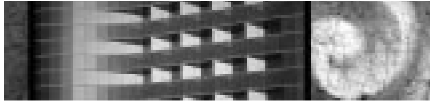


14 Employee Stakeholders and Workplace Issues

CHAPTER OBJECTIVES

After studying this chapter, you should be able to:

1. Identify the major changes that are occurring in the work force today.
2. Outline the characteristics of the new social contract between employers and employees.
3. Explain the employee rights movement and its underlying principles.
4. Describe and discuss the employment-at-will doctrine and its role in the employee's right to a job or not to be fired.
5. Discuss the right to due process and fair treatment.
6. Describe the actions companies are taking to make the workplace friendlier.
7. Elaborate on the freedom-of-speech issue and whistle-blowing.

Society's changing values are having a great impact on the workplace. Although external stakeholders such as government, consumers, the environment, and the community continue to be major facets of business's concern for the social environment, considerable attention is now being given to employee stakeholders—their status, their treatment, their rights, and their satisfaction. This should come as no surprise when it is considered that most adult Americans spend the bulk of their daytime hours at work. It was only a matter of time until citizens as employees would express the same kind of concern for their work lives as they had expressed for external, more remote social issues.

The development of employee stakeholder rights has been a direct outgrowth of the kinds of social changes that have brought other societal issues into focus. The history of work has been one of steadily improving conditions for employees. In recent years, however, issues have emerged that are quite unlike the old bread-and-butter concerns advocated by labor unions—higher pay, shorter hours, more job security, and better working conditions. These expectations still exist, but they have given way to other, more complex workplace trends and issues.

In the late 1990s, two major themes or trends seem to be characterizing the modern relationship between employees and their employers. First, we will discuss the dramatic changes that have been occurring in the workplace. Prominent here will be our discussion of a newly evolving social contract between organizations and

workers that is quite different from any such contract of the past. This new social contract is being driven by global competition. Second, we will consider a continuation of a trend toward more expansive employee rights. These two trends are interrelated, and we will describe how the changes in the workplace have precipitated a renewal in the employee rights movement.

Because these topics are so extensive, we dedicate two chapters to employee stakeholders and workplace issues. In this chapter, we discuss some of the workplace changes that have been taking place, the emerging social contract, and the employee rights movement. Three employee rights issues, in particular, are treated here: the right to a job (or at least the right not to be fired without just cause), the right to due process and fair treatment, and the right to freedom of speech in the workplace. In Chapter 15, we will continue our discussion of employee rights by examining the related issues of the rights of employees to privacy, safety, and health. These two chapters should be considered a continuous discussion of employee stakeholders wherein economic, legal, and ethical responsibilities are all involved in the treatment.

The quest for employee rights should be viewed as just one part of today's employees' expectations of fair treatment. A study conducted by Walker Research asked the general public to allocate 100 points across 11 business factors to reflect what is most important to them in deciding where to work. Employee treatment was ranked first, followed by business practices, another very important work-related factor. Figure 14–1 summarizes the work-related factors and their rankings.

CHANGES IN THE WORKPLACE

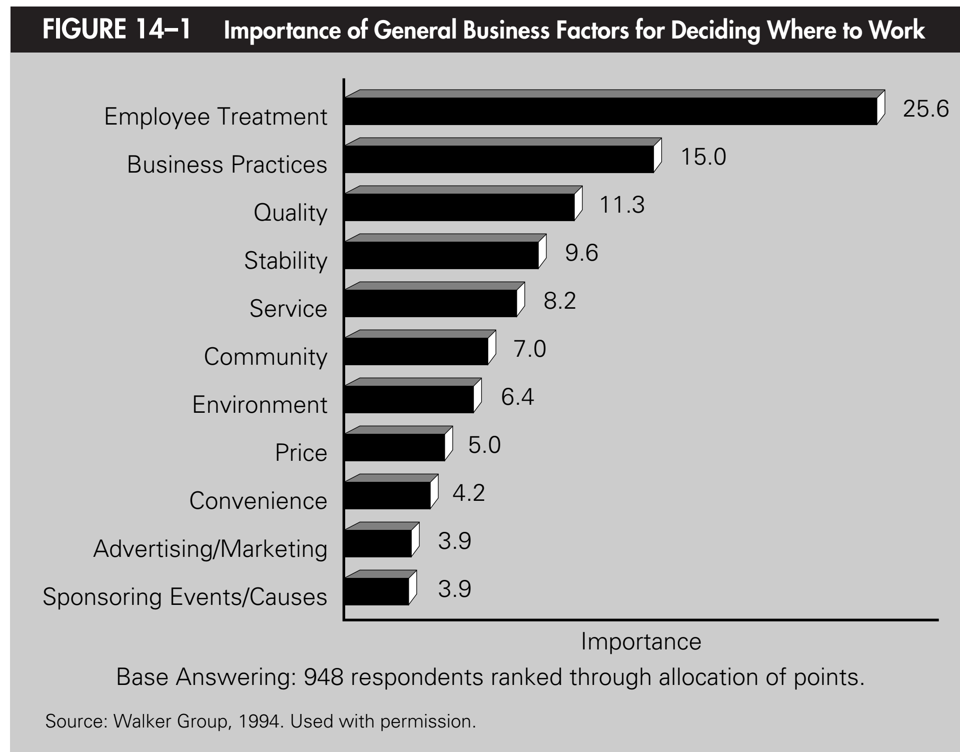
The 1980s represented a turning point for the relationship between employees and employers. Many of the societal changes we described earlier in this book—education, awareness, affluence, rising expectations, the rights movement, and so on—directly affected this issue. These changes caused employees to be more assertive about their treatment and what is owed them as employees. Other, more specific developments occurred as well, and, because these developments have had a more focused effect on the workplace, it is worthwhile discussing them. According to David W. Ewing,[1] a noted authority on workplace issues, four trends, in particular, occurred in the workplace:

1. An increase in technological hazards to employees
2. The invasion of the workplace by the computer
3. The divided loyalties of professionals
4. The increased mobility of employees

Increased Technological Hazards

Over the past 30 years, employees have been subjected to an increasing number and variety of new technologies, chemicals, and hazards in the workplace, including nuclear power, complex electronic control devices, and chemicals such as polychlorinated biphenyls (PCBs). Productivity has been enhanced by the new technologies,

FIGURE 14–1 Importance of General Business Factors for Deciding Where to Work



SOURCE: Walker Group, 1994. Used with permission.

but so have employee hazards. A control failure can cause an automated subway train to crash. Careless packaging can result in toxic hazards. Signs of the latent perils of modern chemistry—emergency showers in corridors, "Danger" signs, masks, and protective clothing—have become evident in many manufacturing operations.[2] Technological hazards in the workplace create a constant low-level anxiety among employees, who find it difficult to avoid thoughts of how the next workplace disaster might somehow affect them.

The Computer Invasion

The computer invasion not only has contributed to workplace anxiety but also has turned the classic balance of privacy upside down. There was a time when privacy invasion was restricted to what a supervisor could see or hear or what information could be collected by personnel offices. In the 1980s, a whole new array of computer-based and other electronic devices that monitor employees entered the work environment. Examples include listening devices, polygraphs, closed-circuit television monitors, computer-based information systems, and drug-testing devices. Most companies have been careful about this newly found power, but employees still worry about abuses and invasions of privacy.[3] We will discuss this issue more fully in the next chapter.

Professionals with Divided Loyalties

One of the most significant trends now occurring in the workplace is the dramatic growth in the number of professional and technical employees. According to the Census Bureau, the number of professional and technical employees in the work force doubled from 1960 to 1980.[4]

The increased number of professionals has improved organizations, but it has also altered attitudes and values in the workplace. Especially affected has been loyalty to the employer. Professionals such as scientists, engineers, accountants, computer specialists, and others find it hard to subscribe to the traditional philosophy, "my corporation, right or wrong." Their codes of conduct require that they use their knowledge and skill for the public welfare. In fact, it is a growing conviction among professionals that acts of dissidence, honestly and thoughtfully taken in the public interest, are not only permissible but obligatory.[5]

Conventional management wisdom used to be that, once management had reached a decision, all employees were to assume that the decision was right and were to support it fully. Today's professionals, on the other hand, feel a compulsion to question what they think is wrong because of their duty to their professional codes. More and more, this brings them into conflict with their employers.[6]

There is evidence that loyalty to employers is diminishing for other reasons as well. Younger workers, who are generally better educated, have higher expectations about their jobs and are more likely to feel dissatisfied when their ambitions are not fulfilled. Also, the wave of mergers, acquisitions, reorganizations, and downsizing that has resulted in significant reductions in professional and managerial jobs over the past decade has convinced many employees that companies will no longer return their loyalty. Cutbacks and closings, as well as general cynicism about the workplace, have also resulted in diminished employee loyalty and an increase in concern about employee rights.[7]

A recent book describes how job security (particularly among white-collar professional jobs), which was so prevalent in the 1950s, has disappeared. Amanda Bennett's book *The Death of the Organization Man* describes how the perk-padded paradise for executives described in William H. Whyte's 1956 bestseller *The Organization Man* "went to hell in the 1980s." Managers who had staked everything on their loyalty to a major corporation suddenly found themselves out on their own. Their jobs and their loyalty were sacrificed to meet cutback quotas forced by global competition, postraid reorganizations, and other such unexpected events.[8] Consequently, the loyalty that corporate management routinely expected from professionals was gone, and a new era of workers with divided loyalties had begun. This new era has continued through the 1990s, and we will discuss it more broadly in our treatment of the new social contract.

Increased Mobility of Employees

Another drift of the past several decades has been an increase in employee mobility. At one time, people lived in one or a very few places all their lives. This is no longer the case. Today we live in a corporate society in which transfers from one city to another and career moves from one employer to another to get quick raises and promotions have become commonplace.

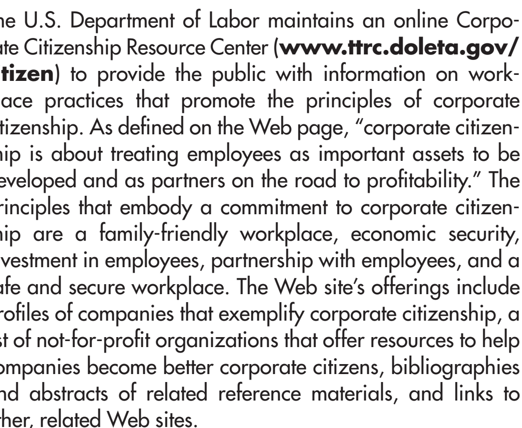
As regional lines continue to diminish, one is as likely to find a New Englander living in the Southeast as a Midwesterner living on the West Coast. Employees move geographically, between functions, and between levels of responsibility. One major unintended result of this interchange is an uncertainty in employer/employee relationships. Employees no longer know exactly what to expect from their employers or supervisors. Anxiety, tension, and even conflict can arise as employment relationships become less stable and more transient. Employees in this kind of environment feel vulnerable.[9]

* * *

These four kinds of basic changes in workplace relationships have enhanced the professional environment in business organizations. Improvements in productivity have followed, but for employees these changes have had significant downside consequences. These conditions have created an environment in which employees feel more anxious and less secure—indeed, vulnerable to real or perceived detrimental management decisions. In this kind of environment, it should not be surprising to find employees becoming increasingly sensitive and attentive to what rights they have in their employment roles.

THE NEW SOCIAL CONTRACT

The workplace trends just described have contributed not only to a desire for enhanced employee rights but also to a newly emerging social contract between employers and employees. Although the new social contract—or set of reciprocal understandings and expectations regarding each party's role and responsibilities—has been unfolding for at least a decade, it has been only in the mid-1990s that formal descriptions of this new "contract," or "compact," have become commonplace. As a 1994 *Business Week* editorial conveyed it, the change represents a "revolution in America's workplace."[10] The revolution is basically this: The get-along-to-get-ahead culture of the past is being displaced by a high-risk environment in which Americans are being asked to give up the employment security they once took for granted for opportunities that are no longer clearly defined or guaranteed. In short, the workplace once considered to be a stable, protected habitat offering a measure of prosperity and security in exchange for a lifetime of dedicated work and loyalty is now viewed as a dangerous place.[11]


SEARCH THE WEB

The U.S. Department of Labor maintains an online Corporate Citizenship Resource Center (**www.ttrc.doleta.gov/citizen**) to provide the public with information on workplace practices that promote the principles of corporate citizenship. As defined on the Web page, "corporate citizenship is about treating employees as important assets to be developed and as partners on the road to profitability." The principles that embody a commitment to corporate citizenship are a family-friendly workplace, economic security, investment in employees, partnership with employees, and a safe and secure workplace. The Web site's offerings include profiles of companies that exemplify corporate citizenship, a list of not-for-profit organizations that offer resources to help companies become better corporate citizens, bibliographies and abstracts of related reference materials, and links to other, related Web sites.

As *Business Week* appropriately observed, there are "no villains at work, just the inexorable forces of economic and technological change." But if there are no villains, there are certainly victims. Workers are being impacted

as companies have had to reorganize, slim down, "reengineer" and "reinvent" themselves. Downsizing and restructuring have significantly altered pay compensation systems. Pay based on longevity and status is being replaced with rewards based on performance, contributions, and value added.[12]

What is driving the collapse of the old social contract and the emergence of the new? We have touched upon several factors already—most notably, global competition. Chilton and Weidenbaum, in their discussions of the new social contract, pinpoint three sweeping forces that began in the 1970s, grew in salience in the 1980s, and became dominant drivers in the 1990s.[13] These three forces are:

1. *Global competition*
2. *Technology advances* (especially in computers and telecommunications)
3. *Deregulation* (especially of transportation and telecommunications)

As a result of these forces and others in the workplace, we have witnessed the destabilization of organizations and an old social contract. The old social contract between companies and workers was clearer than the new social contract will be. The old, traditional arrangement was predicated on a security-loyalty-paternalism pact. Attributes of the old social contract included lifetime employment, steady advancement, and loyalty.[14] It is easy to see how this arrangement engendered an entitlement mentality on the part of employees.

The new social contract places on employees more responsibility for their own success and prosperity in the employment relationship. Job security, compensation, and advancement depend more on what the employee is contributing to the organization's mission. The notion of "adding value" to the organization has become a crucial factor. In exchange, companies are expected to provide learning opportunities, meaningful work, and honest communication.[15] Figure 14–2 presents some of the characteristics of the old and new social contracts.

An outline of the features of the new social contract between employers and employees has been provided by Chilton and Weidenbaum. This outline is presented in Figure 14–3.

It is challenging to say whether the new social contract will be bad or good. More than anything else, it represents an adaptation to the changing world and changing business circumstances. In some respects, workers may prefer the new model. Whatever turns out to be the case, it is clear that employee stakeholders' expectations of fair treatment will continue to rise. We will continue to see the employee rights movement that has characterized business for decades, but it will grow in the new environment. Employee rights will be moderated by employer expectations that are being driven by uncontrollable economic, social, and technological forces.

The moderating impact of these forces became apparent in 1998, when a booming economy combined with shifting demographics to create an unemployment rate of 4.7 percent, the lowest in 25 years. In this environment, highly trained young knowledge workers were in great demand. A *Fortune* article on "The New Organization Man" described the lengths to which companies were going to attract the best of Generation X (i.e., those born between 1965 and 1977). In addition to generous salaries and bonuses, enticements include flexible working conditions, the right to

FIGURE 14–2 The Changing Social Contract Between Employers and Employees

Old Social Contract	*New Social Contract*
Job security; long, stable career and employment relationships	Few tenure arrangements; jobs constantly "at risk"; employment as long as you "add value" to the organization
Life careers with one employer	Fewer life careers; employer changes common; careers more dynamic
Stable positions/job assignments	Temporary project assignments
Loyalty to employer; identification with employer	Loyalty to self and profession; diminished identification with employer
Paternalism; family-type relationships	Relationships far less warm and familial; no more parent-child relationships
Employee sense of entitlement	Personal responsibility for one's own career/job future
Stable, rising income	Pay that reflects contributions; pay for "value added"
Job-related skill training	Learning opportunities; employees in charge of their own education and updating
Focus on individual job accomplishments	Focus on team building and projects

bring pets to work, sumptuous offices, casual attire, music festivals, and parties. Having learned from their parents' experience that companies were no longer loyal to them, these young employees are comfortable changing jobs frequently to improve their work situations.[16] After completing a study on the changing U.S. work force, David Friedman, a partner at McKinsey & Co., had the following comment:

> *The stereotype is that Generation X thinks it's entitled. But the people who sound like they have an entitlement mentality are the companies. They think they are entitled to have a work force that works like their parents did.*[17]

Of course, the economic boom will not last, and unemployment will eventually rise. As these forces shift, so will the social contract between employers and employees. It is within this context, therefore, that we consider further the employee rights movement.

