

# **Table of Contents**

## **PART I. PROBLEMS OF EMPLOYEE PRIVACY**

### **CHAPTER 1. INTRODUCTION: EMPLOYEE PRIVACY RIGHTS AND MANAGEMENT'S NEED FOR PRIVATE INFORMATION**

- § 1:1 Employer actions that implicate privacy interests of employees
- § 1:2 Employer justifications for intrusive actions
- § 1:3 Need for recognition of right of employee privacy
- § 1:4 Importance of right of employee privacy
- § 1:5 Scope of this book

## **PART II. SUBSTANCE ABUSE IN THE WORKPLACE**

### **CHAPTER 2. DRUG TESTING AS A RESPONSE TO EMPLOYEE DRUG USE**

- § 2:1 Drug usage in society and among employees
- § 2:2 Effect of drug use by employees
- § 2:3 Extent of drug testing in employment
- § 2:4 Methods of drug testing
- § 2:5 Effectiveness of employee drug testing
- § 2:6 Economic and human costs of drug testing

### **CHAPTER 3. PUBLIC SECTOR DRUG TESTING**

#### **I. HISTORY OF PUBLIC SECTOR DRUG TESTING**

- § 3:1 Early uses of drug testing in public sector
- § 3:2 Executive Order No. 12,564

## II. CONSTITUTIONALITY OF PUBLIC SECTOR DRUG TESTING

### A. FOURTH AMENDMENT CHALLENGES TO DRUG TESTING

#### 1. Court Consideration of Public Sector Drug Testing

- § 3:3 Elements of Fourth Amendment challenges to drug testing by public sector employers
- § 3:4 Early Fourth Amendment challenges to drug testing
- § 3:5 *Skinner v. Railway Labor Executives Ass'n*
- § 3:6 *National Treasury Employees Union v. Von Raab*
- § 3:7 Implications of *Skinner* and *Von Raab*
- § 3:8 Lower court application of *Skinner* and *Von Raab*
- § 3:9 *Vernonia School District 47J v. Acton*
- § 3:10 Implications of *Acton*
- § 3:11 Lower court application of *Acton*
- § 3:12 *Chandler v. Miller*
- § 3:13 Implications of *Chandler*
- § 3:14 Lower court application of *Chandler*

#### 2. Validity of Different Types of Drug Testing

- § 3:15 Pre-employment testing
- § 3:16 Routine periodic testing
- § 3:17 Random testing
- § 3:18 Post-accident testing
- § 3:19 Testing based on reasonable suspicion

#### 3. Details of Particular Drug Testing Programs

- § 3:20 Need for particular drug testing program
- § 3:21 Protections to privacy afforded by testing program
- § 3:22 Accuracy of testing procedures
- § 3:23 Proper application of Fourth Amendment analysis to public sector drug testing

### B. OTHER CONSTITUTIONAL CHALLENGES TO DRUG TESTING

- § 3:24 Equal protection challenges to drug testing
- § 3:25 Drug testing as violation of right against self-incrimination
- § 3:26 First Amendment implications of drug testing
- § 3:27 Due process challenges to drug testing
- § 3:28 Challenges to drug testing as violation of right to privacy

## TABLE OF CONTENTS

### **III. STATUTORY AND REGULATORY CONTROL OF PUBLIC SECTOR DRUG TESTING**

- § 3:29 Drug testing and Rehabilitation Act of 1973
- § 3:30 Drug testing under Americans with Disabilities Act of 1990
- § 3:31 Drug-Free Workplace Act of 1988
- § 3:32 Omnibus Transportation Employee Testing Act of 1991
- § 3:33 Health and Human Services Mandatory Guidelines for Federal Workplace Drug Testing Programs
- § 3:34 State statutes concerning drug testing in public employment

### **CHAPTER 4. PRIVATE SECTOR DRUG TESTING**

#### **I. STATUTORY REGULATION OF DRUG TESTING IN EMPLOYMENT**

- § 4:1 Federal legislation relevant to private sector drug testing
- § 4:2 Drug-Free Workplace Act of 1998
- § 4:3 Title VII of Civil Rights Act of 1964
- § 4:4 State statutes concerning drug testing in private employment
- § 4:5 Other statutory regulation of or restrictions on drug testing in employment

#### **II. COMMON LAW RESTRICTIONS ON EMPLOYER DRUG TESTING**

- § 4:6 Need to rely on common law challenges to drug testing
- § 4:7 Invasion of privacy
- § 4:8 Defamation
- § 4:9 Intentional or negligent infliction of emotional distress
- § 4:10 Negligence in testing process
- § 4:11 Wrongful discharge based on violation of public policy
- § 4:12 Breach of covenant of good faith and fair dealing
- § 4:13 Breach of employment contract based on employee handbook or other employment policies
- § 4:14 Drug test results or refusal to be tested as grounds for discharge
- § 4:15 Other challenges to drug testing
- § 4:16 Denial of unemployment compensation benefits for positive drug test results

