

## WORKPLACE SEARCHES

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An employer suspects that an employee is stealing company property. The employer decides to undertake a careful search of all of the employee's work areas and personal possessions. Since these items are maintained on company property, this search does not present a problem for the employer, right? Wrong. This search could violate the employee's civil rights and expose the employer to significant liability.

In the recent case of *Ortega v. O'Connor*, 146 F.3d. 1149 (9th Cir. Cal. 1998), the United States Court of Appeals upheld a jury award which found an employer liable for extensive searches of a physician's private office, as well as retention of the physician's personal possessions. The searches in *Ortega* were allegedly conducted without permission and were made in response to seemingly vague concerns regarding the purchase of a computer and possible sexual harassment allegations. The Court characterized the searches as "extremely thorough and highly intrusive."

While the *Ortega* case involved a public employer, its holding is equally important for private companies since the United States and California Constitutions protect the right of privacy of all individuals. Accordingly, before initiating a search, an employer must balance its own need for controlling the workplace against the employee's right of privacy. The employer's interest should be measured in light of the accusation or crime being investigated. Where the employer has direct evidence that an employee has committed a crime and the evidence leads to a specific work area, the right to search that area is clear. On the other hand, where the employer has information which does not clearly define the purpose of the search or which does not directly point to a particular employee, the search of a private area is less legitimate.

The employee's privacy interests are examined by determining whether the employee has a reasonable expectation of privacy over the area to be searched. A common area, such as a lunch room, or an area which is shared with one or more co-workers, is much less private than, for example, the private office which was at issue in *Ortega*. A personal locker, handbag or briefcase is also entitled to more protection than a desktop. The employee's expectation of privacy can, however, be significantly modified by a written policy which notifies workers to expect searches of all areas, including those

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which might otherwise be considered "private."

It is therefore important for employers to establish guidelines for workplace searches which will minimize any risk of liability by providing advance notice to the employee of the employer's right to search as well as any procedures to be followed by management. The employer's guidelines should include the following elements:

- 1. A Written Policy Permitting Searches.** The employer's employee handbook and/or employment agreement should include a policy which informs employees that work areas may be searched at any time, with or without notice. The policy should specifically include private areas, such as desks, offices, lockers, briefcases, handbags and other personal possessions, but should reserve the right to examine areas not contemplated by the handbook. The policy should be disseminated to all employees and posted in a common work area, such as a lunch room. The existence of this policy will make it difficult for employees to claim that the areas searched were private.
- 2. Written Waiver.** An employer can request that the employee provide written permission prior to any search. Where the employer's business is extremely susceptible to employee theft, or where protection of trade secrets or confidential information is of primary importance, the employee should be asked to sign a written waiver at the time of hiring.
- 3. Limited Searches.** The search should be limited only to the area or areas which are directly implicated by the evidence which has been presented to the employer. For example, if an employee has been seen placing company property in a personal locker, the search should be limited to that locker and not expanded to include all of the employees' personal possessions and work areas.
- 4. Consider the Evidence.** As in *Ortega*, a vague allegation that some unspecified company policy has been violated will not be sufficient to justify a search. Rather, the employer's suspicion should be based on evidence which is clear and unrefuted. Accordingly, before beginning the search, the employer should verify the accuracy of the information to the extent possible. This may include checking security cameras, access logs, and interviewing witnesses.
- 5. Consider Calling the Police.** The employer may wish to call the police where the employee is suspected of a crime and is not cooperating in the search. This is particularly true where the evidence indicates that the employee has stolen property on his or her person and the employee has refused to empty his or her pockets. In such a situation, the employer should never force the search; this could lead to a claim of battery and other causes of action.
- 6. Conduct Searches in Private.** Employee searches are a serious matter. Whether the employer is right or wrong, the employee is likely to be distressed by the procedure as well as the accusation. The employer should therefore attempt to be as discreet as possible and conduct the search away from the prying eyes of coworkers. Employers should, however, have two management personnel present at all times to witness the events as they unfold.

Although a sensitive subject, an employee's right of privacy is not equivalent to a license to steal or injure the employer or its other employees. Where the employer is confident that a crime has occurred or a significant company policy has been violated, the employer should take steps to remedy the situation. Provided the employer is careful to abide by certain guidelines, a search properly conducted to prevent a crime or enforce an important policy should not expose the employer to liability.