THE EMPLOYEE RIGHTS MOVEMENT

To appreciate the background of employee rights issues (especially the rights of freedom of speech and due process), it is useful to consider the underlying public sector/ private sector dichotomy that organizations in society face. The public sector is subject to constitutional control of its power. The private sector generally has not been subject to constitutional control because of the concept of private prop-

FIGURE 14–3 One View of the New Social Contract Between Employers and Employees

Outline for A New Social Contract	
Employer Expectations of Employees	***Employee Expectations of Employers***
• Performance to the best of one's ability	• "Fair" pay and benefits proportionate to contribution to company success
• Commitment to the objectives of the firm	• Security tied to fortunes of the company and ability to perform
• Participation (suggestions)	• Respect, recognition, and participation
• Willingness to take training to improve productivity	• Opportunities for growth
• Ethical and honest behavior	• Access to timely information and openness by candid leaders
	• Safe and healthy workplace

Joint Expectations

- Partnering replaces paternalism
- Employees are value-adding resources, not merely costs to be cut
- Employee and employer must focus on customer needs and desires

SOURCE: Kenneth Chilton and Murray Weidenbaum, *A New Social Contract for the American Workplace: From Paternalism to Partnering* (St. Louis: Center for the Study of American Business, Washington University, 1994), 43. Used with permission.

erty. The ***private property*** notion holds that individuals and private organizations are free to use their property as they desire. As a result, private corporations historically and traditionally have not had to recognize employee rights because society honored the corporation's private property rights. The underlying issues then become *why* and *to what extent* the private property rights of business should be changed or diluted.

Although Americans have enjoyed civil liberties for nearly two centuries, these same rights have not always been afforded by many companies, government agencies, and other organizations where Americans work. David W. Ewing states the matter quite strongly:

> *Once a U.S. citizen steps through the plant or office door at 9 a.m., he or she is nearly rightless until 5 p.m., Monday through Friday. The employee continues to have political freedoms, of course, but these are not the significant ones now. While at work, the important relationships are with bosses, associates, and subordinates. Inequalities in dealing with these people are what really count for an employee.*[18]

Although there are growing exceptions to Ewing's rather strong statement, it does call attention to the importance of the issue. Ewing goes on to state, "The employee sector of our civil liberties universe is more like a black hole, with rights so

ETHICS IN PRACTICE

Manager's Makeshift Rules

It is Holland Flowers's mission to deliver fresh and innovative floral designs. To achieve this, Holland Flowers hires creative university students from the local area. The company feels it is important to make every possible attempt to work around the students' schedules.

John Smith was a delivery driver for Holland Flowers and a university student. Before accepting the position with Holland Flowers in August 1994, John requested several days off the week prior to Christmas. December is a very busy time at Holland Flowers. To accommodate the increase in business, Holland Flowers hires seasonal employees. That year, the owner's son, Bob, was one of the seasonal employees. Bob was to work with John and the other drivers. The week prior to Christmas, the owner informed John that Bob was sick and unable to work. Subsequently, the owner told John he was to work that week, even though, before John was hired, they had agreed that John would be off. Reluctantly, John agreed to work.

The following night, John was downtown when he saw Bob with a drink in his hand and appearing quite healthy. John approached Bob, questioning his sickness and absence from work. Bob denied his illness, acting as if being the owner's son meant he could be off when he wanted.

John was furious, because the owner had previously stressed that Holland Flowers was built on honest working relationships. John felt that this incident went against the principles on which the company was founded. John no longer felt respect for the owner or Holland Flowers; instead, he felt lied to and betrayed. John called the owner that night and informed him of his feelings. Because the owner offered no defense, John felt he could no longer work for Holland Flowers, and he resigned.

1. Did the management of Holland Flowers behave unethically with respect to employee treatment in this case?
2. Was John right in questioning the owner's employee practices?
3. If you were John, what action would you have taken in this dilemma?

Contributed by Christopher Lockett

compacted, so imploded by the gravitational forces of legal tradition, that, like the giant black stars in the physical universe, light can scarcely escape."[19]

A brief comment on the role of labor unions is appropriate here. In general, although labor unions have been quite successful in improving the material conditions of life at work—pay, fringe benefits, and working conditions—they have not been as interested in pursuing civil liberties. Unions must be given credit, however, for the gains they have made in converting what were typically regarded as management's rights or prerogatives into issues in which labor could participate. It should be noted, moreover, that labor unions are disappearing from the business scene. In 1953, union representation reached its highest proportion of the private employment workforce, at 36 percent. Labor unions represented about 11 percent of the private workforce in the mid-1990s, and one estimate is that this would fall to 7 percent by the year 2000.

Although public sector unionism is growing, it is not expected to have a significant impact on the kinds of employee rights we are discussing here.[20] For nonunion workers, however, the employee rights issue continues to be a problem.

Many managers find the movement for employee rights to be disturbing. Management prerogatives are being challenged at an unprecedented rate, and the traditional model of employee loyalty and conformity to the wishes of management is rapidly fading from the scene. Some have observed that the traditional model seems to be disappearing more as a concept than as a reality, however. Although managers indicate strong support for wider employee rights when responding to questionnaires, practice does not show employee rights prevailing extensively in business today. Indeed, although managers support the concept in principle, they sometimes express an ambivalence about employee rights and their costs. One survey of managers showed a higher concern for instability in our society (confusion about sexual standards, attitudes toward drugs, treatment of criminals, respect for the family and authority, breakdown of law and order, and disintegration of the work ethic) than for obstacles to individuality in the workplace.[21] Thus, although managers sympathize with the need for privacy, due process, and free speech in the workplace, they seem to be more concerned with general social trends and their impacts.

The Meaning of Employee Rights

Before we consider specific employee rights issues, it is useful to discuss briefly what the term "employee rights" means. A lawyer might look at employee rights as claims that may be enforced in a court of law. To many economists as well, rights are only creations of the law. More generally, however, employee rights might refer to legitimate and enforceable claims or privileges obtained by workers through group membership that entitle or protect them in specific ways from the prevailing system of governance. In this light, employee rights are seen as individuals' legitimate and enforceable claims to some desired treatment, situation, or resource.[22]

Richard Edwards has argued that employee or workplace rights serve to provide workers with either (1) desired outcomes or (2) protection from unwanted outcomes. He also asserts that these rights find their source in *law, union contracts,* or *employers' promises.* Rights provided by law are called statutory rights. These rights include, for example, those rights established by The Civil Rights Act of 1964 (at a national level), or by Massachusetts' "right-to-know" law (at the state level), which grants production workers the right to be notified of specific toxic substances they may be exposed to in the workplace. Union contracts, by contrast, provide workers with rights established through the process of collective bargaining. Examples of these rights are seniority preferences, job security mechanisms, and grievance procedures.[23]

Employer promises are the third source of employees' rights categorized by Edwards. He calls these employer grants or promises *enterprise rights.* Typical examples of such enterprise rights might include the right to petition beyond one's immediate supervisor, the right to be free from physical intimidation, the right to a grievance or complaint system, the right to due process in discipline, the right to have express standards for personnel evaluation, the right to have one's job clearly defined, the right to a "just-cause" standard for dismissal, the right to be free from nepotism and unfair favoritism, and so on.[24]

It is clear that these enterprise rights, as construed by Edwards, are provided and justified by management on the basis of several different criteria. In some cases, these rights simply extend beyond what the organization is required to do by law. In other situations, they address issues that are not covered by law. In either case, these rights are sometimes justified on the basis of customs and practices that may be necessary for the firm to remain competitive (and thus are economically justified). In addition, the rights are sometimes afforded on the basis of some normative ethical principle or reasoning (for example, "This is the way workers *ought* to be treated"). In this situation, the ethical principles of justice, rights, and utilitarianism, as well as notions of virtue ethics, may be employed as rationales.

In this connection, management may provide the employee rights as part of an effort to display moral management, as discussed in Chapter 4. To illustrate this point further, Figure 14–4 characterizes how moral managers, as well as amoral and immoral managers, might view employee stakeholders.

To summarize, employee rights may be afforded on the basis of economic, legal, or ethical sources of justification. In a limited number of cases, companies even use philanthropic arguments as the bases for providing employee rights or benefits. For example, some companies have justified day-care rights and benefits to employees on philanthropic grounds. For purposes of our discussion here, however, we will concentrate on legal and ethical bases for considering employee rights. In all these discussions, moreover, we take the perspective of organizations blending ethical wisdom with management wisdom.

The job-related rights that are mentioned often enough to merit further discussion here include: (1) the *right to a job,* or at least the right *not to be fired without just*

FIGURE 14–4 Three Models of Management Morality and Their Orientations Toward Employee Stakeholders

Model of Management Morality	*Orientation Toward Employee Stakeholders*
Moral Management	Employees are a human resource that must be treated with dignity and respect. Employees' rights to due process, privacy, freedom of speech, and safety are maximally considered in all decisions. Management seeks fair dealings with employees. The goal is to use a leadership style, such as consultative/participative, that will result in mutual confidence and trust. Commitment is a recurring theme.
Amoral Management	Employees are treated as the law requires. Attempts to motivate focus on increasing productivity rather than satisfying employees' growing maturity needs. Employees are still seen as factors of production, but a remunerative approach is used. The organization sees self-interest in treating employees with minimal respect. Organization structure, pay incentives, and rewards are all geared toward short- and medium-term productivity.
Immoral Management	Employees are viewed as factors of production to be used, exploited, and manipulated for gain of individual manager or company. No concern is shown for employees' needs/rights/expectations. Short-term focus. Coercive, controlling, alienating environment.

cause; (2) the *right to due process and fair treatment;* and (3) the *right to freedom,* particularly freedom of expression and freedom of speech. In Chapter 15 we will consider the rights to privacy, safety, and health in the workplace.

THE RIGHT TO A JOB/NOT TO BE FIRED WITHOUT CAUSE

We are not suggesting by the title of this section that employees have a *right* to a job. We are attempting, however, to assert that current trends in employment practices, if extended to their logical conclusion, may be signaling a belief on the part of workers that they have such a right. Given the entitlement mentality that prevails in our country today, and in spite of tough global competition, a significant proportion of Americans may think they are entitled to jobs. Our discussion, however, addresses this issue from another direction. There is growing evidence that Americans think they have a right *not to be fired without just cause.* Depending on how one defines "just cause," we may be seeing a trend toward a right to keep a job once one has it, or perhaps even a right to a job. If this occurs, it will surely spell the death of the common-law principle known as the employment-at-will doctrine.

Employment-at-Will Doctrine

The central issue in the movement to protect workers' jobs surrounds changing views of the ***employment-at-will doctrine***. This doctrine is the longstanding, common-law principle that the relationship between employer and employee is a voluntary one and can be terminated at any time by either party. Just as employees are free to quit a company any time they choose, this doctrine holds that employers can discharge employees for any reason, or no reason, as long as they do not violate federal discrimination laws, state laws, or union contracts. What this doctrine means is that if you are not protected by a union contract (about 80 to 90 percent of the work force is not) or by one of the discrimination laws, your employer is free to let you go anytime, for any reason.

The employment-at-will doctrine is being eroded by court decisions, however. The courts have ruled with increasing frequency that employers have responsibilities to employees that, from the standpoint of fairness, restrict management's former prerogative to fire at will. Terms that have been added to the vocabulary of employment relationships include *unjust dismissals* and *wrongful discharge.*

Three broad categories of issues that illustrate the legal challenges now arising in regard to employment-at-will discharges are (1) public policy exceptions, (2) contractual actions, and (3) breach of good faith actions.

Public Policy Exceptions

For a wide variety of reasons, the courts are beginning to hold that employees who previously were unprotected from unjust firings are now so protected. One emerging major exception to the longstanding employment-at-will doctrine is known as the ***public policy exception***. This exception protects employees from being fired because they refuse to commit crimes or because they try to take advantage of privileges to which they are entitled by law.[25] The courts have held that management may not discharge an employee who refuses to commit an illegal act (participation in a

price-fixing scheme, for example). In one case, a company had to reinstate an x-ray technician who had been fired for refusing to perform a medical procedure that, under state law, could be performed only by a physician or registered nurse. Another public policy exception is that employees cannot be dismissed for performing public obligations, such as serving on a jury or supplying information to the police. Increasingly, the courts are protecting whistle-blowers—those who report company wrongdoings—from being fired. We will further discuss the case of whistle-blowers later in the chapter.

There have been so many claims of public policy exceptions in recent years that most courts have had to establish standards for employee plaintiffs. A plaintiff is a person who brings a lawsuit before a court of law. For example, a fired employee must specify a "clear public policy mandate," embodied in a statute, regulation, or court decision, that allegedly has been violated by her or his discharge. In addition, the employee plaintiff must show a direct causal linkage between that public policy and the discharge.[26] However, the *implied* existence of public policy actions is increasingly being accepted by state courts as a basis for successful employee lawsuits.[27]

Contractual Actions

The courts are also more frequently protecting workers who they believe have ***contracts*** or ***implied contracts*** with their employers. The courts are holding employers to promises they do not even realize they have made. For example, statements in employee handbooks or personnel manuals, job-offer letters, and even oral assurances about job security are now being frequently interpreted as implied contracts that management is not at liberty to violate.[28] One employee was protected because he proved in court that he was told, "Nobody gets fired around here without a good reason." Another quoted a line in an employee handbook that read, "You will not be fired without just cause."[29] Still another employee successfully argued that, when the company had used the term "permanent employee" to mean an employee who had worked beyond the 6-month probationary period, it had implied *continuous employment.*

Breach of Good Faith Actions

The courts also recognize that employers are expected to hold themselves to a standard of fairness and good faith dealings with employees. This concept is probably the broadest restraint on employment-at-will terminations. The good faith principle suggests that employers may run the risk of losing lawsuits to former employees if they fail to show that unsatisfactory employees had every reasonable opportunity to improve their performance before being fired. The major implication for companies is that they may need to introduce systems of disciplinary measures or grievance-type review procedures for employees.[30] We will discuss such due-process mechanisms later in the chapter.

Management's Response to Employees' Job Claims

With respect to employees' job claims, management needs to be aware of two important points: (1) it is now appropriate stakeholder management policy to treat workers fairly and to dismiss them only for justifiable cause, and (2) the law today increasingly protects workers who do not get fair treatment. Therefore, management has an added incentive not to get embroiled in complex legal entanglements

over wrongful discharges. Four specific actions that management might consider in dealing with this issue[31] include the following:

1. *Stay on the right side of the law.* It is management's responsibility to know the law and to obey it. This is the clearest, best, and most effective position to take. The company that conducts itself honestly and legally has the least to fear from disgruntled employees.
2. *Investigate any complaints fully and in good faith.* Well-motivated complainers in organizations are likely to report problems or concerns to someone within the company first. Therefore, employee complaints about company activities should be checked out. If there is substance to the problem, management has time to make corrections internally, with a minimum of adverse publicity.
3. *Deal in good faith with your employees.* Honor commitments, including those made in writing and those that employees have a reasonable right to expect as matters of normal policy, behavior, and good faith. Employees continue to win court cases when it is determined that their companies have acted in bad faith.
4. When you fire someone, make sure it is for a good reason. This is the best advice possible. Also make sure that the reason is supported by sound records and documentation. Effective performance appraisals, disciplinary procedures, dispute-handling procedures, and employee communications are all keys to justifiable discharges. Management needs to be attentive to abusive or retaliatory firings that are supported by thin technicalities. If the need arises to fire someone, it should not be difficult to document sound reasons for doing so.

Before an employee is terminated, wisdom suggests that management should ask the supervisor, "If you had to appear before a jury, why would you say the employee should be discharged?" Management should also ask the supervisor if the action being taken is consistent with other actions and whether the employee was aware that certain conduct would result in discharge. Finally, management should assume that litigation might result from the firing and that the supervisor making the decision to fire might not be with the company when the case goes to court. Therefore, documentation for each event leading to the termination should be assembled immediately.[32]

Effective stakeholder management suggests that organizations seriously consider their obligations to employee stakeholders and their rights and expectations with respect to their jobs. Not only are the courts increasingly affording employees greater job protection, but evolving notions of ethical treatment are increasingly expanding employees' job rights as well. Companies that are aspiring to emulate the tenets of the moral management model will need to reexamine continuously their attitudes, perceptions, practices, and policies with respect to this issue.

THE RIGHT TO DUE PROCESS AND FAIR TREATMENT

One of the most frequently proclaimed employee rights issues of the past decade has been the right to due process. Basically, ***due process*** is the right to receive an impartial review of one's complaints and to be dealt with fairly. In the context of the

workplace, due process is thought to be the right of employees to have decisions that adversely affect them be reviewed by objective, impartial third parties.

One major obstacle to the due-process idea is that to some extent it is seen to be contrary to the employment-at-will principle discussed earlier. It is argued, however, that due process is consistent with the democratic ideal that undergirds the universal right to fair treatment. It could be argued that without due process employees do not receive fair treatment in the workplace. Furthermore, the fact that the employment-at-will principle is being eroded by the courts might be taken as an indication that this principle is basically unfair. If this is true, the due-process concept makes more sense.

Patricia Werhane, a leading business ethicist, contends that, procedurally, due process extends beyond simple fair treatment and should state, "Every employee has a right to a public hearing, peer evaluation, outside arbitration, or some other open and mutually agreed-upon grievance procedure before being demoted, unwillingly transferred, or fired."[33] Thus, we see due process ranging from the expectation that employees be treated fairly to the position that employees deserve a fair system of decision making.

Sometimes the employee is treated unfairly in such a subtle way that it is difficult to know that unfair treatment has taken place. What do you do, for example, if your supervisor refuses to recommend you for promotion or permit you to transfer because she or he considers you to be exceptionally good at your job and doesn't want to lose you? How do you prove that a manager has given you a low performance appraisal because you resisted sexual advances? The issues over which due-process questions may arise can be quite difficult and subtle.