### **CHAPTER 4A. STATE DRUG TESTING LAWS**

- § 4A:1 Generally

§ 4A:2	Alabama
§ 4A:3	Alaska
§ 4A:4	Arizona
§ 4A:5	Arkansas
§ 4A:6	California
§ 4A:7	Colorado
§ 4A:8	Connecticut
§ 4A:9	Delaware
§ 4A:10	District of Columbia
§ 4A:11	Florida
§ 4A:12	Georgia
§ 4A:13	Hawaii
§ 4A:14	Idaho
§ 4A:15	Illinois
§ 4A:16	Indiana
§ 4A:17	Iowa
§ 4A:18	Kansas
§ 4A:19	Kentucky
§ 4A:20	Louisiana
§ 4A:21	Maine
§ 4A:22	Maryland
§ 4A:23	Massachusetts
§ 4A:24	Michigan
§ 4A:25	Minnesota
§ 4A:26	Mississippi
§ 4A:27	Missouri
§ 4A:28	Montana
§ 4A:29	Nebraska
§ 4A:30	Nevada
§ 4A:31	New Hampshire
§ 4A:32	New Jersey
§ 4A:33	New Mexico
§ 4A:34	North Carolina
§ 4A:35	North Dakota
§ 4A:36	Ohio
§ 4A:37	Oklahoma
§ 4A:38	Oregon
§ 4A:39	Pennsylvania
§ 4A:40	Rhode Island
§ 4A:41	South Carolina
§ 4A:42	South Dakota
§ 4A:43	Tennessee
§ 4A:44	Texas
§ 4A:45	Utah
§ 4A:46	Vermont
§ 4A:47	Virginia

## TABLE OF CONTENTS

- § 4A:48 Washington
- § 4A:49 West Virginia
- § 4A:50 Wisconsin

## **CHAPTER 5. UNIONIZED EMPLOYER DRUG TESTING**

### **I. SPECIAL ISSUES CONCERNING DRUG TESTING BY UNIONIZED EMPLOYERS**

- § 5:1 Considerations of unionized employers in adopting drug testing programs
- § 5:2 Union attitudes toward drug testing

### **II. EMPLOYER'S DUTY TO BARGAIN OVER DRUG TESTING**

- § 5:3 National Labor Relations Act
- § 5:4 —Drug testing as “term and condition of employment”
- § 5:5 Railway Labor Act
- § 5:6 —Drug testing as “major” or “minor” dispute

### **III. PREEMPTION OF STATE LAW CLAIMS REGARDING DRUG TESTING BY FEDERAL LABOR LAW**

- § 5:7 Labor Management Relations Act
- § 5:8 National Labor Relations Act
- § 5:9 Railway Labor Act

### **IV. ARBITRATION OF DRUG TESTING CASES**

- § 5:10 Injunctions against drug testing programs pending arbitration
- § 5:11 Arbitral treatment of drug testing grievances
- § 5:12 Pre-employment drug testing
- § 5:13 Random drug testing
- § 5:14 Post-accident drug testing
- § 5:15 Periodic drug testing
- § 5:16 Drug testing as follow-up to treatment or rehabilitation for drug use
- § 5:17 Drug testing based on reasonable suspicion
- § 5:18 Accuracy of drug testing results
- § 5:19 Privacy implications of drug testing
- § 5:20 Concern with off-duty drug use and on-duty impairment
- § 5:21 Discipline for positive drug test results
- § 5:22 Discipline for refusal to submit to drug testing

- § 5:23 Discipline for attempts to interfere with drug testing
- § 5:24 Challenges to enforcement of arbitration awards  
dealing with drug testing or drug use
- § 5:25 Challenges to union failure to pursue grievances based  
on drug use or positive drug tests

## **PART III. HONESTY IN THE WORKPLACE**

### **CHAPTER 6. POLYGRAPH TESTING**

#### **I. USE OF LIE DETECTION DEVICES IN EMPLOYMENT**

- § 6:1 History of lie detection devices
- § 6:2 Types of “modern” lie detection devices
- § 6:3 Uses of polygraph examinations in employment
- § 6:4 Methods of polygraph examination
- § 6:5 Employer justifications for polygraph use
- § 6:6 Validity and utility of polygraph

#### **II. CONSTITUTIONAL RESTRICTIONS ON PUBLIC SECTOR EMPLOYER USE OF POLYGRAPH TESTS**

- § 6:7 Importance of constitutional challenges to polygraph  
testing
- § 6:8 Polygraph testing as violation of right against  
self-incrimination
- § 6:9 Polygraph testing as violation of constitutional right to  
privacy
- § 6:10 Equal protection challenges to polygraph testing
- § 6:11 Due process challenges to polygraph testing

#### **III. STATUTORY REGULATION OF POLYGRAPH TESTING BY EMPLOYERS**

##### **A. FEDERAL STATUTES REGULATING POLYGRAPH USE**

- § 6:12 Employee Polygraph Protection Act of 1988
- § 6:13 Limited exemption for ongoing investigations of  
economic loss or injury
- § 6:14 Limited exemption for security services
- § 6:15 Limited exemption for drug manufacturers and  
distributors
- § 6:16 Requirements for limited exemptions from Employee  
Polygraph Protection Act of 1988

## TABLE OF CONTENTS

- § 6:17 Limitations on disclosure of polygraph results
- § 6:18 Preemptive effect of Employee Polygraph Protection Act of 1988 on state laws
- § 6:19 Title VII of Civil Rights Act of 1964
- § 6:20 Americans with Disabilities Act of 1990

### B. STATE REGULATION OF POLYGRAPH USE IN EMPLOYMENT

- § 6:21 In general
- § 6:22 Alabama
- § 6:23 Alaska
- § 6:24 Arizona
- § 6:25 Arkansas
- § 6:26 California
- § 6:27 Connecticut
- § 6:28 Delaware
- § 6:29 District of Columbia
- § 6:30 Georgia
- § 6:31 Hawaii
- § 6:32 Idaho
- § 6:33 Illinois
- § 6:34 Indiana
- § 6:35 Iowa
- § 6:36 Kentucky
- § 6:37 Louisiana
- § 6:38 Maine
- § 6:39 Maryland
- § 6:40 Massachusetts
- § 6:41 Michigan
- § 6:42 Minnesota
- § 6:43 Mississippi
- § 6:44 Montana
- § 6:45 Nebraska
- § 6:46 Nevada
- § 6:47 New Jersey
- § 6:48 New Mexico
- § 6:49 New York
- § 6:50 North Dakota
- § 6:51 Ohio
- § 6:52 Oklahoma
- § 6:53 Oregon
- § 6:54 Pennsylvania
- § 6:55 Rhode Island
- § 6:56 South Carolina
- § 6:57 South Dakota
- § 6:58 Tennessee

