigation results in a finding of guilt.

6. Identify the applicable policies or rules involved in the complaint to determine what conduct may involve a violation.

7. Determine *before* the interview what the philosophy of the school district is concerning pursuing any available criminal charges against an employee.

8. Once a time and place has been selected, notify the employee (one or two days in advance) through his or her supervisor of the time, place, and purpose of the interview.

9. If the accused has the right to representation and has requested a representative, follow the **Weingarten** principles set out above. Even if the accused is not entitled to a representative, consider allowing a "representative" to be present at the interview, especially when the allegations, if true, could result in termination.

10. Avoid making decisions of guilt or what penalty might be applicable during the interview unless there is an admission by the employee.

11. Ensure that responses are voluntary and that the procedure and general atmosphere will appear fair if challenged and reviewed later by the board of education, court, jury, or arbitrator.

12. The interviewer must control his or her emotions; be courteous; avoid arguments; and do not get angry. The tone of the interview must be investigative, designed to discover. The tone should not be punitive, coercive, or adversarial.

13. The investigator should never make promises or representations that he or she can, will, or will not do something that cannot be delivered.

14. Avoid giving advice to the accused on what he or she should do.

15. Avoid making threats or giving an ultimatum. The investigator may and should, however, set deadlines and disclose what will happen next.

16. Do not be "cagey." Let the accused know the purpose of the meeting, what the charges or suspicions are, the evidence of the alleged wrongdoing, that investigation may result in disciplinary action, and (where appropriate) that the employer may be required to turn over information to police.

17. Do not physically prevent the accused from leaving the interview. (Employment consequences, however, may flow from the accused's failure to cooperate.)

18. Have a range of options ready for discontinuing the employment relationship and the authority to propose them to the accused. This interview may result in admissions of the wrongdoing, and the only remaining issue will become the ultimate penalty or disposition of the employment relationship.

19. If the employee is not on leave at the time, consider whether placing the accused on administrative leave is necessary during the completion of the investigation and until disposition. Ascertain who has authority to implement and direct such leave.

20. Preserve the opportunity for the person to maintain his or her personal

dignity.

H. Concluding the Investigation

1. Review policies to determine what action is available.

2. Treat alleged wrongdoer consistently with others who have engaged in similar misconduct.

3. Meet with the complainant. Inform of the complainant of the conclusion and the action to be taken.

4. Meet with accused. Inform the accused of the conclusion and the action to be taken.

5. If the investigation does not yield clear findings in either direction:

   a. advise the accused that the conduct complained of, if true, would constitute misconduct and that work place is being monitored to guard against such behavior, and

   b. advise the complainant to report future incidents immediately.

6. Meet with the complainant periodically to determine if there are any further problems.

SAMPLE POLICY REGARDING WORKPLACE PRIVACY AND SEARCHES

The Employer attempts to maintain equipment and supplies which permit work to be accomplished in the most efficient and effective manner possible. While employees are encouraged to use these items, it is important to understand that they are Employer property are only to be used for conducting Employer business.

As a part of your employment, a desk or work space may be made available to you. The desk and the work space are Employer property. Because the desk and the work space are Employer property, not your personal property, the desk and the work space are subject to being inspected by the Employer at any time, with or without notice to you.

The Employer assumes no responsibility or liability for any items of personal property which are placed in the desk or work space which is assigned to you.

The Employer may also provide you a telephone and/or a computer to perform your job. These items are also Employer property and may only be used to conduct Employer business. The Employer may enter and copy any computer file, may examine and copy any computer communication, may monitor and record any telephone communication, and may examine and copy or record any voice mail communication. Your continued employment with the Employer constitutes your consent to the interception and recording of any of these communications. To the extent that any computer or telecommunication activities are regulated by state or federal law, the Employer will observe all such regulations imposed upon it.

If the Employer conducts an examination or inspection under the terms of this policy, there will be at least two individuals present at the time of the examination or inspection.

SEARCH AND SEIZURE CHECKLIST

I. Which employer policy, rule, directive, or which statute do you believe has been violated:
_____
If none exists, identify the misconduct, the threat to the safety of persons, the threat to property, or the threat to the orderly operation of the workplace which is the cause for the search:_____
_____

II. What factors gave you a reasonable and articulable suspicion that the search of this employee would turn up evidence that the employee has violated or is violating the law, or employer policy, rules or regulations?

A. Eyewitness account.

1. By whom: _____
2. Date/Time: _____
3. Place: _____
4. What was seen: _____

B. Information from a reliable source.

1. From whom: _____
2. Time received: _____
3. How information was received: _____
4. Who received the information: _____
5. Describe information: _____
_____

C. Suspicious behavior? Explain.
_____
_____
_____

D. Employee's past history? Explain.
_____
_____
_____

E. Date and time of search: _____

F. Location of search: _____

G. Employee told purpose of search: _____

H. Consent of employee requested: _____

III. Was the search you conducted reasonable in terms of scope and intrusiveness?

A. What were you searching for: _____

B. Where did you search? _____

C. Nature of emergency, if any: _____

D. What type of search was being conducted: _____

E. Who conducted the search: _____
Position: _____

F. Witness(s): _____
_____

IV. Explanation of Search.

A. Describe the time and location of the search: _____
_____

B. Describe exactly what was searched: _____
_____

C. What did the search yield: _____

D. What was seized: _____

E. Were any materials turned over to law enforcement officials? _____
_____

F. Were items that were seized marked and placed in a secure location and was information concerning the items recorded in the evidence log:
_____

SAMPLE POLICY CONCERNING INVESTIGATIONS

All employees are required to fully cooperate with any member of management who is conducting a work-related investigation. Employees will be disciplined for lying to any member of management, or providing information to any member of management which is dishonest, misleading, inaccurate, or incomplete.

Employees will also be disciplined for impeding, obstructing, or failing to cooperate with an inquiry or investigation conducted by any member of management. "Obstructing" includes, but is not limited to, threatening, intimidating, or coercing other individuals who may be contacted by management, and discouraging other individuals who may be contacted by management from responding to or cooperating with management. "Failing to cooperate" includes, but is not limited to, failing to provide information, documents, or materials requested by management, and providing information, documents, or materials to management which are dishonest, misleading, inaccurate, or incomplete.