Only in the past 30 years have some leading companies given special consideration to employees' rights to due process. Historically, managers have had almost unlimited freedom to deal with employees as they wished. In many cases, unfair treatment was not intentional but was the result of inept or distracted supervisors inflicting needless harm on subordinates.[34] It can also be easily seen how amoral managers may have failed to provide employees with acceptable due process and fair treatment. By failing to institute alternative ways to resolve disputes, the managers lost an opportunity to avoid the time, energy, and money that is often lost in protracted administrative and judicial processes.[35]

Employee Constitutionalism

David Ewing, an authority on the question of employee civil liberties, has argued that employee due process should be regarded as but one part of employee constitutionalism. He suggests that ***employee constitutionalism*** "consists of a set of clearly defined rights, and a means of protecting employees from discharge, demotion, or other penalties imposed when they assert their rights." He goes on[36] to enumerate the main requirements of a due-process system in an organization:

1. It must be a procedure; it must follow rules. It must not be arbitrary.
2. It must be sufficiently visible and well known that potential violators of employee rights and victims of abuse are aware of it.
3. It must be predictably effective.

ETHICS IN PRACTICE

"How Ethical Values Vary"

During my Christmas break, I was employed at ABC Company, a caulk manufactory located in a small town. Jim Wilson, who had little or no education, was employed in the shipping department at ABC. He was also trained as a blender in case someone in the Blending Department quit, went on vacation, or was fired. Luis Alberto, who was about 58 years old, was also employed at ABC Company, as a packer. Basically, a packer operates a machine that fills the cartridges with caulk, seals the tubes, and finally places either 12 or 24 10-ounce cartridges in a box. Luis's education did not range beyond an eighth-grade level. Luis's daughter-in-law was also employed at ABC, as a chemist in the lab. She spoke up when Luis's employment situation was on the line. She even told management when it was time to consider giving Luis an increase in his earnings.

Prior to the Christmas holiday break, the hired blender quit. Knowing how hard the position was to fill, Jim was told it was a permanent position. Jim was told by his supervisor, "Jim, you can't get another job anywhere in town because you don't have a high school diploma and you can't read, so you are up the creek if you don't take this position." Nothing was mentioned to Luis about the position. Luis's daughter-in-law made sure that the supervisor kept the opening notice out of Luis's sight. Knowing the dangers of that particular job, she thought it was in his best interest not to be made aware of it. It seems as if Jim Wilson had to do all the dirty work in the plant without being able to say anything.

1. How is ethics involved in this situation at the ABC Company?
2. If ethics is involved, what procedures should be implemented?
3. What are Jim's alternatives? What should he do? Why?
4. If you observed the above situation with respect to employees as stakeholders, what would you do? Why?

Contributed by Mystro Whatley

4. It must be institutionalized—a relatively permanent fixture in the organization.
5. It must be perceived as equitable.
6. It must be easy to use.
7. It must apply to all employees.

Ewing has gone on to define *corporate due process* in the following way:

> *A fair hearing procedure by a power mediator, investigator, or board with the complaining employee having the right to be represented by another employee, to present evidence, to rebut the other side's charges, to have an objective and impartial hearing, to have the wrong corrected if proved, to be free from retaliation for using the procedure, to enjoy reasonable confidentiality, to be heard reasonably soon after lodging the complaint, to get a timely decision, and so forth.*[37]

Ewing's concept of corporate due process represents a formal ideal, and it is doubtful that many corporate due-process systems meet all his requirements. However,

there are many due-process systems or mechanisms in use by companies today as they strive to treat their employees fairly. In the next section we will briefly discuss some of these approaches.

Alternative Dispute Resolution

There are several ways companies can and do provide due process for their employees. The approaches described below represent some of the alternative dispute resolution (ADR) methods that have been employed over the past 30 years.

Common Approaches

One of the most often-used mechanisms is the ***open-door policy***. This approach typically relies on a senior-level executive who asserts that her or his "door is always open" for those who think they have been treated unfairly. Another approach has been to assign to a *human resources department executive* the responsibility for investigating employee grievances and either handling them or reporting them to higher management. Closely related to this technique is the assignment of this same responsibility to an *assistant to the president*.[38] From the employee's standpoint, the major problems with these approaches are that (1) the process is closed, (2) one person is reviewing what happened, and (3) there is a tendency in organizations for one manager to support another manager's decisions. The process is opened up somewhat by companies that use a ***hearing procedure***, which permits employees to be represented by an attorney or another person, with a neutral company executive deciding the outcome based on the evidence. Similar to this approach is the use of a ***management grievance committee***, which may involve multiple executives in the decision process.

The Ombudsperson

An innovative due-process mechanism that has become popular in the past decade for dealing with employee problems is the use of a corporate ***ombudsperson***. *"Ombudsman,"* the word from which *ombudsperson* is derived, is a Swedish word that refers to one who investigates reported complaints and helps to achieve equitable settlements. The ombudsperson approach has been used in Sweden since 1809 to curb abuses by government against individuals. In the United States, the corporate version of the ombudsperson was first experimented with in 1972, when the Xerox Corporation named an ombudsperson for its largest division. General Electric and the Boeing Vertol division of Boeing were quick to follow.[39] The ombudsperson is also known as a "troubleshooter."[40]

The operation of the ombudsperson program at Xerox is generally representative of ombudsperson programs. The ombudsperson began as an *employee relations manager* on the organization chart in Xerox's Information Technology Group (ITG). Everyone soon knew that the ombudsperson's function was to ensure fair treatment of employees. This person reported directly to the ITG president, who was the only one who could reverse the ombudsperson's decisions. During the early years of the program, none of the ombudsperson's decisions was overturned—a point signifying the power and effectiveness of the one holding the job.

Under the Xerox system, the employee was expected to try to solve her or his problem through an immediate supervisor or the personnel department before submitting a complaint to the ombudsperson. At this point, the ombudsperson

studied the complaint and the company file on the case. Then the ombudsperson discussed both items with a personnel department representative and then with the employee. Subsequently, the ombudsperson's recommended solution was passed on to the personnel department, which presented it as its own idea to the manager involved. Only if the manager declined to go along did the ombudsperson reveal her or his identity and put her or his authority behind the recommendation.[41]

Another recent example of the use of the ombudsperson is provided by Sony Electronics, Inc. In about 1993, Sony named an ombudsman to function as a clearinghouse for employee concerns. The position was intended especially to handle matters regarding illegal or unethical behavior observed within the company. The goal was early identification of legal or ethical violations.

The ombudsman at Sony also acts as a neutral third party in resolving employee complaints and as one who listens to and handles employee and manager complaints and concerns. As an independent third party, the ombudsman functions as a reporting link between employees and management. The ombudsman functions as a confidential assistant, counselor, mediator, fact finder, and upward-feedback facilitator.

At Sony, the ombudsman endeavors to protect the rights of all employees and managers involved in any matter under consideration. In addition, the ombudsman plays a key role in all business ethics matters, including the company's business ethics committee, ethics training, and implementation of the company's code of conduct.[42]

The ombudsperson approach to ensuring due process is not without problems. Managers may feel threatened when employees go to the ombudsperson, who must be willing to anger executives in order to get the job done. There is also the fear that employees might experience retribution for going to the ombudsperson in the first place. Despite these potential problems, once in place and understood, the system has worked. A positive and unexpected result of the Xerox experience was that even supervisors went to the ombudsperson for advice on personnel problems. Thus, in some cases, issues were referred to the ombudsperson even before managerial decisions were made.[43]

The Peer Review Panel

The ***peer review panel*** is another innovative due-process mechanism presently under experimentation at several large companies. Control Data Corporation (CDC) was one of the pioneers in the use of the peer review process. Over 30 years ago, Control Data was one of the first nonunion companies in the United States to introduce an employee grievance system. It was a system whereby an aggrieved employee could appeal all the way up the chain of authority through six management levels. The company tried to make the system work, but many times the grievance either died because of the cumbersome process or was "kicked upstairs" for some higher level of management to handle. Rulings in favor of the worker were rare. The company determined that this approach was not fair, and in 1983 it added a peer review process to the system.[44]

The peer review process at CDC required the same initial steps as had the traditional grievance system. The employee was to talk first with her or his manager, then to the human resources manager, and then to one higher executive in the management chain. If the employee was still not satisfied that due process had prevailed, she or he was entitled to request a peer review board. The central feature of a peer

review board is a panel of two randomly chosen "peers" of the aggrieved employee, along with one disinterested executive from a different division. ***Peers*** were defined as fellow workers in the same job family at a grade level equal to or higher than that of the grievant.[45]

Managers on the losing side sometimes complain because they think that outsiders are deciding on local issues about which they are not intimately knowledgeable. The company's position is that a manager not only has to convince herself or himself and local superiors that a personnel action is right but also must have it deemed as right against a companywide policy. The success of the system depends on (1) its having the clear support of top management for fair treatment of employees and (2) its being seen as a permanent fixture. The people who operate the peer review system must have sufficient respect and stature to make the process credible in the eyes of even the most authoritarian line manager.[46]

The trend toward using ADR is growing with no end in sight. In 1998, the American Arbitration Association estimated that over 400 employers were using alternative methods to resolve disputes and predicted that 10,000 employers would use such methods by the year 2000. This growth is spurred partly by the time and money saved by avoiding costly litigation. Brown & Root, a Houston-based construction and engineering firm, estimates that its legal fees have dropped 30 to 50 percent since employing ADR, and 70 to 80 percent of the firm's cases are now settled within 8 weeks (40 percent within a month). Further, the proportion of adverse settlements and the size of the judgments are no different from when they went through the court system.[47] A 1997 survey conducted by Cornell University, the Foundation for the Prevention and Resolution of Conflict, and Price Waterhouse, LLP, showed that most Fortune 1000 corporations have used some form of ADR. Of these, 81 percent found ADR to be "a more satisfactory process" than litigation, while 59 percent indicated that ADR "preserves good relationships."[48]

Concerns have recently been expressed that employers are beginning to require new hires to sign contracts waiving their right to sue the firm and accepting mandatory arbitration as the alternative. Critics of this practice argue that this robs employees of their right to due process; supporters contend that the arbitration process is just as fair as a jury trial while costing much less in time and money. At this writing, the courts appear to have generally upheld mandatory arbitration, but Congress is considering bills to ban it.[49]

It is unclear what the future holds for employee due process. As Ewing has indicated, "Due process is a way of fighting institutionalized indifference to the individual—the indifference that says that productivity and efficiency are the goals of the organization, and any person who stands in the way must be sacrificed."[50] Increasingly, companies are learning they must acknowledge due process to be not only an employee right but also a sound and ethical management practice in keeping with the wishes and expectations of employees.

FREEDOM OF SPEECH IN THE WORKPLACE

In the 1980s, Henry Boisvert was a testing supervisor at FMC Corp., makers of the Bradley Fighting Vehicle. The Bradley was designed to transport soldiers around

battlefields and, when necessary, "swim" through rivers and lakes. When Boisvert tested the Bradley's ability to move through a pond, he found it filled quickly with water. He wrote the Army a report of his findings but was told by FMC supervisors that the report would never be sent. When Boisvert refused to sign a falsified report of his test results, he was fired.[51]

About the same time that Boisvert was discovering the Bradley's inability to swim, Air Force Lieutenant Colonel James Burton found additional problems with the fighting machine. When hit by enemy fire, the Bradley's aluminum armor melted and filled the inside of the vehicle with poisonous fumes. After 17 years of development and $14 billion for research and prototypes, the Bradley was unfit for warfare. Burton uncovered tests of the Bradley that were rigged by filling the gas tanks with water and the ammunition with noncombustible sand, making it impossible for the Bradley to explode. He also fought an attempt to transfer him to Alaska. After persevering to successfully force changes in the Bradley, Burton was forced to take early retirement as the officers who tried to stop his investigation were promoted.[52]

For most whistle-blowers, the story ends here, but Boisvert and Burton prevailed in their fights to fix the Bradley. In 1998, after a 12-year legal battle, Boisvert received one of the largest damage awards ever seen in a federal case, well over $300 million. During the trial, evidence emerged about employees using putty to fix cracks in the machine while vehicles to be selected for random inspection were marked with "X"s and worked on more carefully than the rest.[53] Burton's story also ends happily. Congress mandated that the Bradley be tested under the supervision of the National Academy of Sciences, using conditions that resembled true battlefield combat. As a result of these tests, the Bradley was redesigned and used successfully during the 1991 Persian Gulf War. Burton wrote a successful book about his experiences, *The Pentagon Wars,* which subsequently became a 1998 HBO movie.[54] It is impossible to estimate how many soldiers' lives were saved by the courage and persistence of these two men.

Unfortunately for employees who believe they have a legitimate right to speak out against a company engaging in an illegal or unethical practice, most whistle-blowers' stories lack happy endings. Studies of whistle-blowers have found that as many as 90 percent experience negative outcomes, and more than half lose their jobs. Many end up taking prescription medicine to ease the stress, while others even contemplate suicide.[55] Nevertheless, the willingness to challenge management by speaking out is typical of a growing number of employees today, and these individuals are receiving increasing amounts of protection from the courts.

Whistle-Blowing

As stated earlier, the current generation of employees has a different concept of loyalty to and acceptance of authority than that of past generations. The result is an unprecedented number of employees "blowing the whistle" on their employers. A whistle-blower has been called a "muckraker from within, who exposes what he [or she] considers the unconscionable practices of his [or her] own organization."[56]

What constitutes whistle-blowing? For our purposes, we define a ***whistle-blower*** as "an individual who reports to some outside party [for example, media, government agency] some wrongdoing [illegal or unethical act] that he or she knows or suspects his or her employer of committing." An alternative but similar definition of whistle-

blowing is provided by Miceli and Near, two experts on the subject, who characterize it as "the disclosure by organization members [former or current] of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action."[57]

Thus, there are four key elements in the whistle-blowing process: the whistle-blower, the act or complaint the whistle-blower is concerned about, the party to whom the complaint or report is made, and the organization against which the complaint is made.[58] Although our definition indicates that whistle-blowing is done to some outside party, there have been many cases where "internal whistle-blowers" have simply reported their concerns to members of management and yet have been treated as though they had gone to outside parties.

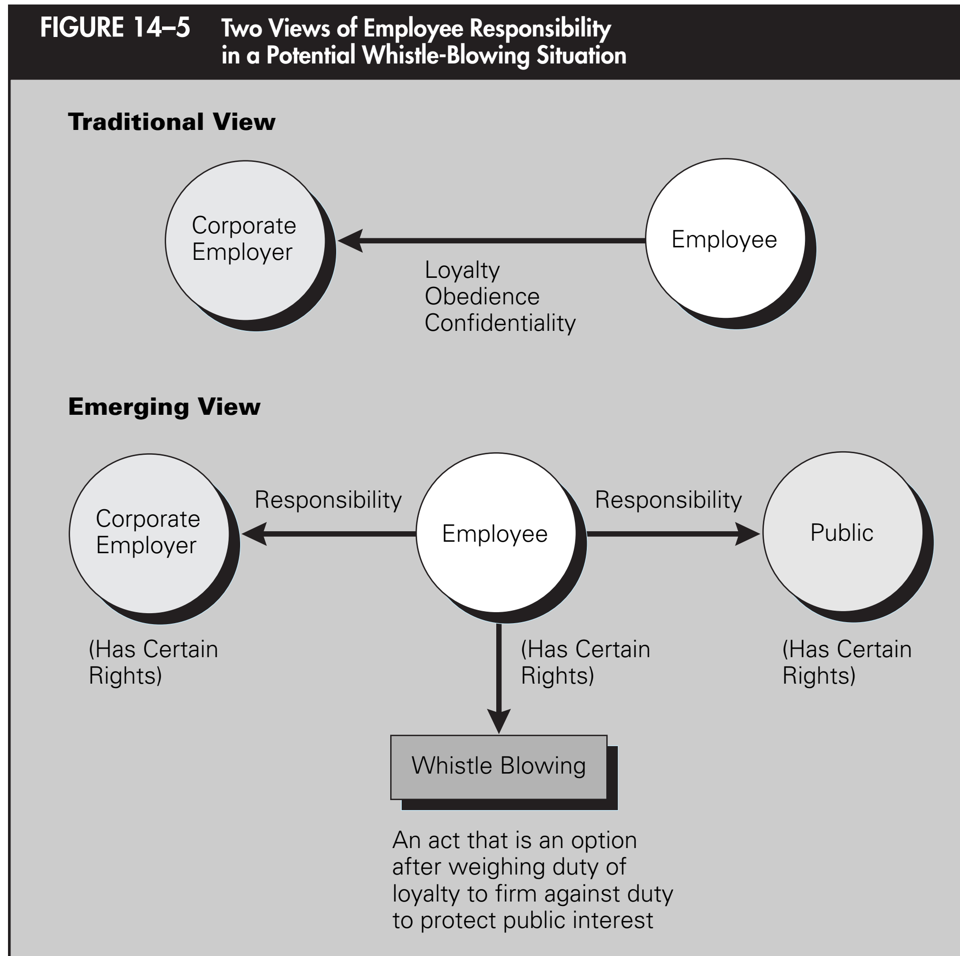
What is at stake is the employee's right to speak out in cases where she or he thinks the company or management is engaging in an unacceptable practice. Whistle-blowing is contrary to our cultural tradition that an employee does not question a superior's decisions and acts, especially not in public. The traditional view holds that loyalty, obedience, and confidentiality are owed solely to the corporate employer. The emerging view of employee responsibility holds that the employee has a duty not only to the employer but also to the public and to her or his own conscience. Whistle-blowing, in this latter situation, becomes a viable option for the employee should management not be responsive to expressed concerns. Figure 14–5 depicts these two views of employee responsibility.