- § 6:59 Texas
- § 6:60 Utah
- § 6:61 Vermont
- § 6:62 Virginia
- § 6:63 Washington
- § 6:64 West Virginia
- § 6:65 Wisconsin

#### **IV. COMMON LAW RESTRICTIONS ON POLYGRAPH TESTING BY EMPLOYERS**

- § 6:66 State claims challenging use of polygraphs
- § 6:67 Polygraph testing as invasion of privacy
- § 6:68 Challenges to polygraph testing as intentional infliction of emotional distress
- § 6:69 Defamation claims based on polygraph testing
- § 6:70 Negligence claims based on polygraph testing
- § 6:71 Polygraph testing as assault and battery or false imprisonment
- § 6:72 Polygraph testing as violation of public policy supporting wrongful discharge action
- § 6:73 Polygraph test results or refusal to submit to polygraph testing as grounds for discharge
- § 6:74 Other state law claims challenging employer use of polygraph testing
- § 6:75 Refusal to submit to polygraph testing or polygraph test results as grounds for denying unemployment compensation benefits

#### **V. RESTRICTIONS ON POLYGRAPH USE BY UNIONIZED EMPLOYERS**

- § 6:76 Special considerations of unionized employers with respect to polygraph testing
- § 6:77 Employer's duty to bargain over polygraph testing—National Labor Relations Act
- § 6:78 —Railway Labor Act
- § 6:79 Preemption of state law claims regarding polygraph testing by federal labor law
- § 6:80 Arbitration cases involving employer use of polygraph testing
- § 6:81 Reasonableness of polygraph testing
- § 6:82 Refusal to submit to polygraph testing—Grounds for discharge
- § 6:83 —Evidence of guilt
- § 6:84 Admissibility and weight to be given to polygraph test results



TABLE OF CONTENTS

**CHAPTER 7. PSYCHOLOGICAL AND  
HONESTY TESTING**

**I. USE OF PSYCHOLOGICAL AND HONESTY  
TESTING IN EMPLOYMENT**

- § 7:1 Purpose of psychological and honesty testing
- § 7:2 Extent of and employer justification for use of  
psychological and honesty testing
- § 7:3 Validity of psychological and honesty testing in  
employment
- § 7:4 Economic and human costs of employer use of  
psychological testing

**II. CONSTITUTIONALITY OF PSYCHOLOGICAL  
AND HONESTY TESTING**

- § 7:5 Psychological testing as violation of the Fourth  
Amendment
- § 7:6 Employer use of psychological or honesty testing as  
violation of First Amendment freedom of speech
- § 7:7 Psychological testing as violation of freedom of belief
- § 7:8 Psychological testing and honesty testing as violation  
of right to privacy
- § 7:9 Due process challenges to psychological testing
- § 7:10 Challenges to psychological testing as a violation of  
equal protection
- § 7:11 Constitutional challenges based on employer's failure  
to conduct or act on results of psychological testing

**III. STATUTORY REGULATION OF  
PSYCHOLOGICAL AND HONESTY TESTING**

- § 7:12 Federal statutes relevant to employer use of  
psychological and honesty testing
- § 7:13 Employee Polygraph Protection Act of 1988
- § 7:14 Title VII of Civil Rights Act of 1964
- § 7:15 42 U.S.C.A. § 1983
- § 7:16 Americans with Disabilities Act of 1990
- § 7:17 State regulation of psychological and honesty testing
- § 7:18 Alaska
- § 7:19 California
- § 7:20 Connecticut
- § 7:21 Delaware
- § 7:22 Florida
- § 7:23 Hawaii
- § 7:24 Illinois
- § 7:25 Indiana

- § 7:26 Kansas
- § 7:27 Massachusetts
- § 7:28 Michigan
- § 7:29 Minnesota
- § 7:30 Nevada
- § 7:31 New Hampshire
- § 7:32 Ohio
- § 7:33 Oklahoma
- § 7:34 Rhode Island
- § 7:35 Texas
- § 7:36 Washington
- § 7:37 West Virginia
- § 7:38 Wisconsin

#### **IV. COMMON LAW CHALLENGES TO PSYCHOLOGICAL AND HONESTY TESTING**

- § 7:39 Types of common law challenges that can be made to use of psychological or honesty testing
- § 7:40 Challenges to discharges or discipline based on results of or refusal to submit to psychological or honesty testing
- § 7:41 Employer use of psychological or honesty testing as an invasion of privacy
- § 7:42 Other common law challenges to use of psychological or honesty testing

#### **V. RESTRICTIONS ON USE OF PSYCHOLOGICAL AND HONESTY TESTING BY UNIONIZED EMPLOYERS**

- § 7:43 Special duties of unionized employers with respect to psychological and honesty testing
- § 7:44 Employer's duty to bargain over psychological or honesty testing
- § 7:45 Challenges to psychological or honesty testing as revealing evidence of union bias or sympathy
- § 7:46 Preemption of state law claims regarding psychological or honesty testing by federal labor law
- § 7:47 Arbitration cases involving use of psychological or honesty testing

