

## **KEY INDIVIDUALS AND ORGANIZATIONS INVOLVED IN THE DEBATE ON REGULATION OF OFF-HOURS ACTIVITIES**

The following is a list of individuals and organizations that have expressed interest or have involved themselves in issues that may impact upon the regulation of off-hours activities, perhaps including smoking. This list includes a variety of groups and individuals, from privacy scholars and experts on drug testing in the workplace to representatives from the National Association of Manufacturers and a Director of Labor Law at the Chamber of Commerce. From their unique perches, they may all one day have input into the formation of guidelines and legislation on employer regulation of smoking during off-hours.

### **CONGRESS AND PRIVACY**

#### **Summary**

The thrust of remarks by key committee staff members is that Congress will probably evaluate and address specific aspects of the privacy issue as they arise. For Congress, it's business as usual.

#### **Judiciary Committees**

The Senate and House Judiciary committees are traditionally more concerned with Fourth Amendment questions, which involve the intrusion of government, not private parties, into the lives of citizens.

However, a member of the Senate panel, Sen. Paul Simon, D-IL, is sponsor of a bill that would require telephone monitoring to be preceded by an audible warning tone. This is known as the "beeper bill." Sens. Alan Simpson, R-WY, Patrick Leahy, D-VT, and Simon are sponsors of a bill to assure privacy of a citizen's home video rental records. Their bill is a response to the publicizing of video rental records of Judge Bork and Colonel North during their appearances before Congressional hearings.

A House Judiciary staff member says there is a possibility that the telephone monitoring bill may be expanded to include provisions on computer security.

The House panel will have a new chairman next year. Rep. Jack Brooks, D-TX, succeeds Rep. Peter Rodino, D-NJ, who is retiring.

Brooks, as chairman of the Government Operations Committee, was fond of staging hearings with all the news media trappings, including leaks in advance of titillating investigative information and loud, angry lecturing of witnesses, who were usually senior industry executives.

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## **Labor Committees**

The Senate and House labor committees are more concerned than the judiciary committees with labor-management issues.

The Senate labor committee took the lead on polygraph legislation. The committee action was driven by a concern for accuracy in lie detector test results, and that is the committee's general concern on drug testing. Staff members are studying the possibilities of mandating more accurate drug test procedures and laboratory standards.

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## **THIRD-PARTY ALLIES**

### **Organization Allies**

A third-party ally program can build and sustain support for the issue from among diverse, influential, national, special interest groups. Such groups can be educated and motivated to act in support of the issue based on their commitment to action on behalf of their members and constituents. Moreover, these groups, in turn, become channels by which broader segments of the public can be educated and mobilized to support the issue.

This approach yields powerful evidence of broad public interest and support and dramatically underscores the implications of the issue for a large and diverse cross section of the American public.

Such widespread support broadens the issue beyond what might otherwise be viewed politically as a single industry or single interest issue. In effect, it raises the political price placed on an elected official's position.

The third-party lobby can operate in a variety of ways, including coalitions, grass-roots programs, public forums, by-lined articles, testimony, or direct contact with elected officials by representatives of participating third-party national groups.

The following national constituencies have a clear and compelling stake in the privacy issue:

- o Women
- o Ethnics
- o Blacks
- o Civil Libertarians
- o Consumer Groups
- o Organized Labor
- o Professional and Trade Groups
- o Hobbyists
- o Older Worker Advocates
- o Associations representing individuals with disabilities
- o First Amendment proponents

Identified below are examples of leading national groups within each category, which we believe are potential allies. These organizations are the types that could be targeted in this ally program. There are a wide variety of national associations and groups representing the interests of each of these constituencies.

Describing his committee members' stance, a Senate staff member said if the panel was to receive complaints about employer surveillance of the employees after work, the committee would probably act. He also brought up genetic testing, saying the committee would

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probably act if employers sought to screen employees on the basis of their genes. Such a test is discrimination against the handicapped, he said.

On the House side, a labor committee staff member says there is concern about accuracy in drug testing, but no consensus except that government testing would have to be addressed before moving on to drug testing in the private sector.

Another House committee staff member says a trend may materialize in which government moves away from privacy issues, settling on the "just cause" approach. This approach would confine a company to firing an employee for only business reasons.

Montana is the only state with a just-cause law. The intent of the law is to prohibit employers from firing for whatever reason other than business. Amplifying, a House member says that IBM has a virtual lifestyle code for its employees, violation of which results in their dismissal, and there is no federal law protecting the employee.

During the last House session, Rep. Don Edwards, D-CA, was chief sponsor of the beeper bill; Rep. Al McCandless, R-CA, the video rental bill; Rep. Charles Schumer, D-NY, two bills, one requiring a second evaluation of positive drug test results, and another applying provisions of the Fair Credit Recording Act to national rental service screening methods. Security would be tightened for disclosure of federal tax, social security and census information with enactment of a bill offered by Rep. Bill Nelson, D-FL.