Most whistle-blowers seem to be engaging in these acts out of a genuine or legitimate belief that the actions of their organizations are wrong and that they are doing the right thing by reporting them. They may have learned of the wrongful acts by being requested or coerced to participate in them, or they may have gained knowledge of them through observation or examination of company records. The genuinely concerned employee may initially express concern to a superior or to someone else within the organization.[59] Other potential whistle-blowers may be planning to make their reports for the purpose of striking out or retaliating against the company or a specific manager for some reason. This motive is illegitimate. One recent survey of 233 whistle-blowers disclosed that the average whistle-blower is not an oddball, "loose cannon," or disgruntled employee. The average whistle-blower turns out to be a family man, in his mid-40s, who was motivated by conscience, or what might be termed "universal moral values."[60]

Consequences of Whistle-Blowing

What happens to employees after they blow the whistle? Unfortunately, whistle-blowers are seldom rewarded for their perceived contributions to the public interest. Although they are now more likely to get some form of protection from state courts, whistle-blowers in general have paid dearly for their lack of company loyalty. Short of firings, various types of corporate retaliation have been taken against whistle-blowers,[61] including:

- More stringent criticism of work
- Less desirable work assignments



- Pressure to drop charges against the company
- Heavier workloads
- Lost perquisites (for example, telephone and parking privileges)
- Exclusion from meetings previously attended

One example of what can happen to whistle-blowers as a consequence of their actions is the case of Charles Atchison. At age 40, Atchison stood up before regulators and told them about numerous safety violations at the Commanche Peak Nuclear Plant in Glen Rose, Texas. Atchison was a quality control inspector for Brown & Root, the construction company that built the plant for the Texas Utilities Electric Company. Atchison claimed he couldn't get anyone to fix the problems. Atchison lost his job and ended up in debt. Although Atchison was proud of the

stance he had taken, he indicated that he often felt psychic scars from the experience. "The whistle-blower today is probably the most discriminated against individual in the country," Atchison exclaimed.[62]

Another example is the case of Anne Livengood, a 51-year-old medical office worker who claimed she was fired from a physical therapy clinic in Fremont, California, after she had notified management that its accounting system was billing insurance companies for services that had not been performed. Livengood was escorted out of her building by the company accountant. Her response to the experience was, "You feel so alone and intimidated."[63]

Famous cases of whistle-blowing include Ernest Fitzgerald, the Air Force employee who blew the whistle on billions of dollars in cost overruns at Lockheed, and the Morton Thiokol engineers who tried to halt the launch of the space shuttle *Challenger* because of frozen O-rings. All of these whistle-blowers were fired.[64]

Figure 14–6 identifies a pattern that Donald Soeken refers to as the seven stages of life of a typical whistle-blower.

Although whistle-blowers frequently do get fired, as public policy increasingly sides with them and their courageous stances, other corporate actions are becoming possible. An encouraging episode from 1994 is the case of Mark Jorgensen, who was employed at Prudential Insurance Co. of America.[65] Jorgensen was a manager of real estate funds for Prudential. He thought he was just being an honest guy when he exposed fraud he saw occurring in his company. His world then began to fall apart. He was abandoned by his boss, who had once been his friend. His colleagues at work began to shun him. Company lawyers accused him of breaking the law. Jorgensen, who was once a powerful and respected executive in the firm, began to hide out at the local library because he had been forbidden to return to his office. His long and successful career appeared to be dwindling to a pathetic end. Finally, he was fired.

Unlike most whistle-blowers, however, Jorgensen received a phone call from the company chairman, Robert Winters, who wanted to meet with Jorgensen to tell him some startling news: The company now believed him and wanted to reinstate him. Further, the company wanted to force out the boss he had accused of falsely inflating the values of funds that he managed. The turnabout was attributed to Jorgensen's persistence in fighting all odds in his quest to justify his convictions. Coming to the realization that Jorgensen had been right in his allegations all along, Prudential found itself in an unusual situation in business today—siding with the whistle-blower it had fought for months and eventually had fired. The company offered to reinstate Jorgensen in his job, but he elected instead to move on to another company. Prudential paid him a sizable amount to settle his lawsuit.[66] Although we do not read about many stories that end this way, it is encouraging to know that there are some stories that have good endings.

Government's Protection of Whistle-Blowers

Just as employees are beginning to get some protection from the courts through the public policy exception to the employment-at-will doctrine, the same is true for whistle-blowers. The federal government was one of the first organizations to attempt to protect its own whistle-blowers. A highlight of the 1978 *Civil Service Reform Act* was protection for federal employees who expose illegal, corrupt, or

FIGURE 14–6 The Seven Stages of Life of a Typical Whistle-Blower

Based on extensive research into the life experiences of whistle-blowers, Donald Soeken has identified a pattern that he calls the "seven stages of life" of a typical whistle-blower. The seven stages are as follows:

1. **Discovery of the organizational abuse**
2. **Reflection on what action to take**
3. **Confrontation with superiors**
4. **Retaliation (against the whistle-blower)**
5. **Long haul of legal action**
6. **Termination of the case**
7. **Going on to a new life**

In terms of *personal effects,* Soeken found in a survey of 233 whistle-blowers that 90 percent of them had lost their jobs or been demoted, 26 percent had sought psychiatric and medical care, 15 percent had divorced in the aftermath of the episode, 10 percent had attempted suicide, and 8 percent had gone bankrupt.

SOURCE: Cited in Ana Radelat, "When Blowing the Whistle Ruins Your Life," *Public Citizen* (September/October, 1991), 18–19.

wasteful government activities. Unfortunately, this effort has had only mixed results.[67] It is difficult to protect whistle-blowers against retaliation because so often the reprisals are subtle. An added boost for federal employees came in 1989, when Congress passed the *Whistle-Blower Protection Act* and President Bush signed it into law. The effect of this act was to reform the Merit System Protection Board and the Office of General Counsel, the two offices that protect federal employees. Early results show that about one-third of the whistle-blowers had their complaints upheld, whereas less than 5 percent were being upheld prior to the new legislation.[68]

Most state courts recognize a public policy exception and therefore whistle-blowers have some limited protection. The normal remedy for wrongful discharge of employees is reinstatement with back pay, with some sympathetic juries adding compensatory damages for physical suffering.[69]

The problem with most laws intended to protect whistle-blowers is that they are quite spotty. Some state and federal laws, such as environmental, transportation, health, safety, and civil rights statutes, have provisions that protect whistle-blowers from retaliation, but relatively few states have provisions that protect private-sector employees, and these provisions vary widely in their nature and protection coverage. Another obstacle to effective whistle-blowing stems from the recent move toward mandatory arbitration, discussed earlier in the chapter. Because mandatory arbitration is an in-house process, it can deny a whistle-blower the public forum that is one of the whistle-blower's most effective tools for creating change.[70]

Protection is intended to mean that employers are prohibited from firing or otherwise retaliating against employees, but, practically speaking, it typically means that the employee may file suit for harassment or wrongful discharge. Currently, private-sector employees are not protected by federal whistle-blowing laws, but

the Government Accountability Project, an independent, nonprofit organization in Washington, DC, is working to promote legislation that would protect private sector jobs.[71] Their challenge will be to get cooperation and action from Congress.

The Whistle-Blowers Protection Act of Michigan

Few states have gone as far as Michigan did by actually creating specific whistle-blower protection. The *Michigan Whistle-Blowers Protection Act of 1981* became the first state law designed to protect any employee in private industry against unjust reprisals for reporting alleged violations of federal, state, or local laws to public authorities. The burden is placed on the employer to show that questionable treatment is justified on the basis of proper personnel standards or valid business reasons.[72]

When the bill was proposed in Michigan, employer groups were opposed to it because they feared it would result in a flood of litigation and harassing actions by employees who were fired for valid reasons. The bill was amended to address employer concerns, and the final law[73] carried the following requirements for employees to be protected under the law:

1. Employees must prove they have filed or are about to file a complaint at the time of dismissal.
2. The complaint must be made to public authorities, not to the media.
3. Reports must not be found to be false or malicious.

Alan Westin thinks that a major flaw in the bill is that it does not require the whistle-blower, before going public, to use the company's own internal procedures for complaints.[74] Generally speaking, when a court is attempting to decide whether a whistle-blower should be protected, it is interested in (1) the whistle-blower's motives, (2) whether internal channels have been used, (3) whether the whistle-blower's allegations are true or false, and (4) the degree of care exercised by the whistle-blower in gathering the information on which the charges are based. These requirements are reasonable safeguards to protect companies against negligent dissenters.

The Michigan act has spurred similar laws in other states. Another likely impact of such laws will be on company personnel practices and policies. Well-managed companies will need to be sure they have effective and fair procedures or systems for dealing with whistle-blowers. Time has shown, however, that few states have followed Michigan's aggressive lead. Many states now insist that a company be given a reasonable opportunity to correct a violation or condition before making a disclosure to a public body.[75]

Although we see more and more cases of employees wanting the right to question management and to speak out, David Ewing[76] argues that there are some forms of speech that should not be protected:

- Employees should not have the right to divulge information about legal and ethical plans, practices, operations, inventions, and other matters that must be kept confidential if the organization is to do its job in an efficient manner.

- Employees should not have the right to make personal accusations or slurs that are irrelevant to questions about policies and actions that seem illegal or irresponsible.
- Employees should not be entitled to disrupt an organization or damage its morale by making accusations that do not reflect a conviction that wrong is being done.
- Employees should not be entitled to rail against the competence of a manager to make everyday work decisions that have nothing to do with the legality, morality, or responsibility of management actions.
- Employees should not be entitled to object to discharge, transfer, or demotion, no matter what they have said about the organization or how they have said it, if management can demonstrate that unsatisfactory performance or violation of a code of conduct was the reason for its actions.

In the final analysis, an employee should have a right to dissent, but this right may be constrained or limited by the kinds of reasons just given, and perhaps others as well.

False Claims Act of 1986

A provocative piece of federal legislation that was passed to add an incentive for whistle-blowers in the public interest is the False Claims Act of 1986. The False Claims Act was originally passed over 100 years ago in 1863 in response to contractors who had cheated the government. The law was revised in 1986 to make recoveries easier and more generous and thereby encourage whistle-blowing against government contractor fraud.[77] The 1986 act grew out of outrage in the mid-1980s over reports of fraud and abuse on the part of military contractors, such as $600 toilet seats and country club memberships billed to the government.[78]

The 1986 amendments were an effort on the part of Congress to put teeth into its efforts to curb contracting fraud. The False Claims Act has *qui tam* (Latin shorthand for "he who sues for the king as well as himself") provisions that allow employees to blow the whistle about contractor fraud and share with the government in any financial recoveries realized by their efforts.

What is particularly controversial about the False Claims Act of 1986 is the magnitude of the financial incentives that individual employees may earn as a result of their whistle-blowing efforts. The law allows individuals to be awarded as much as 15 to 25 percent of the proceeds in cases where the government joins in the action, and from 25 to 30 percent of the proceeds in actions that the government does not join.[79] Thus, there are millions or even tens of millions of dollars of incentives available to whistle-blowers who successfully win their suits against private contractors, thus allowing the government to get back huge sums, too. In 1997, as the result of a whistle-blower's actions, SmithKline Beecham Clinical Laboratories was ordered to pay a record $325 million fraud settlement to the Justice Department.[80]

As a result of the False Claims Act, whistle-blowing against abuse of government by private companies is enjoying a renaissance. The Justice Department is recovering record sums, and whistle-blowers are becoming millionaires. John Phillips, a

prominent public-interest lawyer in Los Angeles who helped persuade Congress to strengthen the False Claims Act in 1986, is enjoying a bustling law practice. His target companies have included GE, Teledyne, and National Health Laboratories. His first seven cases brought about $380 million back into the U.S. Treasury.[81]

As of this writing, the False Claims Act has returned nearly $2 billion to the federal government. The Act continues to evolve as it is tested by legislation and the court. Proposed legislative changes have included setting a minimum threshold for claims, excluding discrepancies that result from "unintentional" mistakes, and blocking suits in which there had been "prior disclosure" of the same allegations. In the courts, a federal judge in Houston declared the Act was unconstitutional because the right to prosecute cases belongs to the Executive Branch, not Congress. In 1998, a federal judge ruled that states and municipalities cannot be sued under the Act, because they do not qualify as people under the Civil War–era law. To date, three federal appeals courts have upheld the law's constitutionality, and the Supreme Court has declined to hear challenges.[82]

Whatever the outcome of the challenges to the False Claims Act, it is clear that whistle-blowing will remain a major concern for the private sector. This necessitates careful thought and action on the part of company management as they contemplate how to respond to whistle-blowers and to whistle-blowing situations.

Management Responsiveness to Potential Whistle-Blowing Situations

How can an organization work with its employees to reduce their need to blow the whistle? Kenneth Walters[83] has suggested five considerations that might be kept in mind:

1. The company should assure employees that the organization will not interfere with their basic political freedoms.
2. The organization's grievance procedures should be streamlined so that employees can obtain direct and sympathetic hearings for issues on which they are likely to blow the whistle if their complaints are not heard quickly and fairly.
3. The organization's concept of social responsibility should be reviewed to make sure that it is not being construed merely as corporate giving to charity.
4. The organization should formally recognize and communicate respect for the individual consciences of employees.
5. The organization should realize that dealing harshly with a whistle-blowing employee could result in needless adverse public reaction.

Companies are learning that whistle-blowing can be averted if visible efforts are made on the part of management to listen and be responsive to employees' concerns. One specific approach is the use of an ombudsperson, which we discussed earlier, as a due-process mechanism. The ombudsperson can also be used to deal with employee grievances against the company. The Corporate Ombudsman Association, which includes such firms as Anheuser-Busch, Control Data, McDonald's, and Upjohn, even goes so far as to prepare training materials that include likely whistle-blowing scenarios. According to one report, the national grapevine among corpo-

rate ombudspersons is constantly buzzing with rumors of front-page scandals that they have averted. The companies that have put money into such programs say they are well worth the investment.[84]

Whether or not an ombudsperson is used, management should respond in a positive way to employee objectors and dissenters. At a minimum, companies that want to be responsive to such employees[85] should engage in the following four actions:

1. *Listen.* Management must listen very carefully to the employee's concern. Be particularly attentive to the employee's valid points, and acknowledge them and show that you have a genuine respect for the employee's concerns. It is recommended that you attempt to "draw out the objector's personal concerns."
2. *Delve into why the employee is pursuing the complaint or issue.* Determining the objector's motives may give you important insights into the legitimacy of the complaint and how it should best be handled.
3. *Look for solutions that will address the interests of both the objector and the company.*
4. *Attempt to establish an equitable means of judging future actions.* Objective tests or criteria that are agreeable to both sides are superior to perseverance or negotiation as a means of resolving an impasse.

In a related set of recommendations, *Business Week* and The Conference Board have set forth four key components of a model whistle-blower policy.[86] These four recommended actions are as follows:

1. *Shout it from the rooftops.* The company should aggressively publicize a reporting policy that encourages employees to bring forward valid complaints of wrongdoing.
2. *Face the fear factor.* Employee fear may be defused by directing complaints to someone outside the whistle-blower's chain of command.
3. *Get right on it.* The complaint should be investigated immediately by an independent group, either within or outside the company.
4. *Go public.* The outcomes of investigations should be publicized whenever possible so that employees can see that complaints are taken seriously.

The desire of employees to speak out is increasingly becoming a right in their eyes and in the eyes of the courts as well. Although the courts differ from state to state, it is likely that whistle-blowers and employees' rights to free expression will increasingly be protected in the future. This being the case, management needs to assess carefully where it stands on this vital issue. It is becoming more and more apparent that respecting an employee's right to publicly differ with management may indeed serve the longer-term interests of the organization. We should also remember, however, that companies need and deserve protection from employees who do not perform as they should. Thus, "in the end, nothing could be more contrary to public policy than providing judicially imposed job tenure for those who least deserve it."[87]

SUMMARY

Employee stakeholders today are more sensitive about employee rights issues for a variety of reasons. Underlying this new concern are changes in the social contract between employers and employees. Four other changes that have occurred in the workplace are increased technological hazards, the computer invasion, professionals with divided loyalties, and increased mobility of employees. Central among the growing employee rights issues that are treated in this chapter are the right to a job or the right not to be fired without just cause, the right to due process and fair treatment, and the right to freedom of speech.

The basis for the argument that we may be moving toward an employee's right to a job, or not to be fired, is the erosion by the courts of the employment-at-will doctrine. More and more the courts are making exceptions to this longstanding common-law principle. Three major exceptions are the public policy exception, the idea of an implied contract, and breach of good faith. Society's concept of what represents fair treatment to employees is also changing.