### **CHAPTER 8. SEARCHES OF EMPLOYEES AND PROPERTY**

#### **I. WORKPLACE SEARCHES**

- § 8:1 Types of searches conducted by employers and interests implicated by those searches

## TABLE OF CONTENTS

§ 8:2 Employer justifications for conducting searches

## **II. CONSTITUTIONAL CHALLENGES TO SEARCHES BY PUBLIC SECTOR EMPLOYERS**

### **A. EMPLOYER SEARCHES AS FOURTH AMENDMENT VIOLATIONS**

- § 8:3 Elements of Fourth Amendment challenges to employer searches
- § 8:4 *O'Connor v. Ortega*
- § 8:5 Lower court application of *O'Connor v. Ortega*
- § 8:6 Searches of employer property in which employees have interest
- § 8:7 Searches of employee property within and outside of workplace
- § 8:8 Searches of persons of employees
- § 8:9 Effect of regulations or agreements providing for employer searches
- § 8:10 Application of exclusionary rule in actions challenging adverse employment actions based on employer searches

### **B. OTHER CONSTITUTIONAL CHALLENGES TO EMPLOYER SEARCHES**

- § 8:11 Employer searches as violation of constitutional right to privacy

## **III. COMMON LAW CHALLENGES TO EMPLOYER SEARCHES**

- § 8:12 Need of employees to rely on common law challenges to employee searches
- § 8:13 Employer searches as invasion of privacy
- § 8:14 Challenges to employer searches as intentional infliction of emotional distress
- § 8:15 Employer searches as false imprisonment
- § 8:16 Employer searches as defamation
- § 8:17 Employer searches as providing grounds for denial of unemployment compensation benefits

## **IV. SEARCHES BY UNIONIZED EMPLOYERS**

### **A. EMPLOYER DUTY TO NEGOTIATE OVER POLICY OF CONDUCTING SEARCHES**

- § 8:18 Unilateral Employer Action Under National Labor Relations Act
- § 8:19 Unilateral Employer Action Under Railway Labor Act

**B. PREEMPTION OF COMMON LAW  
CHALLENGES TO EMPLOYER SEARCHES BY  
FEDERAL LABOR LAW**

§ 8:20 Preemption Under the Labor Management Relations  
Act and National Labor Relations Act

§ 8:21 Preemption Under the Railway Labor Act

**C. ARBITRATION DECISIONS DEALING WITH  
EMPLOYER SEARCHES**

§ 8:22 Arbitral treatment of employer searches

§ 8:23 Searches of employer property provided for employee  
use

§ 8:24 Searches of employee property in workplace

§ 8:25 Searches of employee property outside of workplace

§ 8:26 Searches of persons of employees in workplace

§ 8:27 Existence of collective bargaining agreement provisions  
or employer policy relating to employer searches

# **Table of Contents**

## **PART III. HONESTY IN THE WORKPLACE (CONTINUED)**

### **CHAPTER 8A. ELECTRONIC MONITORING AND SURVEILLANCE**

#### **I. EMPLOYER USE OF ELECTRONIC MONITORING AND SURVEILLANCE**

- § 8A:1 Methods and extent of employer use of electronic monitoring and surveillance
- § 8A:2 Employer justifications for use of electronic monitoring and surveillance
- § 8A:3 Benefits and costs of employer use of electronic monitoring and surveillance

#### **II. CONSTITUTIONAL RESTRICTIONS ON ELECTRONIC MONITORING AND SURVEILLANCE**

##### **A. ELECTRONIC SURVEILLANCE AND MONITORING AS A VIOLATION OF FOURTH AMENDMENT**

- § 8A:4 Fourth Amendment implications of employer monitoring and surveillance
- § 8A:5 Video surveillance of employees
- § 8A:6 Electronic monitoring of employee communications
- § 8A:7 Other electronic monitoring of employee conduct
- § 8A:8 Computer monitoring of employees
- § 8A:9 Effect of employer policy or practice of monitoring

##### **B. OTHER CONSTITUTIONAL CHALLENGES TO ELECTRONIC MONITORING OR SURVEILLANCE**

- § 8A:10 Electronic surveillance or monitoring as violation of constitutional right to privacy
- § 8A:11 First Amendment implications of electronic monitoring and surveillance

### **III. STATUTORY REGULATION OF ELECTRONIC MONITORING AND SURVEILLANCE**

#### **A. FEDERAL REGULATION OF ELECTRONIC MONITORING AND SURVEILLANCE**

- § 8A:12 Omnibus Crime Control and Safe Streets Act of 1968
- § 8A:13 —Definition of oral, wire, and electronic communications
- § 8A:14 —Restrictions imposed by Omnibus Crime Control and Safe Streets Act
- § 8A:15 —“Consent” exemption for monitoring of communications
- § 8A:16 —“Ordinary course of business” exemption
- § 8A:17 —Exemption for provider of wire or electronic communication service
- § 8A:18 —Access to stored electronic communications
- § 8A:19 —Disclosure of stored electronic communications by service provider
- § 8A:20 USA Patriot Act

#### **B. STATE STATUTES REGULATING ELECTRONIC MONITORING AND SURVEILLANCE**

- § 8A:21 State statutes indirectly regulating employer use of electronic monitoring or surveillance
- § 8A:22 State statutes dealing with electronic monitoring and surveillance
- § 8A:23 Arkansas
- § 8A:24 California
- § 8A:25 Colorado
- § 8A:26 Connecticut
- § 8A:27 Delaware
- § 8A:28 Illinois
- § 8A:29 Louisiana
- § 8A:30 Maine
- § 8A:31 Maryland
- § 8A:32 Michigan
- § 8A:33 Missouri
- § 8A:34 Montana
- § 8A:35 Nebraska
- § 8A:36 Nevada
- § 8A:37 New Hampshire
- § 8A:38 New Jersey
- § 8A:39 New Mexico
- § 8A:40 New York
- § 8A:41 Oklahoma
- § 8A:42 Oregon