This year, it remains to be seen if there is the climate for comprehensive action by Congress.

There is a crazy-quilt of rules, policies, state laws, court and arbitrator decisions upon the land and that situation often is often used as justification for comprehensive federal action.

For each constituency, we identify a potential "point of departure" for generating issue support. Specific "hot buttons" to be pressed in stimulating support will be identified for each category and group as we begin our process. Our research to this point has not benefited from direct discussion with the groups to precisely gauge their specific current interests on the privacy issue. More precise messages will emerge and be refined as we begin our discussions with the leadership of each group.

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## **WOMEN**

Examples: National Organization of Women\*  
Women's Equity Action League\*  
Women's Legal Defense Fund  
9 to 5, National Association of Working Women

A preliminary point of departure for discussion with women's groups might revolve around employment discrimination against single mothers and pregnant women.

## **ETHNICS**

Examples: Arab-American Anti-Discrimination Committee  
B'nai B'rith Anti-Defamation League  
National Italian American Foundation  
LULAC\*  
National Council of LaRaza\*

A point of departure for discussions with ethnic groups would be issues relating to discrimination based on ethnic stereotype.

## **BLACKS**

Examples: National Urban League\*  
NAACP\*  
National Council of Negro Women\*  
National Conference of Black Mayors\*  
National Black Caucus of State Legislators\*

Exploratory discussions with national associations representing the interests of Blacks will begin with discussion on racial stereotypes and discrimination.

## **CIVIL LIBERTARIANS**

Examples: Common Cause  
People for the American Way\*  
ACLU\*  
Americans for Democratic Action\*  
CATO Institute\*

A point of departure in our discussions with these groups likely would face the privacy issue head on and explore the issue of big business as Big Brother.

\* Indicates current/previous Philip Morris support to an organization.

## **CONSUMER GROUPS**

Examples: National Consumers League  
Consumer Federation of America  
Consumers Union

Exploratory discussions with consumer groups might point to the privacy issue as it relates to the potential for consumer advocacy to be threatened and the potential of consumers' credit history to be exploited by employers.

## **ORGANIZED LABOR**

Examples: AFL-CIO\*  
Air Line Pilots Association, International\*  
Association of Flight Attendants  
Coalition of Labor Union of Women\*  
United Auto Workers\*

The point of departure for discussion with unions would likely go directly to workers' rights. (We recognize that labor is being handled at this point by Pete Sparber.)

## **PROFESSIONALS/TRADE ASSOCIATIONS**

Examples: International Association of Firefighters  
International Association of Women Police  
National Police Officers Association  
National Education Association  
American Federation of Government Employees  
American Nurses' Association  
American Library Association  
National Association of Video Distributors  
Distilled Spirits Council of America

The precise messages would relate to each of the group's specific privacy issues, e.g., off-the-job behavior, as they relate to potential employer abuse.

## **HOBBYISTS**

Examples: National Rifle Association\* (gun owners)  
International Hot Rod Association (race car drivers),  
Aircraft Owners and Pilots Association (pilots)

Message development with these and other such groups would begin with discussion around off-the-job high risk behavior and the potential for employer discrimination.

\* Indicates current/previous Philip Morris support to an organization.

## **OLDER WORKER ADVOCATES**

Examples: Older Women's League  
American Association of Retired Persons  
National Council on the Aging\*  
National Council of Senior Citizens

The privacy issue relates directly to national groups representing the interests of older workers. Age discrimination is a primary concern of these groups.

## **ASSOCIATIONS REPRESENTING INDIVIDUALS WITH DISABILITIES**

Examples: Epilepsy Foundation of America (epileptics)  
Cancer Hopefuls United (cancer patients)  
Council for Understanding Mental Illness (individuals in therapy)  
National Association of Protection and Advocacy Systems (handicapped)

Discussions with associations representing individuals with impairments might relate to the potential for discrimination on the part of employers.

## **FIRST AMENDMENT PROPONENTS**

Examples: Sigma Delta Chi (journalists)  
American Publishers Association  
National Newspaper Publishers Association\*  
National Artists Equity Association  
American Association of Advertising Agencies\*  
Mountain States Legal Foundation\*

The discussions with each of these types of groups likely would begin with the issue of encroachment on First Amendment rights.

## **POTENTIAL ALLIES/SPOKESPERSONS**

The following men and women are identified as likely candidates, based on a review of their writings and comments to reporters to be approached through third parties as op-ed advocates. Some of their remarks are provided to suggest a sense of their thinking and prospects for legislative action.

### **American Civil Liberties Union**

Allan Adler  
Legislative counsel  
Washington

\* Indicates current/previous Philip Morris support to an organization.