The right to due process is concerned primarily with fair treatment. Common approaches for management responding to this concern include the open-door policy, human resource specialists, grievance committees, and hearing procedures. The ombudsperson approach is becoming more prevalent, and recently the peer review panel seems to have become a popular due-process mechanism. A special case in which due process is needed is the employee who chooses to speak out against management or blow the whistle on unethical or illegal actions. In spite of government efforts to protect whistle-blowers, these individuals face severe reprisals for taking actions against their employers. Managers should be genuinely attentive to employees' rights in this realm if they wish to avert major scandals and prolonged litigation. A stakeholder approach that emphasizes ethical relationships with employees would ordain this attention and concern.

KEY TERMS

contracts (page 450)

due process (page 451)

employee constitutionalism (page 452)

employment-at-will doctrine (page 449)

hearing procedure (page 454)

implied contracts (page 450)

management grievance committee (page 454)

ombudsperson (page 454)

open-door policy (page 454)

peer review panel (page 455)

peers (page 456)

private property (page 445)

public policy exception (page 449)

whistle-blower (page 457)

DISCUSSION QUESTIONS

1. Rank the various changes that are occurring in the workplace in terms of their importance to the growth of the employee rights movement. Briefly explain your ranking.

2. Explain the employment-at-will doctrine, and describe why it is being eroded. Do you think its erosion is leading to a healthy or an unhealthy employment environment in the United States? Justify your reasoning.
3. In your own words, explain the right to due process. What are some of the major ways management is attempting to ensure due process in the workplace?
4. If you could choose only one, would the ombudsperson approach or the peer review panel be your choice as the most effective approach to employee due process? Explain.
5. How do you feel about whistle-blowing now that you have read about it? Are you now more sympathetic or less sympathetic to whistle-blowers? Explain.
6. What is your assessment of the value of the 1986 False Claims Act?

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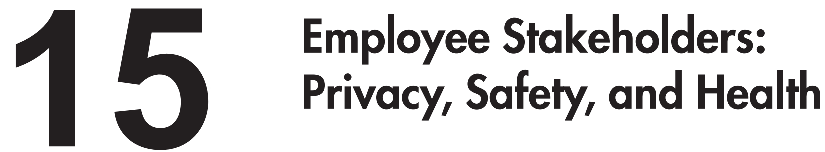


15 Employee Stakeholders: Privacy, Safety, and Health

CHAPTER OBJECTIVES

After studying this chapter, you should be able to:

1. Articulate the concerns surrounding the employee's right to privacy in the workplace.
2. Identify the advantages and disadvantages of polygraphs, honesty tests, and drug testing as management instruments for decision making.
3. Discuss the right to safety in the workplace, and summarize the role and responsibilities of OSHA.
4. Explain right-to-know laws, and identify the status of workplace threats to reproductive health.
5. Elaborate on the right to health in the workplace, with particular reference to the recent concerns about smoking in the office and AIDS.

Employee stakeholders are concerned not only with the issues we discussed in the preceding chapter but also with several other issues. These other issues should be thought of as extensions of the concept of employee rights developed in Chapter 14. In this chapter we are concerned with the employee's rights to privacy, safety, and a healthy work environment.

The right to privacy primarily addresses the psychological dimension, whereas the rights to health and safety primarily address the physical dimension. The status of an employee's right to privacy in the workplace today is ill defined at best. Constitutional protection of privacy, such as the prohibition of unreasonable searches and seizures, applies only to the actions of government, not to those of private sector employers. From a legal standpoint, privacy protection, as with so many employee rights, is a collection of diverse statutes that vary from issue to issue and from state to state. Hence, there is a genuine need for management groups to impose ethical thinking and standards in this increasingly important area.

Employee rights to safety and health are issues of rising intensity, too. In today's workplace, whether it be a manufacturing facility or an office complex, workers are exposed to hazards or risks of accidents or occupational diseases. If the normal hazards of work were not enough, the recent phenomenon of violence in the workplace should cause management to pay serious attention to this threat to workplace peace and stability. Recent Labor Department statistics suggest a spectacle of workplace violence that has captured corporate America's attention: attacks on workers

at company offices, law firms, and shopping malls.[1] Two crucial health issues today are smoking in the workplace and the implications of AIDS. Management also has to be aware of what legal rights employees have today under the recently passed Family and Medical Leave Act of 1993, a piece of legislation designed to make life easier for employees with health or family problems.

To reiterate a point we made in the preceding chapter, the distinction between the issues discussed there and those discussed here is made for discussion purposes. With that in mind, let us continue our consideration of social and ethical issues that have become important to employee stakeholders in recent years. If managers are to be successful in dealing with employees' needs and treating them fairly as stakeholders, they must address these concerns now and in the future.

RIGHT TO PRIVACY IN THE WORKPLACE

In New York, an employee returned to work after a prolonged illness. His supervisor was concerned about the possibility of a relapse, so the supervisor asked the company physician to talk with the employee's doctor. When the employee found out about this, he filed an invasion of privacy suit. During the same year, managers at a New Mexico newspaper got a tip from undercover investigators that members of the night production crew were using drugs. Complete with roaring cars and whirring helicopters, the company's security force moved in. They lined up 27 employees for urine tests. Later, 17 were fired for failing the test or refusing to take it. Several privacy invasion suits were filed.[2]

Both of these cases typify the escalating number of privacy suits being filed against employers. In the first case, a federal court upheld the employer's action, saying that the supervisor was legitimately interested in the employee's health and, therefore, did not commit "an outrageous act of privacy invasion." In the second case, a lower court also found in favor of the employer's action because reasonable cause for suspicion existed.[3] In this age of increased sensitivity to invasion of privacy, however, the outcomes of such cases are not always in the employer's favor. The number of cases of privacy invasion has been increasing in recent years and is expected to continue.[4]

Figure 15–1 summarizes some recent court cases in which workplace privacy invasion allegations were both upheld and denied.[5]

There are no clear legal definitions of what constitutes privacy or invasion of privacy, but everyone seems to have an opinion on when it has happened to them. Most experts say that ***privacy*** means the right to keep personal affairs to oneself and to know how information about one is being used.[6] Patricia Werhane, a business ethicist, opts for a broader definition. She says that privacy includes (1) the right to be left alone, (2) the related right to autonomy, and (3) the claim of individuals and groups to determine for themselves when, how, and to what extent information about them is communicated to others.[7]

Defining privacy in this way, however, does not settle the issue. In today's world, achieving these ideals is extremely difficult and fraught with judgment calls about our own privacy rights versus other people's rights. This problem is exacerbated by the increasingly computerized, technological world in which we live. We gain great

FIGURE 15–1 Examples of Workplace Privacy Invasion Claims

Employers *invaded privacy* in these cases, say the courts:

- **The officer of a company opened and read the private mail of another company officer *(Vernars v. Young).***
- **A manager made offensive remarks, offers, threats, and demands to an employee, including inquiries concerning the nature of the sexual relationship between the employee and her spouse *(Phillips v. Smalley Maintenance).***
- **An employer improperly pressured an employee into taking a lie-detector test based on rumors of off-the-job drug use *(O'Brien v. Papa Gino's).***
- **To investigate the theft of a watch, a manager broke into an employee's personal locker and went through the employee's personal belongings, including a purse *(K-Mart v. Trotti).***

Employers *did not invade privacy* in these cases, say the courts:

- **An employer investigated allegations by coworkers that a supervisor had an inappropriate relationship with a subordinate. The investigation involved interviews of employees and examination of company records *(Rogers v. IBM).***
- **An employer requested that an employee disclose the medications the employee was taking prior to a drug test *(Mares v. Conagra Poultry Co.).***
- **While an employee was on medical leave, the employer wrote to a doctor asking for information about the employee's condition and ability to return to work *(Saldana v. Kelsey-Hayes Co.).***

efficiencies from computers and new technologies, but we also pay a price. Part of the price we pay is that information about us is stored in dozens of places, including federal agencies (the Internal Revenue Service and the Social Security Administration), state agencies (courts and motor vehicle departments), and many local departments and businesses (school systems, credit bureaus, banks, life insurance companies, and direct-mail companies).

According to a recent survey conducted by Louis Harris and Associates and Dr. Alan Westin, more than half of the Americans polled (55.5 percent) were "very concerned" about threats to their privacy.[8] These results nearly double the 31 percent who were "very concerned" in 1978.[9] Clearly, the increase in the ease with which personal information can be collected has been accompanied by an increase in concern over how that information will be gathered and used.

In the realm of employee privacy, which is our central concern here, the following five important issues stand out as representative of the major workplace privacy issues of the past decade:

1. Collection and use of employee information in personnel files
2. Use of the polygraph, or lie detector, in making employee decisions
3. Honesty testing
4. Drug testing
5. Monitoring of employee work and conversations by electronic means

There are other issues that involve protection or invasion of privacy, but the five listed above account for the majority of today's concerns. Therefore, they merit separate consideration.

Collection and Use of Employee Information by Employers

Although our focus here is not a global or societal one, the collection, use, and possible abuse of employee information is a serious public policy issue that warrants scrutiny. Today's government databases, with some 15 agencies mixing and matching data, form a cohesive web of information on individual citizens. Ostensibly, we are protected as citizens by laws such as the Privacy Act of 1974, which requires the consent of individuals before federal agencies can collect and use data for purposes other than those for which the data was originally intended.[10] In the private sector, however, there are very few laws that protect individuals in this regard.

According to privacy expert David F. Linowes, "Most Americans have no idea of the scope of record-keeping by corporations."[11] Linowes, who has conducted major studies on the privacy issue, warns that information collected by employers is being used to decide job promotions, grant credit, sell insurance, and help marketers and political groups tailor commercial or political solicitations. For example, Linowes cites a case where an executive was passed over for promotion because his personnel file reported "larcenous tendencies." It turns out that his file had been poorly summarized, and the report referred to a ninth-grade prank. In another instance, an executive was denied a promotion because his file included an investigator's report of marijuana use years earlier and because of a report that he and his wife had seen a marriage counselor.

The overriding principle that should guide corporate decision making in regard to the collection and use of employee information is that companies should only collect that information from employees that is absolutely necessary and only use it in ways that are appropriate. Companies should be careful not to misuse this information by employing it for purposes for which it was not intended. For example, information collected during a medical exam for insurance purposes should not be used by a supervisor in making an evaluation for a promotion. In 1989, a troubling study revealed that over 60 Fortune 500 companies used medical data in making "employment-related" decisions. The companies defended this practice by referring to high medical costs and substance-abuse problems.[12] The Americans with Disabilities Act now makes it illegal to base employment decisions on a medical condition that does not affect the employee's ability to perform the essential functions of the job. However, it remains very difficult for employees to know, or to be able to prove, when medical information is used to make employment decisions.

Another important principle is that the employer should understand that information collected from employees is not a commodity to be exchanged, sold, or released in the marketplace.[13] Thus, the release of information to a landlord, credit grantor, or any other third party without the employee's consent may be seen as an invasion of privacy.

A final important principle pertains to employees' access to information about themselves in company personnel files or other recordkeeping systems. Employees should have some way of knowing what information is being stored about them, and they should have the opportunity to correct or amend inaccurate information. A

study by David Linowes revealed that 87 percent of companies allowed employees to look at their personnel files, but only 27 percent gave the employees access to their supervisors' files, which often contain the most subjective information.[14]

Use of the Polygraph

In the invasion-of-privacy arena, few topics have generated as much controversy as the use of the polygraph, or lie detector, in business. The following brief scenario typifies the type of employee experience that led up to the Employee Polygraph Protection Act (EPPA) of 1988, which banned most private sector uses of the lie detector. A polygraph machine was perched on a makeshift table in a tiny storage area. The examiner, hired by the employer, connected electrodes to 28-year-old Sandra Kwasniewski and then started interrogating her. "Have you ever shoplifted anything? Whom do you live with? Where does your boyfriend live? What are your dating practices? Do you drink?" Ms. Kwasniewski, manager of a gas station convenience store in the eastern United States, maintained that nothing had been stolen or even reported missing, but 2 days after the lie detector test she was fired.[15]

The notion of a "lie detector," historians tell us, is nothing new. The Bedouins of Arabia knew that certain physiological changes, triggered by guilt and fear, occurred when a person lied. The outstanding change they observed was that a liar would stop salivating. They developed a simple test in which a heated blade was passed across the tongue of a suspected liar. If innocent, the suspect would be salivating normally and the tongue would not be burned; if the person was lying, the tongue would be scorched. The ancient Chinese used dry rice powder. Someone suspected of lying was forced to keep a handful of rice powder in the mouth. If the powder was soggy when it was spat out, the truth was being told; if it was dry, the person was lying.[16]

Critics of today's lie detectors may well argue that the modern devices are not much more advanced than these ancient techniques. The polygraph machine, as it is known today, was developed by John Larson in 1929, although others trace it to an earlier date. It measures changes in blood pressure, respiration, and perspiration, sometimes called galvanic skin response. The theory behind polygraphy is that the act of lying causes stress, which in turn is manifested by observable physiological changes. The examiner, or machine operator, then interprets the subject's physiological responses to specific questions and makes inferences about whether or not the subject's answers indicate deception.[17]

Although the 1988 Employee Polygraph Protection Act banned most uses of the lie detector by private employers, it is easy to sympathize with the desire of businesses to protect themselves against serious losses. A striking figure is that companies suffer annual losses from employee theft in excess of $40 billion. Other studies have shown that 75 percent of employees who handle money steal some of it. In addition, one must add to these numbers the large losses that result from employee sabotage, industrial espionage, and other types of misconduct.[18]

It is little wonder, therefore, that businesses turned to the polygraph as a method of screening out dishonest employees or catching employees suspected of theft. Prior to the 1988 law, companies used the lie detector primarily in three types of situations: (1) to examine current employees concerning specific incidences of theft or misconduct, (2) to periodically examine current employees concerning

ETHICS IN PRACTICE

Give Me What I Want or I'll Tell the President!

Place yourself in the role of a personnel director for a bank. It is company policy that neither personnel files nor copies of files are to leave the personnel office. The director of accounting and computer services is due to give his employees their yearly employee evaluations and has sent a memo to your secretary requesting copies of his employees' evaluations from the previous year. Your secretary shows you the memo. You are upset that the director would send such a memo to your secretary, because he should be aware of the policy concerning employee files.

So, you decide to call the director and inform him that he is welcome to read the evaluations of his employees from the previous year in the personnel office. He tells you that he does not have the time to come to personnel and read the files and that he will speak to the president of the bank about this issue. The working relationship between you and the director has been addressed by the president before, and she has informed the two of you that you need to be able to work out problems such as this between the two of you.

The dilemma is whether you should go against company policy in an effort to avoid another lecture from the president, and let the director take the copies of the evaluations to his office, or adhere to the bank's policy on protection of employee privacy.

1. What are the main ethical dilemmas in this situation?
2. Should you report the director's threat to step over you to the president?
3. What would you do in this situation?

Contributed by Leah Herrin

nonspecific conduct, and (3) to screen potential employees in a preemployment situation.[19]

Because lie detectors are still legal in very restricted circumstances, it is useful to note what are seen as their strengths and weaknesses. Proponents of lie detectors argue that employers have a right to protect their property and that lie detectors are more reliable and less expensive than alternatives. They cite the polygraph industry's claim of 95 to 100 percent accuracy in detecting deception. Proponents further argue that although employees and job applicants may sacrifice some privacy, a properly administered test gathers only information the company has a legitimate right to know.[20] Critics of lie detectors cite studies indicating inaccurate diagnoses in 50 percent of the cases. Critics also object to testing that entails broad probes into certain zones of privacy that are strictly personal and not related to the job. Examples of these personal zones include workers' sexual practices, union sympathies, finances, and political and religious beliefs.[21]

Regulations on Use of Polygraphs

Because of the escalating number of complaints about polygraph abuse and the growing patchwork of state restrictions on polygraph use, Congress passed the Employee Polygraph Protection Act (EPPA) of 1988. This legislation reflected, in

part, Congress's concern over the scientific evidence supporting the validity of lie detectors and the sometimes demeaning tactics employed during administration of lie detector tests.[22]

In general, the 1988 EPPA law prohibited all use of lie detector tests by private employers to examine current or prospective employees. There are two major exceptions. First, tests may be administered to current employees in the course of an employer's ongoing investigation of economic loss. Second, under certain circumstances, employers in the private security and drug manufacturing industries may conduct preemployment polygraph examinations of applicants. Except in these restricted situations, employers may not directly or indirectly require, request, suggest, or cause any employee or applicant to take a polygraph test. Nor may they use, accept, refer to, or inquire concerning the results of any polygraph test that an employee or an applicant may have taken.[23]

The 1988 act defined the term "lie detector" to include "a polygraph, deceptograph, voice stress analyzer, psychological stress analyzer, or any similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual." Because the EPPA was intended to cover mechanical or electronic devices, it does not apply to written psychological tests intended to reveal dishonesty.[24]

Honesty Testing

As criticism grew concerning the use of lie detectors, many companies anticipated an eventual elimination of lie detector use and began experimenting with paper-and-pencil honesty tests, sometimes called "integrity" tests. David Nye, a former human resources executive and now a college professor, dubbed this type of test the "son of the polygraph."[25] There is a certain irony in this title, because honesty tests are already being subjected to the same kinds of criticisms that led to severe restriction of lie detector testing.