## TABLE OF CONTENTS

§ 8A:43	Rhode Island
§ 8A:44	South Dakota
§ 8A:45	Tennessee
§ 8A:46	Utah
§ 8A:47	Vermont
§ 8A:48	Virginia
§ 8A:49	Washington
§ 8A:50	West Virginia
§ 8A:51	Wisconsin

### **IV. COMMON-LAW RESTRICTIONS ON ELECTRONIC MONITORING AND SURVEILLANCE**

§ 8A:52	Electronic monitoring and surveillance as intentional infliction of emotional distress
§ 8A:53	Electronic monitoring and surveillance as invasion of privacy
§ 8A:54	Use of electronic surveillance in connection with worker's compensation or disability claims
§ 8A:55	Other common-law challenges to employer use of electronic monitoring or surveillance
§ 8A:56	Claims of waiver of attorney-client privilege to electronic communications by present and former employees

### **V. ELECTRONIC MONITORING AND SURVEILLANCE BY UNIONIZED EMPLOYERS**

#### **A. UNION ATTITUDES AND APPROACHES TO ELECTRONIC MONITORING AND SURVEILLANCE**

§ 8A:57	Union positions on electronic monitoring and surveillance
---------	---

#### **B. EMPLOYERS' DUTY TO NEGOTIATE OVER ELECTRONIC MONITORING AND SURVEILLANCE**

§ 8A:58	National Labor Relations Act
§ 8A:59	Railway Labor Act

#### **C. PREEMPTION OF COMMON-LAW CHALLENGES TO EMPLOYER MONITORING AND SURVEILLANCE BY FEDERAL LABOR LAW**

§ 8A:60	Labor Management Relations Act
---------	--------------------------------

§ 8A:61 Railway Labor Act

**D. ARBITRATION DECISIONS DEALING WITH  
EMPLOYER MONITORING AND  
SURVEILLANCE**

§ 8A:62 Arbitral treatment of employer monitoring and  
surveillance

§ 8A:63 Challenges to employer policies of electronic  
monitoring or surveillance

§ 8A:64 Challenges to employer discipline based on electronic  
surveillance or monitoring

**PART IV. SEXUAL AND  
REPRODUCTIVE PRIVACY IN  
THE WORKPLACE**

**CHAPTER 9. DISCRIMINATION BASED ON  
SEXUAL ORIENTATION AND GENDER  
IDENTITY**

**I. EMPLOYER POLICIES RELATING TO SEXUAL  
ORIENTATION AND GENDER IDENTITY**

§ 9:1 Employer justifications for discrimination on the basis  
of sexual orientation

§ 9:2 Employer justifications for discrimination on the basis  
of gender identity

§ 9:3 Effects of discrimination based on sexual orientation  
and gender identity

§ 9:4 Prevalence of employment discrimination based on  
sexual orientation and gender identity

**II. CONSTITUTIONAL RESTRICTIONS ON SEXUAL  
ORIENTATION AND GENDER IDENTITY  
DISCRIMINATION BY PUBLIC SECTOR  
EMPLOYERS**

§ 9:5 Sexual orientation and gender identity discrimination  
as violation of right to privacy

§ 9:6 Sexual orientation and gender identity discrimination  
as violation of equal protection

§ 9:7 Deprivation of liberty interests without due process in  
discrimination based on sexual orientation and  
gender identity

§ 9:8 Discrimination based on sexual orientation and gender  
identity as deprivation of property interests without  
due process



## TABLE OF CONTENTS

- § 9:9 Disclosure of sexual orientation and gender identity as protected speech under First Amendment
- § 9:10 Condemnation of homosexuality and transgender status as protected speech under First Amendment
- § 9:11 Discrimination on basis of sexual orientation and gender identity as violation of First Amendment right to freedom of association
- § 9:12 Freedom of religion implications of sexual orientation and gender identity discrimination

### **III. STATUTES REGULATING DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY**

#### **A. FEDERAL STATUTES RELEVANT TO DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY**

- § 9:13 Title VII of Civil Rights Act of 1964
- § 9:14 42 U.S.C.A. § 1983
- § 9:15 42 U.S.C.A. § 1985(3)
- § 9:16 Rehabilitation Act of 1973
- § 9:17 Americans with Disabilities Act of 1990

#### **B. STATE STATUTES AND REGULATIONS RESTRICTING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY**

- § 9:18 Status of state regulation of discrimination based on sexual orientation and gender identity
- § 9:19 Alaska
- § 9:20 Arizona
- § 9:21 Arkansas
- § 9:22 California
- § 9:23 Colorado
- § 9:24 Connecticut
- § 9:25 Delaware
- § 9:26 District of Columbia
- § 9:27 Hawaii
- § 9:28 Illinois
- § 9:29 Iowa
- § 9:30 Kentucky
- § 9:31 Maine
- § 9:32 Maryland
- § 9:33 Massachusetts
- § 9:34 Michigan
- § 9:35 Minnesota