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He has said that if business is really worried about drug abuse it should be concerned with prescription drug abuse and alcohol, which he says are far more prevalent than illicit drug use.

Jerry Berman  
Director  
ACLU project on Information  
Technology and Civil Liberties.

Ira Glasser  
National Director, ACLU

“...urine screens are more of a surveillance device for off-the-job activity than a test for job performance...Once provided, urine samples may be used to reveal other details of one’s private life. Urinalysis can disclose whether an employee or job applicant is being treated for a heart condition, depression, epilepsy, diabetes or asthma.

“People have been fired, or not hired, when the employer finds out about such conditions...”

### **Lawyers and Academics**

Randy E. Barnett  
Professor of law  
Chicago-Kent College of Law  
George Mason University

Allan C. Carlson  
President  
Rockford Institute

“There is a great moral divide between Gary Hart’s liaison with Donna Rice and Pat Robertson’s attempt to protect the secret of his marriage date. The former is a stupid, sordid matter; the latter, an understandable, forgivable attempt to protect one’s wife and children from the consequences of a youthful indiscretion. The relevant question, perhaps, is whether the press is still able to tell the difference.”

Robert B. Fitzpatrick  
Lawyer, Washington, DC

*Represents companies and employees.*

“(Privacy) is an area of legal uncertainty. In a lot of states the law is in flux, and it is unclear what the rules are any longer.”

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JoAnne Frankfurt, Chris Redburn  
Employment Law Center, San Francisco

William B. Gould  
Professor, labor law  
Stanford

“The idea that the employment relationship cannot be regulated will never be with us again. In some form or another, we’re going to have regulation.”

Carl F.H. Henry  
Author, founding editor of Christianity Today

David Herold  
Director, Center for Work Performance Problems  
Georgia Institute of Technology.

Ernest W. Lefever  
Ethics and Public Policy Center

Gary Marx  
Professor, Sociology  
Massachusetts Institute of Technology

“The trajectory is moving toward the all-seeing society, rather than away from it”

Burt Neuborne  
Professor of law  
New York University  
Former national director, ACLU

“The competing values are those of autonomy versus equality. The trick is for the court to find a balance that permits the two to coexist, a middle position that respects both beliefs.”

Cliff Palefsky  
Lawyer, San Francisco

*Defends employees*

“I don’t think politicians and corporate executives realize how strongly Americans feel about it. It’s not a liberal or a conservative issue and the fear of abuse doesn’t emanate from personnel policies. It’s coming out of the larger, impersonal notion that workers are fungible, expendable items.”

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Mark A. Rothstein  
Director  
Health Law Institute  
University of Houston

*Reported as believing employers eventually will try to implement genetic testing to help hold down health care costs.*

“Unless we have some clear indication that employers aren’t going to be engaged in screening, legislation may be necessary.”

Paul Samuels  
Legal Action Center  
New York City

John Shattuck  
Vice President  
Harvard University

*Teaches privacy law at Harvard*

Laurence H. Tribe  
Professor, constitutional law  
Harvard University

“The debate over the outer boundaries of a right to privacy will continue for some time, but the courts have already recognized a core right.”

Alan F. Westin  
Professor, Columbia University

*Has studied interaction of individuals and corporations since the 1950s*

“I think employers are going to get deeper and deeper into the wellness business. This is going to throw a series of profound ethical and legal dilemmas about how they should do it and what we don’t want them to do.”

William W. Van Alstyne  
Professor, constitutional law  
Duke University

“Privacy is a broad fig leaf that covers so many things that often have little in common, making it difficult to generalize.”

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## **Labor**

Communications Workers of America

United Food and Commercial Workers

National Association of Working Women

Federal employee unions

These unions are described as supporting legislative limits on computer monitoring, genetic screening, and studying -- and probably barring -- still speculative procedures such as brain-wave monitoring that could be used to assess workers' productivity and measure potential pace and output.

## **POTENTIAL ADVERSARIES**

The following, based on a review of print articles, suggests some of the players and organizations that may emerge as opponents of a legislative initiative to safeguard private employee privacy.

### **Individuals**

Harold J. Childs

Burl McColm

Management consultants

Merchants and Manufacturers Assn.

Los Angeles

Childs: "If you really want a law suit in a hurry, destroy someone's dignity."

McColm: "The question is: What rights of privacy do I have as an employee? The answer is: There aren't a lot."

Nanette R. Everson

Associate Solicitor

Interior Department

*Well-designed testing will expose excessive prescription-drug use and channel those who test positive into treatment....The chief benefit of testing is deterrence.*

"Most employees who are recreationally using drugs don't need treatment. They need a reason to stop."

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Paul Grossman  
Lawyer; for management  
Los Angeles

Kenneth Kleinman  
Lawyer; for management  
Philadelphia

Robert Millman  
Managing Partner  
Littler Medelson Fastiff & Tichy  
Los Angeles

“You do not want them to have a reasonable expectation of privacy. Employees should realize if they come to the place of work, the employer is going to be opening up anything, any time, any place.”