A study by the U.S. Office of Technology Assessment was conducted and the findings were reported in a report entitled *Truth and Honesty Testing*. The study said that it was not possible to determine the validity of honesty tests in accurately predicting dishonesty. However, the report[26] did suggest four reasons why employers were using honesty tests:

1. To stem employee theft
2. To avoid "negligent hiring" suits
3. To screen employees cost-effectively
4. To replace polygraphs, which were banned by the EPPA

An honesty-type test typically poses 80 to 90 statements with which the employee or applicant is asked to agree or disagree. Some test questions are framed as yes-or-no and multiple-choice options. Examples include, "Would you tell your boss if you knew of another employee stealing from the company?" and "What percent of employee thieves are never caught?" and "What is the dollar value of cash or merchandise you have stolen from past employers?"[27]

Honesty tests are quick to administer, easy to grade, and cost only $6 to $15 each. This compares favorably with lie detector tests, which cost $25 to $75 each. Perhaps honesty tests have attracted less attention than polygraphs because they come across as less intrusive or intimidating than lie detector tests, in which the examinee is hooked up to wires and sensors. The honesty test comes across more as a red-tape item or a job application to be filled out than as an interrogation.[28]

In 1993, it was estimated that 2 to 5 million honesty tests were given by some 5,000 U.S. companies, and the number was growing.[29] Faced with the elimination of the polygraph, companies wanted to find a substitute, and honesty tests seemed to be a convenient alternative. Critics of honesty tests claim they are intrusive and invade privacy by the nature of their inquiries. Critics also say that they are unreliable and that employers use them as the sole measure of the fitness of an applicant. Even when these tests are properly administered, opponents charge that employers end up rejecting many honest applicants in their efforts to screen out the dishonest ones. Management and testing companies claim the tests are very useful in weeding out potentially dishonest applicants. They claim that each question asked has a specific purpose.

Psychologists disagree widely on the validity and effectiveness of honesty tests. The American Psychological Association issued a report accepting the concept of integrity testing as superior to most other preemployment tests but noting that test publishers' accountability and documentation needed serious improvement.[30] Much of the recent research has been done by the test publishers themselves. The future of honesty tests is uncertain, but it is anticipated that they will probably grow in use but face the same kinds of legal and ethical hurdles that affected polygraph and drug tests.[31]

Drug Testing

"Drug testing" is an umbrella term intended to embrace drug and alcohol testing and employer testing for any suspected substance abuse. The issue of drug testing in the workplace has many of the same characteristics as the lie detector and honesty test issues. Companies say they need to do such testing to protect themselves and the public, but opponents claim that drug tests are not accurate and invade the employee's privacy.

For many years, companies did not conduct widespread testing of workers or job applicants for drug abuse. The reported reasons for their reluctance[32] included the following:

- Moral issue/privacy
- Inaccuracy of tests
- Negative impact on employee morale
- Tests show use, not abuse
- High cost
- Management, employee, and union opposition

In the past decade, however, all this has changed. In 1987, fewer than 25 percent of employers surveyed had drug-testing programs. By 1993, 85 percent of the com-

panies surveyed by the American Management Association reported having drug-testing programs.[33] In 1998, SmithKline Beecham Clinical Laboratories reported that the rate of positive drug tests had dropped to an 11-year low of 5 percent.[34] Despite this promising sign, problems with drugs in the workplace continue to plague corporate America, and so drug testing continues to be an important tool companies can use to address those problems.

Arguments for Drug Testing

Proponents of drug testing argue that the costs of drug abuse on the job are staggering. The consequences range from accidents and injuries to theft, bad decisions, and ruined lives. According to one estimate, drug abuse costs the U.S. economy in excess of $60 billion.[35] More recent estimates are significantly higher but difficult to pin down. The greatest concern is in industries where mistakes can cost lives—for example, the railroad, airline, aerospace, nuclear power, and hazardous equipment and chemicals industries. Edwin Weihenmayer, vice president at Kidder, Peabody, a New York–based investment banking firm, believes that drug testing is essential in his industry, "where the financial security of billions of dollars is entrusted to us by clients."[36] Thus, the primary ethical argument for employers conducting drug tests is the responsibility they have to their own employees and to the general public to provide safe workplaces, secure asset protection, and safe places in which to transact business.

Arguments Against Drug Testing

Opponents of drug testing see it as both a due-process issue and an invasion-of-privacy issue. The due-process issue relates to the questionable accuracy of drug tests. Although one test manufacturer claims a 95 percent accuracy rate, some doctors disagree. For example, Dr. David Greenblatt, chief of clinical pharmacology at Tufts New England Medical Center, claims that "false positives can range up to 25 percent or higher. The test is essentially worthless."[37] In addition, some legal experts argue that, even if the tests were foolproof, they would still be an invasion of employee privacy. They claim that tests represent an unconstitutional attempt on the part of companies to control employees' behavior at home, because the tests can yield positive results days and even weeks after at-home drug use.[38]

Many legitimate questions arise in the drug-testing issue. Do employers have a right to know if their employees use drugs? Are employees performing on the job satisfactorily? Obviously, some delicate balance is needed, because employers and employees alike have legitimate interests that must be protected. This issue is a fairly new one for business, but it is apparent that it will not go away. Therefore, if companies are going to engage in some form of drug testing, they should think carefully about developing policies that not only will achieve their intended goals but also will be fair to the employees and minimize invasions of privacy. Such a balance will not be easy to achieve but must be sought. To do otherwise will guarantee decreased employee morale, more and more lawsuits, and new government regulations.

Guidelines for Drug Testing

If management perceives the need to conduct a drug-testing program to protect other stakeholders, it should carefully design and structure the program so that it

will be minimally intrusive of employees' privacy rights. The following guidelines[39] may be helpful.

- Management should not discipline or fire someone for refusing to take a drug test because the results of such tests are inconclusive.
- Drug tests should typically be used only when there is legitimate suspicion of abuse by an employee or work group.
- The focus of testing should be on-the-job performance rather than off-the-job conduct.
- Employees should be informed of methods used and results obtained and given the chance to rebut the test findings.
- If an employee's status is going to be affected by the outcome of a drug test, a confirmatory test should be conducted.
- All tests should be conducted in such a way that the dignity and privacy of the employee are respected and honored.

Obviously, there are exceptions to these guidelines, and there are other guidelines that might be used. The major point is that management needs to think through its policies and their consequences very carefully when designing and conducting drug-testing programs.

State and Federal Legislation

Some states and cities have enacted or are considering laws to restrict workplace drug testing. Generally, these laws restrict the scope of testing by private and public employers and establish privacy protections and procedural safeguards. The laws do not completely ban drug testing but typically restrict the circumstances (for reasonable cause, for example) under which it may be used. States that have passed drug-testing laws include Florida, Vermont, Iowa, Minnesota, Montana, Maine, Connecticut, Rhode Island, and North Carolina. These states restrict drug testing to reasonable suspicion and place limits on the disciplinary actions employers may take. Other states are considering such legislation.[40]

At the federal level, the Americans with Disabilities Act (ADA) must be considered, because the definition of disability applies to drug and alcohol addiction. The ADA prohibits companies from giving applicants medical exams before they extend those applicants conditional offers of employment. Prehire drug tests, however, are permitted. Philadelphia employment lawyer Jonathan Segal advises employers to extend conditional offers before drug testing, because an innocent question on a drug test could easily become a medical question. He recommends conducting the drug test immediately after making the conditional offer and then waiting until the test results are back before beginning employment. An employer who wishes to fire or refuse to hire someone with an alcohol or a drug addiction must show that the employee poses a direct threat to others. Furthermore, if a person loses a job opportunity because of an inaccurate failed drug test, the company has committed an ADA offense by basing an action on the perception of a disability.[41]

It is worth noting some of the categories of employees that the federal government now requires be tested for on-the-job drug and alcohol use. The government,

as of 1994, requires both random alcohol and drug tests each year for 25 percent of transportation workers in such safety-sensitive jobs as trucking, aviation, railroads, and pipelines. Before, only random drug testing was required. In addition, the federal government now requires drug and alcohol testing on mass-transit workers and expanded testing on intrastate truckers and bus drivers.[42]

Employee Assistance Programs

One of the most significant strategies undertaken by corporate America to deal with the growing alcohol- and drug-abuse problem in the workplace has been ***Employee Assistance Programs (EAPs)***. EAPs originated, for the most part, in the 1940s, 1950s, and 1960s to deal with alcoholism on the job.[43] By the 1990s, EAPs had extended into other employee problem areas as well, such as compulsive gambling, financial stress, emotional stress, marital difficulties, aging, legal problems, AIDs, and other psychological, emotional, and social difficulties.

EAPs are employer-provided programs that are operated either by in-house corporate staff or by an outside contractor. Generally, they are designed for two major objectives: to prevent problems that interfere with employees' ability to do their jobs and to rehabilitate those employees who are experiencing problems that are interfering with their job performance.[44]

In spite of the serious alcohol, drug, and other problems employers must deal with, EAPs represent a positive and proactive step companies can take to deal with these serious problems. EAPs are designed to be confidential and nonpunitive, and they affirm three important propositions: (1) Employees are valuable members of the organization, (2) it is better to help troubled employees than to discipline or discharge them, and (3) recovered employees are better employees.[45] It is encouraging that in an era when employees are increasingly exerting their workplace rights, enlightened companies are offering EAPs in an effort to help solve their mutual problems.

Monitoring Employees on the Job

In the old days, supervisors monitored employees' work activities by peeking over their shoulders and judging how things were going. Next came cameras and listening devices whereby management could keep track of what was going on from remote locations. With the advent of computers, workers and civil liberties activists are concerned about the use of technology to gather information about workers on the job. These concerns are well founded. In a 1997 survey, the American Management Association (AMA) found that 63 percent of mid- to large-sized firms participate in some type of employee electronic surveillance. In many cases, the method is as benign as video cameras in a lobby. However, about 35 percent of firms used more invasive means of monitoring their workers, such as recording their phone calls or voice mail, reading their computer files, or videotaping them. Of these firms, about 23 percent did not inform workers of their practices. An industry has developed around employee monitoring, with an estimated one-third of the Fortune 500 shopping for surveillance devices.[46]

Employer monitoring of employees may take on any of three different forms: *visual, voice,* or *computer based (electronic)*. In each of these cases, we might argue that the key factor in determining the legality, and perhaps the ethics, of the practice is the employee's reasonable expectation of privacy under the particular circumstances.[47]

Balanced against the employee's expectation of privacy might be the employer's need to know information for legitimate business-related, decision-making purposes.

Visual surveillance by employers may be as simple as the observation of employees by a supervisor or security guard or by a video camera. A lawful surveillance might be a security guard monitoring potential theft at a warehouse or distribution center. A questionable surveillance might be video cameras in rest rooms, locker rooms, or employee lounges. Voice monitoring is accomplished primarily through the recording of telephone messages. The federal Omnibus Crime Control and Safe Streets Act of 1968 made it unlawful to intentionally intercept wire, oral, or electronic communications. However, there are exceptions. For example, the "telephone extension" exception permits employers to monitor employee phone calls "in the ordinary course of business." Once it is clear that a call is personal in nature, however, the purposeful listening to it is no longer permitted.[48]

Computer-based or electronic surveillance is now possible with new and expanded technologies. Such technologies allow careful monitoring of employee production and performance.

In response to abuses, the Electronic Communications Privacy Act of 1986 was signed into law by President Reagan, and for the first time restrictions were placed on government's right to intrude on individual privacy by technological means. This law, among other things, made it illegal to eavesdrop on electronic mail, computer-to-computer transmissions, private video conferences, and cellular car phones.[49] It is immediately obvious how difficult it would be to enforce this legislation.

Civil liberties groups have asserted that the use of computers to monitor the efficiency and productivity of workers raises a growing concern related to privacy invasion.[50] In virtually any job in which computer terminals are used by workers today, the machines have the capability of monitoring worker productivity. The consequence is that millions of workers are laboring under the relentless gaze of electronic supervision.[51]

What Can Be Monitored?

It has been estimated that over 50 million Americans use computer terminals in their jobs and that as many as one-third of these people are being scrutinized as they work. Monitoring requires the installation of special software (called AUDIT by one firm) in the central computer to which terminals are attached. The programs are able to measure, record, and tabulate dozens of kinds of information about workers: how slow or fast they are, when they take breaks, how long phone calls take, how much time passes before a next order is processed, what number is called, how many keystrokes per hour an operator is typing, when machines are idle, and so on.

In addition to monitoring those at computer terminals, there is increasing surveillance by management of employees in other work settings. Monitoring of telephone conversations is a significant arena for electronic eavesdropping. Workers in telecommunications, mail-order houses, airline reservations, and brokerage firms are especially hard hit. Not only do supervisors frequently listen in on their conversations, but computers also gather and analyze data about their work habits. One major firm also claims that it uses tiny fisheye lenses installed behind pinholes in walls and ceilings to watch employees suspected of crimes. Another firm actually

uses special chairs for their employees that measure wiggling. The assumption is that employees who wiggle too much are not working. Other firms use long-distance cameras to monitor employees around the clock. It is little wonder that some privacy experts are likening the current situation of high-tech snooping to an "electronic sweatshop."[52]

Effects of Being Monitored

Invasion of privacy is one major consequence of employee monitoring. Another is unfair treatment. Employees working under such systems complain about stress and tension resulting from their being expected and pressured to be more productive now that their efforts can be measured. The pressure of being constantly monitored is also producing low morale in a variety of places. The director of a national group of working women declares that, "The potential for corporate abuse is staggering. It puts you under the gun in the short run and drives you crazy in the long run." *The New York Times* installed a software program to track the performance of its clerks who were taking classified ads over the phone. Some of the employees started wearing buttons that read, "BIG BROTHER IS WATCHING."[53]

As with the lie detector issue, the controversy over technology and its use seems to bring employers' rights into conflict with employees' rights. Given the impact that the employee monitoring issue is having on employee morale, wise managers may want to consider it carefully from the standpoint of a desirable management practice, as well as from the perspective of protecting worker privacy. This issue currently is not as controversial as lie detectors or drug testing, but the potential is definitely there as technology continues to outpace our ability to effectively monitor its social consequences.

Legislative Momentum

Since about the mid-1980s, employee advocacy groups have been pushing for legislation that would restrict snooping on workers by employers. Although several states have various restrictions, little has happened at the federal level to protect private sector employees. In 1987, the telemarketing industry lobbied heavily against and defeated a bill that would have mandated an audible beep when employers were listening in on employees. In 1990, two federal bills that were once considered dead began to receive renewed interest. One bill would ban phone bugging without a warrant unless all parties to the call consented, and the other would require employers to notify workers with a visual or an aural signal when they were being monitored with computers, cameras, or taping machines.[54] In 1991, Senate hearings were held on legislation to restrict employers from electronically monitoring employees.[55]

In 1993, worker privacy bills were introduced into each house of the Congress. The "Privacy for Consumers and Workers Act" (H.R. 1218 and S. 516) would have required that employers notify employees of monitoring and limited the way in which the monitoring could be conducted and the information could be used. A massive lobbying effort by the insurance industry resulted in an amended bill that never passed Congress. The following year, reintroduced bills also failed to pass Congress. At this writing, worker privacy legislation is not high on the congressional agenda, but with the exponential growth in new technologies, it is certain to resurface.

Policy Guidelines on the Issue of Privacy

As we have discussed various privacy issues, we have indicated steps that management might consider taking in an attempt to be responsive to employee stakeholders. As a final recommendation, we set forth four policy guidelines that touch on several of the issues we have discussed. Robert Goldstein and Richard Nolan[56] assert that organizations should:

1. *Prepare a "privacy impact statement."* This would require the firm to analyze the potential privacy implications that all systems (especially computerized ones) should be subjected to.

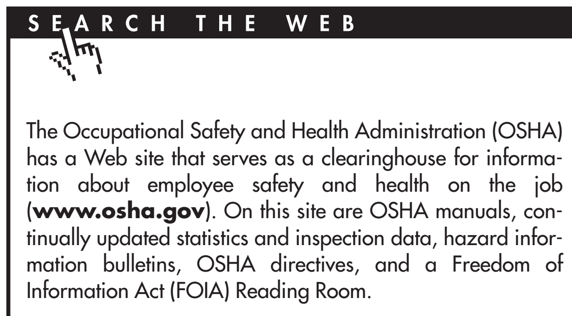
2. *Construct a comprehensive privacy plan.* The purpose of such planning would be to ensure that the necessary privacy controls are integrated into the design of a system at the very beginning.

3. *Train employees who handle personal information.* Be sure they are aware of the importance of protecting privacy and the specific procedures and policies to be followed.
4. *Make privacy a part of social responsibility programs.* Companies need to acknowledge that they have an internal responsibility to their employees and not fail to consider this when designing and implementing corporate social efforts.

Business's concern for protection of the privacy of its employees, customers, and other stakeholders is a growing business. It was not surprising, therefore, when the major newsletter *Privacy and American Business* appeared on the scene in 1993. Alan F. Westin, an expert on privacy issues in the workplace, was one of the cofounders of this newsletter. By 1994, the newsletter was going out to 3,300 business and government subscribers. Company efforts to develop policies and guidelines to protect privacy are at such an embryonic stage that the need for such a newsletter to chronicle what are the best practices is evident.[57]

WORKPLACE SAFETY

The workplace safety issue has grown up like so many other issues we have discussed, complete with the creation in 1970 of a federal agency—the Occupational Safety and Health Administration (OSHA). From the beginning, OSHA has been one of the most controversial and, some would argue, most ineffectual of the federal regulatory agencies. With increasing emphasis on the quality of life, workplace health and safety have been, and continue to be, legitimate concerns of employees. OSHA's goals seemed quite appropriate: inspections in the workplace; development of safety standards, especially those relating to health; training of employers and



SEARCH THE WEB

The Occupational Safety and Health Administration (OSHA) has a Web site that serves as a clearinghouse for information about employee safety and health on the job (**www.osha.gov**). On this site are OSHA manuals, continually updated statistics and inspection data, hazard information bulletins, OSHA directives, and a Freedom of Information Act (FOIA) Reading Room.