- § 9:36 Mississippi
- § 9:37 Missouri
- § 9:38 Montana
- § 9:39 Nevada
- § 9:40 New Hampshire
- § 9:41 New Jersey
- § 9:42 New Mexico
- § 9:43 New York
- § 9:44 North Carolina
- § 9:45 North Dakota
- § 9:46 Ohio
- § 9:47 Oregon
- § 9:48 Pennsylvania
- § 9:49 Rhode Island
- § 9:50 Tennessee
- § 9:51 Utah
- § 9:52 Vermont
- § 9:53 Virginia
- § 9:54 Washington
- § 9:55 West Virginia
- § 9:56 Wisconsin

#### **IV. COMMON-LAW CHALLENGES TO DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY**

- § 9:57 Availability of common-law claims to challenge employer discrimination based on sexual orientation or gender identity
- § 9:58 Discrimination based on sexual orientation or gender identity as violation of public policy
- § 9:59 Inquiries concerning sexual orientation and homosexual activity or gender identity as invasion of privacy
- § 9:60 Discrimination based on sexual orientation or gender identity as intentional or negligent infliction of emotional distress
- § 9:61 Unemployment compensation benefits after termination based on sexual orientation or gender identity

#### **V. CONTRACTUAL LIMITATIONS ON EMPLOYER DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY**

- § 9:62 Effect of non-discrimination policies of non-unionized private sector employers
- § 9:63 Collective bargaining provisions prohibiting

## TABLE OF CONTENTS

- discrimination based on sexual orientation and gender identity
- § 9:64 Treatment of sexual orientation or gender identity discrimination under “just cause” provisions of collective bargaining agreements
- § 9:65 Preemptive effect of federal labor law on state common-law claims for sexual orientation discrimination and gender identity

## CHAPTER 10. FETAL VULNERABILITY POLICIES

### I. EMPLOYER POLICIES BASED ON PROTECTION FOR EMPLOYEE OFFSPRING OR REPRODUCTIVE CAPACITY

- § 10:1 Workplace reproductive hazards
- § 10:2 Employer policies relating to fetal vulnerability and reproductive capacity
- § 10:3 Costs and benefits of employer policies excluding women from hazardous workplace conditions

### II. LEGAL STATUS OF FETAL VULNERABILITY POLICIES

#### A. CONSTITUTIONAL RESTRICTIONS ON FETAL VULNERABILITY POLICIES

- § 10:4 Need for constitutional challenges to fetal vulnerability policies
- § 10:5 Fetal vulnerability policies as violation of constitutional right to privacy
- § 10:6 Fourth Amendment challenges to fetal vulnerability policies

#### B. STATUTORY RESTRICTIONS ON FETAL VULNERABILITY POLICIES

##### 1. Title VII of Civil Rights Act of 1964

- § 10:7 Historical treatment of protectionist employer practices
- § 10:8 Application of Title VII analysis to fetal vulnerability policies
- § 10:9 Lower court treatment of challenges to fetal vulnerability policies before *Johnson Controls*
- § 10:10 Position of Equal Employment Opportunity Commission on fetal vulnerability policies
- § 10:11 *International Union, United Automobile Workers of America v. Johnson Controls, Inc.*

- § 10:12 —Implications of Supreme Court's decision
- § 10:13 —Lower courts' application of Supreme Court's decision

## 2. Occupational Safety and Health Act

- § 10:14 Role of Occupational Safety and Health Administration concerning reproductive hazards
- § 10:15 Occupational Safety and Health Act as limitation on fetal vulnerability policies

## 3. State Statutes Regulating Fetal Vulnerability Policies

- § 10:16 State anti-discrimination statutes
- § 10:17 State statutes dealing specifically with reproductive hazards
- § 10:18 —California
- § 10:19 —Connecticut

## C. COMMON-LAW CLAIMS RELATING TO FETAL VULNERABILITY

- § 10:20 Employer actions concerning fetal vulnerability as intentional infliction of emotional distress
- § 10:21 Claims for prenatal injuries or death resulting from workplace exposures or injuries after *Johnson Controls*
- § 10:22 Breach of contract claims based on employer's policies concerning fetal vulnerability

# PART V. MEDICAL SCREENING IN THE WORKPLACE

## CHAPTER 11. AIDS AND HIV TESTING

### I. PROBLEM OF AIDS AND HIV INFECTION IN THE WORKPLACE

- § 11:1 HIV virus and AIDS
- § 11:2 AIDS dementia complex
- § 11:3 Prevalence of AIDS and HIV infection
- § 11:4 Methods of transmission of HIV virus
- § 11:5 Workplace risks posed by AIDS and HIV infection
- § 11:6 Employer responses to AIDS and HIV infection

### II. TESTING FOR HIV VIRUS

- § 11:7 Methods of testing for AIDS and HIV infection

## TABLE OF CONTENTS

- § 11:8 Benefits and costs of employer use of HIV testing
- § 11:9 Prevalence of employer use of HIV testing

### **III. CONSTITUTIONAL LIMITATIONS ON HIV TESTING BY PUBLIC SECTOR EMPLOYERS**

- § 11:10 Employer use of HIV testing as violation of Fourth Amendment
- § 11:11 Challenges to employer use of HIV testing as violation of constitutional right to privacy
- § 11:12 Discrimination based on HIV status or AIDS as denial of equal protection

### **IV. STATUTORY RESTRICTIONS ON EMPLOYER USE OF HIV TESTING AND DISCRIMINATION BASED ON AIDS**

#### **A. FEDERAL STATUTES RELATING TO AIDS AND HIV TESTING**

- § 11:13 Guidelines for prevention of transmission of human immunodeficiency and hepatitis B viruses during invasive procedures
- § 11:14 Rehabilitation Act of 1973
- § 11:15 Americans with Disabilities Act of 1990
- § 11:16 Occupational Safety and Health Act
- § 11:17 Title VII of the Civil Rights Act of 1964

