THE PRIVACY OF THE EMPLOYEE--THE LAW OF ISRAEL

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The protection of privacy in Israeli Law has been expressly recognized since 2002 as falling within the ambit of Basic Law: Human Dignity and Liberty. In constitutional as well as statutory law, it is clearly provided: "An individual's privacy will not be infringed upon without his consent." The concept "privacy" or an individual's private interest has been given broad interpretation. The protection afforded to privacy is applicable to all sectors, private and public alike. Protection of privacy, as with all rights, is relative and must be balanced against other basic rights to ensure that it does not exceed its legitimate purpose. What is its legitimate purpose? Do the protections maintain proportionality? Needless to say, the European Union's directives are not binding in Israel, which is not a part of the European Union states; however, as with many other subjects. the courts of Israel review and consider European Union directives on the subject of privacy rights.

In the computer age in which we find ourselves, a time when every computer contains many details about everyone, it becomes more and more difficult to protect privacy. This makes it particularly difficult to protect a worker's privacy. There are more than a few workers in any organization who have computer access and are able to withdraw private information from a computer, despite all of the protective means designed to limit such access to one file or another. What follows is a review of the protection of a worker's privacy vis-à-vis his work.

Israeli legislation does not specifically mention the protections of privacy of the worker; thus, it is the general legislation from which the labour courts derive the right to privacy, when the need for such protection arises. One inquiry regarding the personal privacy of any employee, is against whom may the right to privacy be asserted? Are the directors of a company or the officers of a public entity entitled to the details of the private information? There is a ruling that the "inner circle" of an entity are allowed to know the private information; however, they are obligated to keep the information confidential. Another issue is whether handwriting analysis tests are permissible under the parameters of protecting an employee's privacy where only relevant test results will be disseminated to the employer. Another question is whether an employer is permitted to send an employee to a doctor and receive the doctor's report. These and other questions will be answered in the discussion that follows.

One may find many legislative enactments and private marketplace agreements that clearly damage the privacy of the employee. An example includes requirements that an individual disclose details of family status to comply with tax requirements. Further examples include the legal obligation of a pregnant woman, who is employed in a dangerous occupation, to disclose her condition to her employer so he can protect her and the fetus, and the obligation of all pregnant women to so disclose at the fifth month, so that the employer can request the statutorily mandated medical clearance before assigning overtime work in the final months of pregnancy. Also, there is a duty of seasonal check-ups for employees (of both genders) in light of dangerous occupations (involving chemicals, asbestos, dust, etc.). The subject of medical examinations also arose when an employer requested that an insured employee submit to a medical examination for purposes of determining payment of a disability pension.

The court ruled that while the employee could not be forced to take the physical examination, he could be fired for refusing to do so. The issue of whether an employer can require his workers to submit to drug or AIDs testing has yet to arise in Israel.

It is provided by law for public services and by collective bargaining agreements in the private sector, that an employee seeking to work at an additional job beyond his normal working hours must receive permission from his employer. This demand infringes on the privacy (in addition to infringing on work vacation) of what the employee is doing outside of the hours of his work. The rationale in requiring the disclosure is that in disclosing the name of the place of the proposed employment, the employer can discern if a "conflict of interests" exists between the two places of employment.

Many collective bargaining agreements have provisions requiring employees to undergo tests for fitness to receive promotions. The National Labour Court approves this condition and in determining the question of legality requires that the questions must be relevant to the position sought, must elicit only answers related to the position, and must be disseminated only to those in charge of the position, such as those of the Tender Committee. Regarding graphology, handwriting tests for competence for the position, there are diverse opinions by the National Labour Court. However, there is no binding judgment for the need for such a test, for whether the employee must give his express consent for such test, or for whether consent will be implied where the employee submits his hand written resume as part of the job application process. In Israel, an employee cannot be forced to undergo a polygraph

test to determine the employee's credibility except for workers in high security or highly sensitive positions.

An important question is: Does an employer have the right to follow his employees during working hours? Should the employer be allowed to set up cameras in the workplace? Should the employer be allowed to pursue an employee's access to the Internet? Should he be allowed to examine the use of phones at the workplace? Should the employer be allowed to eavesdrop on an employee's phone calls? On one hand, personal calls during work hours and surfing the Internet sites not related to the employee's work are considered illegal use of the employer's property. On the other hand, eavesdropping is an invasion of privacy. As an additional factor, the law provides that eavesdropping upon an employee's conversation with a third outside party, without the consent of either person, constitutes grounds for a civil suit and is a criminal offense according to the Secret Monitoring Law of 1979.

From time to time, the question arises of what constitutes the "consent" required to expose a private issue regarding the employee. Should consent be express or implied? How do we relate to the "consent" from an employee that compromises his privacy in one or anther issue? The premise for some of the judges is that an employee always occupies a position of weakness in relation to his employer; he would sign anything required to accept or maintain his position. Therefore the employee's consent can be nullified. Who has the burden of proof to show that consent was or was not given of the employee's free will? Is an employee who accepts a position in a work place that has surveillance cameras consenting to a violation of his privacy? Is there a need for consent of the employee to work under a surveillance camera where the purpose of

the camera is to prevent robbery (in banks or a home business) or to prevent shop lifting (in stores) while, concurrently, the employee is being taped during all the hours of his work? Should it not be clear to an employee applying for a tendered position that many details relating to him would be disclosed to the Tender Committee, and possibly to others if he legally challenges the hiring decision? The National Labour Court of Israel has not yet answered all of these questions conclusively.

The subject of protecting an employee's privacy often arises in the context of an equal pay request. In this context, a co-employee refuses to reveal his or her pay and the employee seeking equal treatment cannot effectively demand the equal pay from the employer. The legislature, aware of this issue, followed the path paved by the National Labour Court and enacted legislation whereby the pay must be revealed to the employee without revealing the names of the employees to whom the pay pertains. The law titled Male and Female Workers Equal Pay Law, 1996 strikes its balance by providing that the employer "shall only be required to deliver such information to such extent as the circumstances require…" The information provided to the employee must avoid disclosure of details of the identity of employees. The solution used by the legislature is insufficient where only a small number of workers are employed, since in such a situation the individual worker can be identified even if his or her name is not revealed. When the conditions of employment or of retirement are at issue, the problem is similar. There too, some information must be disclosed so that an employee can prove his or her case.

Another subject, no less important than those presented in the preceding discussion, is the right of the employee to obtain data relating to himself, such as his

personnel file, which contains his supervisors' opinions on his performance or which contains internal discussions by decision-making bodies who determine promotions, such as academic committees discussing continuation of employment or the hiring of a researcher or lecturer. On the subject of personnel files, case law provides that an employee has the right to his personnel file in order to exercise his right to respond to a negative determination; on the subject of internal discussions, it has been determined that a University lecturer is entitled to receive the protocol or text of the discussions only where the names of the participants have been deleted.