FIGURE 15–2 OSHA's Purpose

Under the Act, the Occupational Safety and Health Administration (OSHA) was created within the Department of Labor to:

- **Encourage employers and employees to reduce workplace hazards and to implement new or improve existing safety and health programs;**
- **Provide for research in occupational safety and health to develop innovative ways of dealing with occupational safety and health problems;**
- **Establish "separate but dependent responsibilities and rights" for employers and employees for the achievement of better safety and health conditions;**
- **Maintain a reporting and recordkeeping system to monitor job-related injuries and illnesses;**
- **Establish training programs to increase the number and competence of occupational safety and health personnel;**
- **Develop mandatory job safety and health standards and enforce them effectively; and**
- **Provide for the development, analysis, evaluation, and approval of state occupational safety and health programs.**

Although OSHA continually reviews and redefines specific standards and practices, its basic purposes remain constant. OSHA strives to implement its mandate fully and firmly with fairness to all concerned. In all its procedures, from standards development through implementation and enforcement, OSHA guarantees employers and employees the right to be fully informed, to participate actively, and to appeal actions.

SOURCE: *All About OSHA* (Washington, DC: Department of Labor, OSHA, 1992, Revised), 2.

employees to develop self-inspection programs; approval of state plans to provide job safety and health; and administration of programs for federal employees.[58] Figure 15–2 summarizes OSHA's purpose.

The Workplace Safety Problem

Two events, among many, stand out in the past decade or so as symbols of the workplace safety problem. One was the dramatic and catastrophic poisonous gas leak at the Union Carbide plant in Bhopal, India, in 1984. The death toll topped 2,000, and tens of thousands more were injured. People around the globe were startled and shocked at what the results of one major industrial accident could be. The company is still reeling today from the aftermath of this industrial accident, in which lawsuits seeking damages quickly exceeded the net worth of the company.[59] In 1991, India's Supreme Court upheld a $470 million settlement that Union Carbide had already paid, and it lifted the immunity from criminal prosecution that it had granted the company in 1989.

The second event was considerably less publicized but nevertheless ranks among the landmark cases on job safety. In Elk Grove Village, Illinois, Film Recovery Systems operated out of a single plant that extracted silver from used hospital x-ray and photographic film. To extract the silver, the employees first had to dump the film into open vats of sodium cyanide and then transfer the leached remnants to another tank. On February 10, 1983, employee Stefan Golab staggered outside and

collapsed, unconscious. Efforts to revive him failed, and he was soon pronounced dead from what the local medical examiner labeled "acute cyanide toxicity."[60]

An intensive investigation by attorneys in Cook County, Illinois, revealed a long list of incriminating details: (1) Film Recovery workers seldom wore even the most rudimentary safety equipment, (2) workers were laboring in what amounted to an industrial gas chamber, and (3) company executives played down the dangers of cyanide poisoning and removed labeling that identified it as poisonous. The prosecutors took action under an Illinois homicide statute that targets anyone who knowingly commits acts that "create a strong probability of death or serious bodily harm."[61] In 1985, three executives at Film Recovery Systems—the president, the plant manager, and the foreman—were convicted of the murder of Stefan Golab and sentenced to 25 years in prison. Their convictions marked the first time that managers had been convicted of homicide in a corporate matter such as an industrial accident.[62] The Film Recovery Systems case marked a new era in managerial responsibility for job safety.

A variety of other prosecutions of managers have followed the Film Recovery Systems case. What this clearly signals is not only that employees have a moral right to a safe working environment but also that managers face prosecution if they do not ensure that employees are protected.

Right-to-Know Laws

Prompted by the Union Carbide tragedy in Bhopal and other, less dramatic industrial accidents, workers have been demanding to know more about the thousands of chemicals and hazardous substances they are being exposed to daily in the workplace. Experts are now arguing that employers have a duty to provide employees with information on the hazards of workplace chemicals *and* to make sure that workers understand what the information means in practical terms. Since the early 1980s, many states have passed ***right-to-know laws*** and expanded public access to this kind of information by employees and even communities.[63] Since that time, several other states have passed such laws. One point of view is that the states have moved in and taken such actions because of federal nonenforcement of occupational safety and environmental laws.[64]

Although the states have taken the initiative on the right-to-know front, it is inaccurate to say that OSHA has done nothing. In 1983, OSHA created a Hazard Communication Standard that took effect in 1985. This standard requires covered employers to identify hazardous chemicals in their workplaces and to provide employees with specified forms of information on such substances and their hazards. Specifically, manufacturers, whether they are chemical manufacturers or users of chemicals, must take certain steps to achieve compliance with the standard.[65] These steps include the following:

1. Update inventories of hazardous chemicals present in the workplace.
2. Assemble material safety data sheets (MSDSs) for all hazardous chemicals.
3. Ensure that all containers and hazardous chemicals are properly labeled.
4. Provide workers with training on the use of hazardous chemicals.

5. Prepare and maintain a written description of the company's hazard communication program.
6. Consider any problems with trade secrets that may be raised by the standard's disclosure requirements.
7. Review state requirements for hazard disclosure.

Some managers have scoffed at the new state and federal right-to-know laws, arguing either that they will not work or that they will cost too much. It appears clear, however, that legal and regulatory pressures for the disclosure of workplace hazard information will not abate in the near future. Employees as well as the general public want more, not less, information about, disclosure of, and rules governing the use of hazardous substances in the work environment. A 1985 *Business Week* editorial argued that the costs to industry of $600 million to bring its operations into line with the OSHA standard and $160 million in annual compliance costs would be greatly exceeded by the benefits. Furthermore, this editorial provided the following advice for companies:

> *They would be well advised to comply with the spirit as well as the letter of the regulations. Tell people the hazards, and tell them simply, in plain English. The point is to save lives and preserve health, and any effort is worth making that will encourage workers to use respirators and protective clothing, for example. In matters such as these, playing it straight is the only way to play it.*[66]

In addition to the right-to-know laws, it is also important to note that employees have certain workplace rights with respect to safety and health on the job that OSHA provides by law. As in our discussion of the public policy exceptions to the employment-at-will doctrine in the preceding chapter, it should be clear that workers have a right to seek safety and health on the job without fear of punishment or recrimination. Figure 15–3 spells out OSHA's policies regarding these workplace rights.

Troubles at OSHA

The time was right for an occupational, safety, and health agency such as OSHA, but the effort that followed was not exactly what OSHA or its designers had in mind. OSHA was troubled from the very beginning by the sheer size of its task—to monitor workplace safety and health in millions of workplaces with only several thousand inspectors.[67]

Nitpicking Rules

In its early years, OSHA added to its troubles by promulgating rules and standards that seemed quite trivial when compared with the larger issues of health and safety. It was not until 1978 that OSHA decided to purge itself of some of these nitpicking rules. Some of its standards were senseless, such as the one that said, "Piping located inside or outside of buildings may be placed above or below the ground." This, of course, covered just about every possibility. Consider also a standard that went too far in specifying product design: "Every water closet (toilet) should have a hinged

FIGURE 15–3 Employee Rights to Safety and Health Provided by OSHA

Employees have a right to seek safety and health on the job without fear of punishment. That right is spelled out in Section 11(c) of the Act.

The law says employers shall not punish or discriminate against workers for exercising rights such as:

- Complaining to an employer, union, OSHA, or any other government agency about job safety and health hazards;
- Filing safety or health grievances;
- Participating on a workplace safety and health committee or in union activities concerning job safety and health; and
- Participating in OSHA inspections, conferences, hearings, or other OSHA-related activities.

If an employee is exercising these or other OSHA rights, the employer is not allowed to discriminate against that worker in any way, such as through firing, demotion, taking away seniority or other earned benefits, transferring the worker to an undesirable job or shift, or threatening or harassing the worker.

If the employer has knowingly allowed the employee to do something in the past (such as leaving work early), he or she may be violating the law by punishing the worker for doing the same thing following a protest of hazardous conditions. If the employer knows that a number of workers are doing the same thing wrong, he or she cannot legally single out for punishment the worker who has taken part in safety and health activities.

Workers believing they have been punished for exercising safety and health rights must contact the nearest OSHA office within 30 days of the time they learn of the alleged discrimination. A union representative can file the 11(c) complaint for the worker.

The worker does not have to complete any forms. An OSHA staff member will complete the forms, asking what happened and who was involved.

Following a complaint, OSHA investigates. If an employee has been illegally punished for exercising safety and health rights, OSHA asks the employer to restore that worker's job earnings and benefits. If necessary, and if it can prove discrimination, OSHA takes the employer to court. In such cases the worker does not pay any legal fees.

If a state agency has an OSHA-approved state program, employees may file their complaints with either federal OSHA or the state agency under its laws.

SOURCE: *All About OSHA* (Washington, DC: U.S. Department of Labor, OSHA, 1992, Revised), 37–38.

seat made of substantial material, having a nonabsorbent finish. Seats installed or replaced shall be of the open front type."[68]

In another example, a telephone company was instructed that it could only provide linemen with "belts that have pocket tabs that extend at least 1½ inches down and 3 inches back of the inside of the circle of each D-ring for riveting on plier or tool pockets. . . . There may be no more than four tool loops on any belt."[69] Such nuisance rules and standards created serious credibility problems for OSHA. Although at least 928 such rules were rescinded in 1978, many times that number are still on the books.

In the mid-1990s, it became evident that OSHA's nitpicking rules had not been adequately eliminated or that perhaps there were more of them than initially thought. A 1995 revelation that caused much discussion occurred in Boise, Idaho,

where a plumbing company was fined $7,875 by OSHA when company workers rescued a fellow worker from a collapsed trench. The workers had failed to shore up the trench or put on safety hats before pulling the endangered worker to safety. In the face of public outrage, OSHA rescinded the fine.[70]

In *The Death of Common Sense: How Law Is Suffocating America,* author Philip K. Howard pokes fun at OSHA's classification of ordinary beach sand. He asserts:

> *OSHA categorizes sand as poison because sand, including the beach sand you and I sunbathe on, includes silica. Some scientists believe that silica, in conditions found nowhere except in certain grinding operations, might cause cancer.*[71]

Howard goes on to observe that OSHA still has over 4,000 detailed regulations, dictating everything from the height of railings (42 inches) to how much of a plank can stick out from a temporary scaffold (no more than 12 inches). In spite of OSHA's 2,000 safety inspectors in the field and the several hundred billion dollars that U.S. business has spent on compliance with OSHA's rules, Howard thinks that safety in American workplaces in the mid-1990s is about like it was in 1970.[72]

In spite of Howard's observations, there are others who think OSHA has done a better job. In its own defense, OSHA presents statistics about its overall effectiveness. In the 28 years from OSHA's creation in 1970 to 1998, the workplace death rate had been cut in half. Injury and illness rates have declined in the industries on which OSHA has focused, while rates have remained unchanged in those industries in which OSHA has been less involved. According to OSHA, in the 3 years following an OSHA inspection, injuries and illness drop by an average of 22 percent.[73]

Spotty Record

Although OSHA made a serious effort to impact health and injury statistics, over the years its record has been spotty. In 1 year in the mid-1980s, injuries, illnesses, and deaths in the workplace began to climb again after several years of decline.[74] There were numerous reasons for this reversal, and not all of them could be attributed to OSHA. During the recession of the early 1980s, companies sharply reduced their spending on health and safety. With the economic recovery, many employers hired inexperienced workers, which further contributed to rising accident statistics. The Reagan administration deemphasized the writing and enforcement of safety rules, and employers put greater emphasis on competitiveness, often at the expense of safety and health.[75]

A Rejuvenated OSHA

Like so many of the federal agencies we have discussed (FTC, FDA, CPSC), OSHA experienced a new boost of energy and enthusiasm in the post-Reagan period of the late 1980s and early 1990s. The renewed energy came at an appropriate time, because in 1988 the Bureau of Labor Statistics announced that injury rates had been increasing since about 1983. Officials admitted that a part of this increase could be attributed to more accurate reporting.

With a new administrator and an increased budget, OSHA began taking significant actions against high-visibility employers. For example, in 1989 it hit USX Corporation with a $7.3 million fine, which was the largest ever. It charged USX with

58 "willful" hazards it claimed the company knew about but did not address. The company appealed.[76]

OSHA continued to suffer from what it claimed to be a budget and staff that were inadequate for the job that Congress and the public expected it to do. One observer pointed out that the EPA's budget was more than 21 times that of OSHA. In some states, too, there are conflicts between OSHA and state inspectors as to who has responsibility for workplace safety. In 1991, a major accident in North Carolina illustrated this point. A major fire in a poultry processing plant led to the deaths of 25 workers. This occurred because the plant's management kept the emergency exits padlocked to deter pilfering. Employees said there were no fire exits, no sprinkler system, and no fire drills. It was discovered that no government agency had conducted a safety inspection at that plant for 11 years. Some blamed state authorities; others blamed OSHA.[77] In any event, there simply are not enough inspectors to handle all businesses, and therefore a heavy responsibility falls on business for safety in the workplace.

In the mid-1990s, Secretary of Labor Robert Reich began efforts to revitalize OSHA once again. A landmark case occurred in 1994, when Reich phoned the CEO of Bridgestone/Firestone, Inc., to say that it was being charged by OSHA with 107 safety violations and slapped with a $7.5 million fine because one of its plants in Oklahoma City was declared to be an "imminent danger" to workers. This action was symbolic of the Clinton administration's determination to reinvigorate OSHA. Reich declared, "American workers are not going to be sacrificed at the altar of profits."[78] Critics of this move by Reich admit that workplace safety is a problem but claim that in this particular case it was not as severe as Reich judged. In fact, in Reich's eagerness to show the administration's new zeal and aggressiveness, he moved to cite the plant even though he didn't have the support of most of the safety inspectors who had recently walked through the plant. In subsequent depositions, three of the four inspectors admitted that they hadn't discerned any imminent danger.[79]

An important issue for OSHA is repeated trauma disorders, which now account for 60 percent of all occupational illnesses. One major variation of this class of disorders is known as repetitive stress injury (RSI). RSI results from the strain of repetitive motion, such as that resulting from keyboard use in offices. RSI has become the fastest-growing workplace illness in the United States, having increased an astonishing 770 percent over the past decade. While the government is working on ergonomics standards to address the problem of repeated trauma disorders, RSI lawsuits are mounting. In an interesting turn of events, the defendants in these cases are not only employers of afflicted workers, but also manufacturers of computer keyboards, who are being sued for selling flawed products and not warning users of their potential risks. Such blue-chip corporate giants as IBM, AT&T, and Digital Equipment have become ensnared in the resulting legal morass. A 1995 *Business Week* article observed that the scope of worker-injury litigation on this issue could become so vast that RSI could be the nightmare for corporate America in the 1990s that asbestos was in the 1980s.[80]

While technology brings new challenges, the old problems of OSHA remain. In 1995, OSHA turned to negotiated rulemaking to develop standards for industry. Efforts at conciliation continued as Charles Jeffress, a former OSHA administrator

ETHICS IN PRACTICE

OSHA's Surprise Visit

During the summers, Mark Price worked at a local caulk manufactory located in Reddog, Georgia. One hot and busy July day, Willie Truit and Mark received a call from the plant manager's secretary authorizing them to dispose of a batch of monomers, which are a type of hazardous waste. The order was to remove them from the inspector's sight. Willie and Mark bagged them up and threw them in the dumpster, but Mark kept asking why they were doing this. Improper disposal of hazardous materials usually results in heavy fines. This violation would have resulted in a fine of about $20,000.

Mark asked Willie what he thought would happen if they decided not to do what they were told. Willie said that they were working in an employment-at-will state and failure to do what they were authorized to do would definitely result in termination. The OSHA inspector asked Mark if he had been trained in handling hazardous waste. He also asked if Mark had been told to do things that he normally didn't engage in while working. Not wearing the proper clothing and disposing of the material improperly could result in danger to both Willie and Mark. It could also endanger whoever comes into contact with the material not disposed of properly.

1. If Mark chose not to perform the task he was told, how could he have protected his job? Could he have lost his job because he was working in an employment-at-will situation?
2. What would you have done if caught in this ethical dilemma?
3. How would you have responded to the OSHA inspector's questions?