John N. Roudabaugh  
Lawyer, Atlanta

### **Organizations**

The following categories of special interests are potential critics of rights to privacy issues. Within each of these categories we have identified national organizations which have the potential to play a major role on the issue. This list, however, is not inclusive and is intended to serve as an overview of the types of organizations which we could expect to be on the other side of this issue.

### **Business**

U.S. Chamber of Commerce  
American Bankers Association  
National Association of Manufacturers  
Business Roundtable

### **Religious Fundamentalists**

Moral Majority

### **Anti-Abortionists**

American Life Lobby  
Americans Against Abortion

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**Industrial Security Industry**

American Society for Industrial Security

**Insurance Industry**

American Council of Life Insurance

Insurance Services Office

Health Insurance Association of America

**Temperance Advocates**

American Health and Temperance Society

International Health and Temperance Association

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## **EMPLOYEE PRIVACY ORGANIZATIONS**

Allen Adler, Legislative Counsel, ACLU, Washington, D.C.

Ed Chan, San Francisco ACLU (415) 624-2488

Arthur B. Spitzer, D.C. Chapter ACLU (202) 457-0800

In 1985, the New York ACLU had a Privacy Project, headed by Norma Rollins. Staff at the National Office said that the ACLU has taken no position on smoking rights and were amazed that a 24-hour smoking ban might exist anywhere. They possibly would not be interested in the issue until an actual case was brought.

Privacy Magazine, Washington D.C., Robert Ellis Smith, Editor -- publishes book on worker rights, and survey of general state privacy law around country, (202) 547-2865.

Bureau of National Affairs -- held conference on workplace privacy, May 5 & 6, 1988.

Plaintiff Employees Legal Association -- Paul Tobias, Cincinnati, (513) 241-8137, handles privacy lawsuits.

Legal Action Center, New York -- Paul Samuels, (212) 243-1313, employee rights group, but works mostly with workers with criminal records.

## **SMOKING POLICY ORGANIZATIONS**

SMOKING POLICY RESEARCH INSTITUTE -- Seattle, (206) 324-4444, Robert Rosner, Exec. Dir.

This group educates about workplace conditions and consults on smoking policy. Beyond USG, they knew of no other company that has instituted a 24 hour smoking ban. The USG workers had apparently tried to take the issue into court, but had no luck. Apparently, affirmative action did not apply and the union did not support them. The February 1987 USG smoking policy was billed as a safety program incorporating smokenders programs and pulmonary function tests. The rationale was that the fibers from acoustic tiles had a more negative health impact on smokers.

## **ATTORNEYS INVOLVED IN EMPLOYEE PRIVACY ISSUES/SMOKING**

Ira Michael Shepard, Schmeltzer, Aptaker & Sheppard, P.C. (Chaired BNA conference on Workplace Privacy and wrote a special report on the subject for them in 1987)

Robert L. Duston, Schmeltzer, Aptaker & Sheppard, P.C. (co-authored BNA special report on workplace privacy)

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Paul M. Heylman, Schmeltzer, Aptaker & Sheppard, Washington, D.C.

Joel Bennett, Law Offices of Joel Bennett, Washington, D.C.

Jay Berke, Special Counsel, Skadden, Arps, Meagher & Flom, New York, N.Y.

Robert Fitzpatrick - Fitzpatrick & Verstegen, Washington, D.C. (smoking)

John Lewis - Arter & Hadden, Cleveland, Ohio (smoking)

Henry Saad - Dickenson, Wright, Moon, Van Dusen & Freeman, Detroit, Mich. (privacy)

David Bradshaw - Sheppard, Mullin, Richter & Hampton, San Francisco, Ca. (privacy)

Stuart H. Bompey - Baer, Marks & Upham, New York, N.Y.

Jay W. Waks, Kaye, Scholar, Fireman, Hays & Handler, New York, N.Y.

### **ACADEMICS ADDRESSING PRIVACY ISSUES**

Harvard Business Review article (Jan/Feb 88) on employee privacy by Prof. Terry L. Leap, College of Commerce and Industry, Clemson University.

Science Mag. AAAS editorial by David E. Koshland Jr. (Feb. 87)

“The freedom of consenting adults in private to practice their own sexual preferences should be a civil right.”

Research Institute of America N.Y., 212 645 4800/1-800-431-9025, survey of privacy issues around country.

Prof. Alan Westin, Columbia University (employee privacy)

Prof. Geoffery Stone, University of Chicago Law School

Prof. Alexander Morgan Capron, USC (genetic testing)

Prof. Erwin Chemerensky, USC (testing issues)

Mark Rothstein, University of Houston Health Law Institute

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