#### **B. STATE STATUTES RELEVANT TO AIDS AND HIV TESTING**

##### **1. State Statutes Dealing Expressly With AIDS or HIV Testing in the Workplace**

- § 11:18 In general
- § 11:19 Alabama
- § 11:20 Arizona
- § 11:21 California
- § 11:22 Colorado
- § 11:23 Connecticut
- § 11:24 Delaware
- § 11:25 Florida
- § 11:26 Georgia
- § 11:27 Hawaii
- § 11:28 Illinois
- § 11:29 Iowa
- § 11:30 Kansas
- § 11:31 Kentucky
- § 11:32 Louisiana

§ 11:33	Maine
§ 11:34	Massachusetts
§ 11:35	Michigan
§ 11:36	Minnesota
§ 11:37	Missouri
§ 11:38	Montana
§ 11:39	Nebraska
§ 11:40	Nevada
§ 11:41	New Hampshire
§ 11:42	New Jersey
§ 11:43	New Mexico
§ 11:44	New York
§ 11:45	North Carolina
§ 11:46	North Dakota
§ 11:47	Ohio
§ 11:48	Oklahoma
§ 11:49	Oregon
§ 11:50	Pennsylvania
§ 11:51	Rhode Island
§ 11:52	Texas
§ 11:53	Vermont
§ 11:54	Virginia
§ 11:55	Washington
§ 11:56	West Virginia
§ 11:57	Wisconsin

## 2. State Anti-Discrimination Statutes Relevant to AIDS and HIV Infection

§ 11:58	In general
§ 11:59	Alaska
§ 11:60	Arizona
§ 11:61	Arkansas
§ 11:62	California
§ 11:63	Colorado
§ 11:64	Connecticut
§ 11:65	District of Columbia
§ 11:66	Georgia
§ 11:67	Hawaii
§ 11:68	Illinois
§ 11:69	Indiana
§ 11:70	Kansas
§ 11:71	Louisiana
§ 11:72	Maine
§ 11:73	Maryland
§ 11:74	Massachusetts
§ 11:75	Michigan

## TABLE OF CONTENTS

§ 11:76	Minnesota
§ 11:77	Missouri
§ 11:78	New Mexico
§ 11:79	New York
§ 11:80	North Carolina
§ 11:81	Oklahoma
§ 11:82	Oregon
§ 11:83	Pennsylvania
§ 11:84	Tennessee
§ 11:85	Utah
§ 11:86	Virginia
§ 11:87	West Virginia
§ 11:88	Wisconsin

## **V. COMMON LAW CHALLENGES TO EMPLOYER USE OF HIV TESTING AND EMPLOYER DISCRIMINATION BASED ON AIDS**

§ 11:89	Common law claims applicable to AIDS or HIV infection
§ 11:90	Discrimination based on AIDS as wrongful discharge in violation of public policy
§ 11:91	Violations of common law right to privacy based on HIV testing or disclosure of HIV status
§ 11:92	Intentional infliction of emotional distress claims relating to AIDS and HIV
§ 11:93	Denial of unemployment compensation benefits for failing to disclose HIV status to employer
§ 11:94	Disclosure of HIV status in connection with claims for worker's compensation benefits
§ 11:95	Common law claims based on "fear of AIDS"

## **VI. CONTRACTUAL LIMITATIONS ON HIV TESTING**

### **A. DUTY OF UNIONIZED EMPLOYERS TO BARGAIN OVER HIV TESTING**

§ 11:96	National Labor Relations Act
§ 11:97	Railway Labor Act

### **B. PROTECTION PROVIDED BY COLLECTIVE BARGAINING AGREEMENTS AGAINST DISCRIMINATION ON THE BASIS OF AIDS OR HIV INFECTION**

§ 11:98	Arbitration decisions dealing with AIDS or HIV infection in the workplace
---------	---

## **CHAPTER 12. GENETIC TESTING**

### **I. EMPLOYER USE OF GENETIC SCREENING AND GENETIC MONITORING**

- § 12:1 Types of genetic testing
- § 12:2 Genetic traits and conditions discoverable by genetic testing
- § 12:3 Prevalence of genetic testing in employment
- § 12:4 Employer justifications for genetic screening and monitoring
- § 12:5 Benefits and costs associated with employer use of genetic testing

### **II. LEGAL STATUS OF GENETIC TESTING IN THE WORKPLACE**

#### **A. POSSIBLE CONSTITUTIONAL CHALLENGES TO PUBLIC EMPLOYER USE OF GENETIC TESTING**

- § 12:6 Status of genetic testing under Fourth Amendment
- § 12:7 Genetic testing as violation of constitutional right to privacy

#### **B. FEDERAL STATUTES REGULATING USE OF GENETIC TESTING IN EMPLOYMENT**

- § 12:8 Genetic Information Nondiscrimination Act of 2008
- § 12:9 Executive order to prohibit discrimination in federal employment based on genetic information
- § 12:10 Title VII of Civil Rights Act of 1964
- § 12:11 Rehabilitation Act of 1973
- § 12:12 Americans with Disabilities Act of 1990
- § 12:13 Occupational Safety and Health Act
- § 12:14 National Labor Relations Act
- § 12:15 Railway Labor Act

#### **C. STATE REGULATION OF GENETIC TESTING IN EMPLOYMENT**

- § 12:16 State statutes relevant to employer use of genetic testing; overview
- § 12:17 Alaska
- § 12:18 Arizona
- § 12:19 Arkansas
- § 12:20 California
- § 12:21 Connecticut
- § 12:22 Delaware



## TABLE OF CONTENTS

§ 12:23	District of Columbia
§ 12:24	Florida
§ 12:25	Hawaii
§ 12:26	Idaho
§ 12:27	Illinois
§ 12:28	Iowa
§ 12:29	Kansas
§ 12:30	Louisiana
§ 12:31	Maine
§ 12:32	Maryland
§ 12:33	Massachusetts
§ 12:34	Michigan
§ 12:35	Minnesota
§ 12:36	Missouri
§ 12:37	Nebraska
§ 12:38	Nevada
§ 12:39	New Hampshire
§ 12:40	New Jersey
§ 12:41	New Mexico
§ 12:42	New York
§ 12:43	North Carolina
§ 12:44	Oklahoma
§ 12:45	Oregon
§ 12:46	Rhode Island
§ 12:47	South Dakota
§ 12:48	Texas
§ 12:49	Utah
§ 12:50	Vermont
§ 12:51	Virginia
§ 12:52	Washington
§ 12:53	Wisconsin

## D. COMMON-LAW CLAIMS RELATING TO GENETIC TESTING

§ 12:54	Genetic testing as an invasion of privacy
§ 12:55	Employer actions relating to genetic testing as intentional infliction of emotional distress
§ 12:56	Employer discipline based on results of genetic testing

## **PART VI. OTHER EMPLOYEE PRIVACY ISSUES**

### **CHAPTER 13. REGULATION OF EMPLOYEE LIFESTYLE AND LAWFUL OFF- DUTY CONDUCT**

#### **I. EMPLOYER ACTIONS BASED ON LIFESTYLE AND LAWFUL OFF-DUTY CONDUCT OF EMPLOYEES**

- § 13:1 Extent of employer regulation of employee lifestyle and lawful off-duty conduct
- § 13:2 Justifications of employers for regulating lawful off-duty conduct of employees
- § 13:3 Effects of employer regulation of employee lifestyle and lawful off-duty conduct

#### **II. CONSTITUTIONAL PROTECTIONS FOR EMPLOYEE LIFESTYLE AND LAWFUL OFF- DUTY CONDUCT**

- § 13:4 Right to privacy implications of regulation of lawful off-duty conduct
- § 13:5 Regulation of employee lifestyle or off-duty conduct as a violation of equal protection
- § 13:6 First Amendment protection for off-duty conduct
- § 13:7 Right to freedom of association and off-duty conduct
- § 13:8 Deprivation of due process property and liberty rights by employer regulation of employee off-duty activities

#### **III. STATUTORY PROTECTIONS FOR EMPLOYEE LIFESTYLE AND LAWFUL OFF-DUTY CONDUCT**

##### **A. FEDERAL STATUTORY PROVISIONS RELEVANT TO REGULATION OF LAWFUL OFF-DUTY CONDUCT OR EMPLOYEE LIFESTYLE**

- § 13:9 Civil Service Reform Act
- § 13:10 Americans with Disabilities Act of 1990
- § 13:11 Title VII of the Civil Rights Act of 1964

## TABLE OF CONTENTS

### **B. STATE STATUTES RELEVANT TO REGULATION OF LAWFUL OFF-DUTY CONDUCT OR EMPLOYEE LIFESTYLE**

- § 13:12 State laws protecting lawful off-duty activities of employees generally
- § 13:13 California
- § 13:14 Colorado
- § 13:15 Connecticut
- § 13:16 Delaware
- § 13:17 District of Columbia
- § 13:18 Hawaii
- § 13:19 Illinois
- § 13:20 Indiana
- § 13:21 Kentucky
- § 13:22 Louisiana
- § 13:23 Maine
- § 13:24 Massachusetts
- § 13:25 Minnesota
- § 13:26 Mississippi
- § 13:27 Missouri
- § 13:28 Montana
- § 13:29 Nevada
- § 13:30 New Hampshire
- § 13:31 New Jersey
- § 13:32 New Mexico
- § 13:33 New York
- § 13:34 North Carolina
- § 13:35 North Dakota
- § 13:36 Oklahoma
- § 13:37 Oregon
- § 13:38 Rhode Island
- § 13:39 South Carolina
- § 13:40 South Dakota
- § 13:41 Tennessee
- § 13:42 Virginia
- § 13:43 West Virginia
- § 13:44 Wisconsin
- § 13:45 Wyoming
- § 13:46 State statutes protecting against lifestyle discrimination

### **IV. COMMON-LAW PROTECTIONS FOR LIFESTYLE AND LAWFUL OFF-DUTY CONDUCT OF EMPLOYEES**

- § 13:47 Lawful off-duty conduct as grounds for discharge

- § 13:48 Wrongful discharge claims based on consideration of lawful off-duty activities
- § 13:49 Consideration of lawful off-duty conduct as invasion of privacy
- § 13:50 Consideration of off-duty conduct as intentional infliction of emotional distress
- § 13:51 Off-duty conduct as grounds for denial of unemployment compensation benefits

## **V. UNIONIZED EMPLOYER ACTIONS BASED ON EMPLOYEE LIFESTYLE AND LAWFUL OFF-DUTY CONDUCT**

- § 13:52 Preemption of state law claims by federal labor law
- § 13:53 Arbitral treatment of employer regulation of lawful off-duty conduct
- § 13:54 Challenges to employer regulation of lawful off-duty conduct
- § 13:55 Challenges to discipline based on lawful off-duty conduct

### **Table of Laws and Rules**

### **Table of Cases**

### **Index**