Contributed by Mystro Whatley

who was known as an effective conciliator, took over the agency. OSHA's efforts at reform have been criticized by labor leaders who feel that OSHA is more concerned with its own operation than with the safety and health of workers. Even the Chamber of Commerce has expressed concern that OSHA is putting more energy into improving its tarnished image than in reducing injuries and illness. While the need for OSHA is evident, the way in which OSHA can meet that need most effectively has yet to be found.[81]

Threats to Reproductive Health

Another important issue on the job safety front is how companies ought to respond to threats to workers' ability to reproduce brought about by exposure to hazards in the workplace. In 1983, pregnant women working at a Digital Equipment Corporation plant in Massachusetts suffered an unusual number of miscarriages. The company commissioned a study, which found that the miscarriage rate for women working in so-called "clean rooms" where computer chips were etched with acids and gases was 39 percent, nearly twice the national average.[82]

The initial corporate responses to the discovery that exposure to workplace hazards might be affecting reproductive processes were varied. AT&T removed all

pregnant women from several computer-chip-production jobs. Digital Equipment Corporation "strongly urged" pregnant women to leave such positions. National Semiconductor Corporation and others expressed no opinion on the report, leaving decisions about job transfers to the women themselves. These different responses highlight the dilemma companies face today with one of the most sensitive job safety issues. It has been estimated that many employers put "fetal protection" policies in place to protect against this problem.

Some evidence has shown that exposure to a variety of chemicals and even to video display terminals may be posing health risks, but this evidence is not conclusive and there has been little corporate consensus on what action to take. Some companies have designed policies to address the problem, such as banning pregnant or fertile women from certain jobs, but the results have been controversy and discrimination lawsuits.[83] Some women's groups, in particular, have claimed that these schemes were designed simply to displace women.

The controversy over corporate "fetal protection" policies raged throughout the 1980s. In 1991, however, a case known as *Automobile Workers v. Johnson Controls, Inc.,* reached the U.S. Supreme Court. The Supreme Court ruled that fetal protection policies, which exclude women from certain high-risk jobs because of the potential harm to unborn babies, were illegal. The high court concluded that such fetal protection policies were tantamount to sex discrimination and therefore were contrary to Title VII of the Civil Rights Act of 1964.[84] We will discuss this case further in Chapter 16 under the topic of sex discrimination.

For employers who continue to be concerned about the safety of their female employees, a dilemma still remains. Two equally unpleasant choices are (1) to comply with the law and permit women to continue to be exposed to potentially harmful substances, risking lawsuits over damage to unborn babies, and (2) to reduce the use of dangerous chemicals in the workplace, thus driving up costs and incurring an international competitive disadvantage. One of the major problems facing business is that scientists have not yet been able to figure out what a safe fetal exposure level is.[85]

Workplace Violence

Before we leave our discussion of workplace safety, one other issue that is becoming a major problem and posing challenges to management is that of escalating violence in the workplace. The statistics are difficult to analyze. However, a major Justice Department report recently concluded that "one-sixth of all violent crimes in America occur in the workplace." Estimates are that 8 percent of all rapes, 7 percent of all robberies, and 16 percent of all assaults occur at work.[86] A major Labor Department study concluded that murder in the workplace is an increasingly important death-on-the-job statistic.[87]

A representative case of workplace violence occurred when a middle-aged mortgage banker became angry about a real estate deal he had hired a firm to handle years before. He went into a San Francisco law firm and opened fire. When it was over, eight people were dead and six were wounded. The tragedy ended when he shot himself.[88]

As one writer astutely observed, "Violence has crept from city to suburb, from dim alley to sunny schoolyard. It was only a matter of time before its malevolent

shadow darkened the workplace."[89] Another observer concluded that "Workplace violence is the new poison of corporate America."[90]

Companies Respond

How are companies responding to this new kind of workplace hazard? Experts on workplace violence emphasize the importance of anticipating these crises and formulating specific procedures through which employees can report potential trouble so companies can respond. Some firms have decided to fold workplace violence into an already existing department that oversees other personnel matters. Others have decided to take a more proactive strategy. The Postal Service, for example, has trained a nine-person intervention team to be deployed to post offices if tensions get high. It is also striving to screen potential employees more carefully and encourage existing employees to use a hotline to report hot-tempered workers they perceive to be dangerous.[91]

DuPont launched its Personal Safety Program for employees in 1986. This program has evolved into a comprehensive workplace protection program that includes counselors, workshops, and a 24-hour hotline. Both DuPont and the Postal Service claim success with their programs.[92]

Effective stakeholder management necessitates that companies address the growing problem of workplace violence. Companies have only recently started to put safety measures into place, but such measures will become more important in the future. Programs that deal with crises, and long-range efforts to bring about safer workplace environments, will be essential.

THE RIGHT TO HEALTH IN THE WORKPLACE

In the health-conscious 1990s, it was not surprising that companies in the United States became much more sensitive about health issues. In efforts to control runaway health costs, which are rising an estimated 10 percent per year, these companies took drastic steps, some of which have become controversial. Two controversial issues of health in the workplace—smoking and AIDS—merit special attention. Like other issues we have examined, these issues have employee-rights, privacy, and due-process ramifications.

Smoking in the Workplace

The issue of smoking in the workplace grew out of the 1980s, especially in the second half of the decade. The idea that smoking ought to be curtailed or restricted in the workplace is a direct result of the growing antismoking sentiment in society in general. Much of the antismoking sentiment crystallized in 1984, when U.S. Surgeon General C. Everett Koop called for a smoke-free society. In 1986, he proclaimed that smokers were hurting not only themselves but also the nonsmoking people around them, who were being harmed by secondary, or passive, smoke in the air they breathed. Koop argued that the evidence "clearly documents that nonsmokers are placed at increased risks for developing disease as the result of exposure to environmental tobacco smoke."[93] To substantiate his point, a National Academy of Science study estimated that in 1 year, passive smoke was responsible for

2,400 lung cancer deaths in the United States.[94] This finding has been bolstered by public opinion. A Gallup Poll found that 96 percent of the population think that cigarette smoking is harmful to your health.[95]

As a result of the public's view on smoking, it should not be surprising to find comic strips increasingly emphasizing this theme. For example, a comic strip in *The Wall Street Journal* shows a manager interviewing a prospective employee. The manager proclaims, "It's your choice, Ms. Durbin. You can work in the no-smoking area or accept a smoking section hazardous pay increase of 25%."

As the antismoking fervor has hit the nation, effects are being felt everywhere in society. Most states have now restricted smoking in public places; most prohibit it outright in trains, buses, streetcars, and subways; and growing numbers forbid it in offices and other workplaces. There are also an estimated 800 local ordinances against smoking. This number is growing. In 1994, OSHA began hearings that are leading up to a planned ban on all smoking in the workplace.[96]

In 1998, OSHA Administrator Charles Jeffress appeared before the Senate Committee on Labor and Human Resources to urge Congress to take the lead on banning smoking in the workplace. While Congress could initiate a total ban on workplace smoking within months, the rulemaking process within OSHA may take as long as 8 years. Jeffress told legislators that OSHA was ready to enforce any workplace smoking ban legislated by Congress but that the ban would strain the agency's resources.[97]

Corporate Responses

Although companies did not act until considerable public sentiment against smoking had developed, they have quickly begun to adopt policies that restrict smoking. The majority of businesses now restrict smoking in some way, and an increasing number have banned it outright. Others are still studying the issue. Firms are becoming increasingly aware of the costs—higher insurance expenses and higher absenteeism—of having smokers on staff.

Companies were initially slow to restrict workplace smoking. One explanation for this pattern was offered by the executive director of New Jersey's chapter of GASP (Group Against Smoking Pollution), a nonprofit advocacy organization. She said that there are three stages in most smoking policies. First, managers are very apprehensive at the start. Second, the program goes over more smoothly than they anticipated. Finally, managers are flooded with positive responses from their employees.[98]

Companies that have developed smoking policies have generally tried to do so without alienating smokers. (Smokers represent about 26 percent of the population.) Such policies are aimed at restricting smoking to designated areas. Initially there were objections in the workplace to such policies, but much of this opposition has dissipated.

Other, more serious policies, however, have created more controversy. One company adopted the policy that employees may be dismissed if they do not stop smoking. Newspaper classified ads now frequently specify "nonsmokers only." One of the first questions asked of job applicants in one firm is, "Do you smoke?" If the answer is yes, the interview is over. This course of action is legal as long as the employer does not break any of the federal discrimination laws.[99] It has also been found that smoking is growing more and more hazardous to careers in business,

with some employees believing that nonsmokers are being favored in selection and promotion decisions.[100]

The USG Ban

The corporate smoking policy debate grew more heated in 1987 when the USG Corporation announced a ban on employee smoking at work *and* at home. The company claimed that the protection of the company against future disability claims was at issue. Critics say this is a preposterous policy and that it represents a serious invasion of privacy. A spokesperson for the Tobacco Institute asserted, "The idea that any corporation has the right to reach beyond company gates, to what you could even describe as the bedroom of the employee, is ridiculous."[101] So far, no one has successfully challenged the USG ban. Attorneys say that constitutional rights to privacy apply only to actions by the state and not to actions by the private sector. On legal grounds, firms may face more of a threat from nonsmokers.

In 1998, *Management Today* declared passive smoking to be the year's big health and safety issue for employers because of the mounting threat of litigation. John Melville Williams QC, in a legal opinion obtained by Action on Smoking and Health (ASH), argues that employers have a responsibility to protect employees from tobacco smoke because, as a hazardous substance, tobacco smoke is covered under the Health and Safety Act of 1974. Williams believes that the level of current knowledge prohibits employers from using either ignorance or uncertainty as an excuse. The leading barrister's opinion is supported by various recent cases, which have been decided in favor of the nonsmoking employee.[102]

One kind of response that companies have made to the smoking issue and other "unhealthy lifestyle conditions" that may cause their health care costs to rise has been the creation of what are being called "lifestyle policies." In general, these policies require that employees who participate in unhealthy activities, such as smoking, substance abuse, skydiving, mountain climbing, or excessive eating (as monitored by weight guidelines), be assessed monthly surcharges on their health insurance or have their activities otherwise restricted. In 1991, for example, Texas Instruments invoked a $10 health insurance surcharge for employees who smoked, and ICH invoked a $15-a-month discount on medical contributions for employees who had not smoked in 90 days and who met a weight guideline. U-Haul International invoked a biweekly surcharge on health insurance for employees who smoked, chewed tobacco, or exceeded weight guidelines. Privacy expert Alan F. Westin worries that if such lifestyle discrimination continues, we could become a two-class society—"one that is perceived as fit and healthy and the [unhealthy] rest who would be unemployed or marginally employed."[103] Companies defend their policies on the basis of the illnesses, chronic diseases, health costs, and adverse impacts on performance caused by certain lifestyle conditions and practices. The companies continue to support their decisions by citing the significant cost savings, running into millions of dollars, that have been generated by the policies and wellness programs they have instituted.[104]

The smoking-in-the-workplace issue and related concerns are bound to stir debates for years to come as conflicts between company rights and individual rights continue to arise. The most reasonable course of action seems to be for managers to consider carefully all employee stakeholders' claims in this issue and then

develop reasonable policies that are gradually introduced, while employee feedback is continually monitored. Indeed, some companies have gotten employees themselves involved in the development of such policies. This democratizes the decision-making process and provides management with a more solid foundation for taking particular policy stances.

AIDS in the Workplace

Few public issues have as much potential to create severe problems for business as the widespread incidence of acquired immune deficiency syndrome (AIDS) in the United States. About 343,000 Americans have died of AIDS since its introduction in the mid-1980s; another 900,000 are infected with human immunodeficiency virus (HIV).[105] The Centers for Disease Control and Prevention (CDC) reported recently that 1 in 6 large companies and 1 in 15 small companies knew they had an employee with HIV/AIDS.[106] However, in a 1997 Caravan Opinion Research Corporation study, almost one-third of workers surveyed believed their companies would fire or put on disability a person who was HIV positive. Furthermore, 21 percent indicated they would agree with that action. This latter response is particularly troubling, because either action directly violates the ADA.[107] Considerable effort has been expended on AIDS education programs but, despite these efforts, the American worker remains frightened by the disease. Figure 15–4 is an ad the American Red Cross placed in major magazines as a public service announcement.

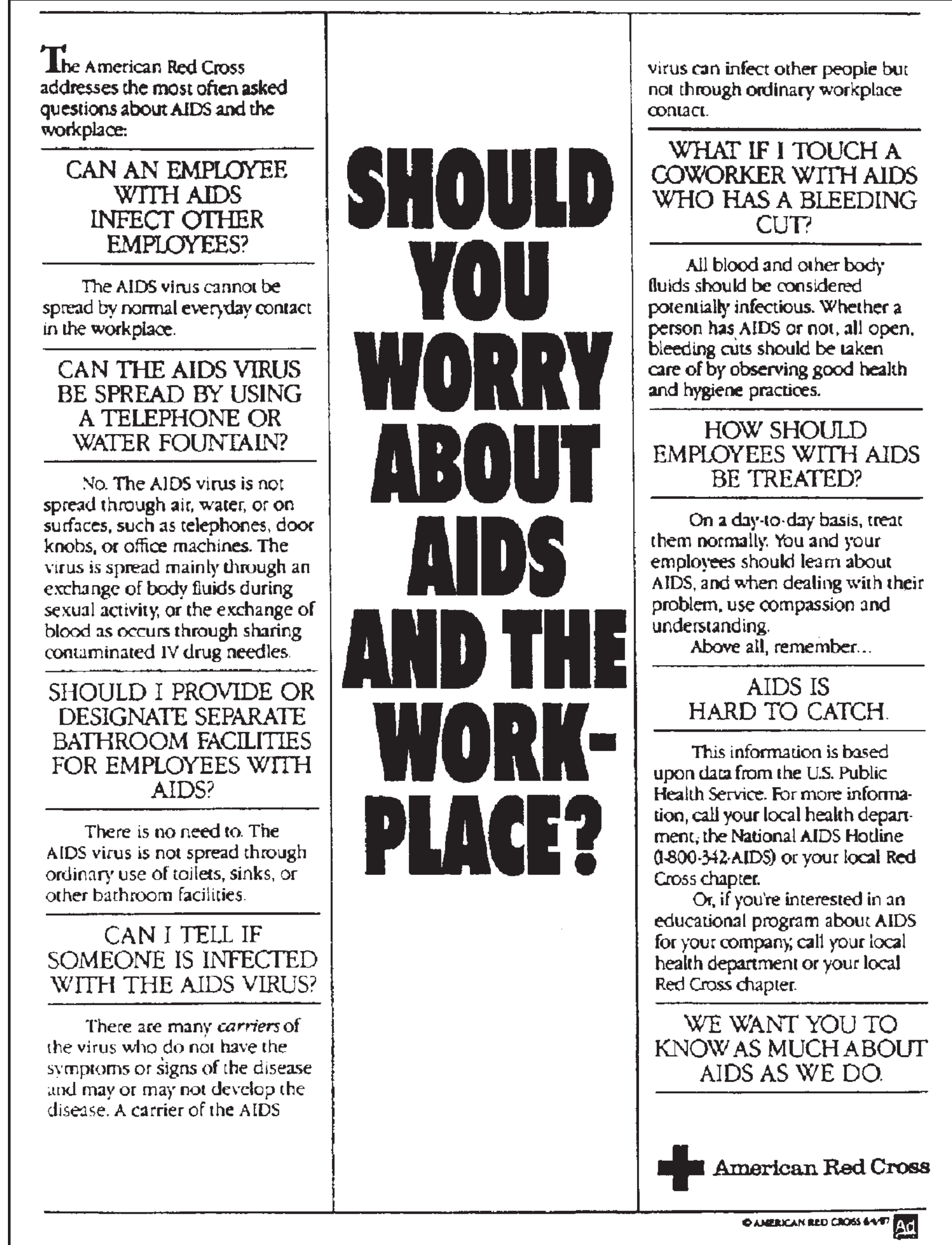
Three groups of employees must be considered when developing policies and educational programs about AIDS and HIV. First are the employees who have been diagnosed with the disease. They need clear policies and procedures that comply with the spirit of the ADA and its interpretations by the EEOC. The second group includes those people who come into contact with bodily fluids. This group includes physicians, nurses, lab workers, paramedics, and police officers. The third group includes all other employees who may have fears and prejudices that will affect their morale and productivity if not assuaged.[108] AIDS is clearly more than a health and safety issue. It also has due-process, fair-treatment, and privacy implications.

Corporate Responses

When AIDS first appeared in the early 1980s, the business community was unsure of its responsibilities to employees who were diagnosed with the disease. In 1986, the Justice Department ruled that some employers could legally fire employees diagnosed with AIDS if the employers' motive was to protect other workers.[109] In March 1987, however, that judgment was reversed when the Supreme Court ruled that people with contagious diseases were protected by the same law that protected handicapped workers from workplace discrimination, the Rehabilitation Act of 1973.[110] With the passage of the ADA, AIDS became a recognized and covered disability.[111]

Some evidence exists that corporate AIDS programs are on the decline. In a 1997 survey by the National AIDS Fund (NAF), 18 percent of companies indicated they had AIDS awareness programs, down 10 percent from the 28 percent who had programs in 1992.[112] This apparent complacency may come at a cost as more lawsuits are filed. In one of the first lawsuits to be filed by the EEOC on behalf of a person

FIGURE 15–4 An Informative Ad on AIDS



SOURCE: Developed by J. Walter Thompson for the American Red Cross. Used with permission of the American Red Cross.

with AIDS, in 1998 a Chicago man successfully sued his employer, Nippon Express, for AIDS discrimination. The company was accused of giving meaningless work to the employee with AIDS, taking away his telephone and forbidding coworkers from speaking with him. According to the 6-year Nippon employee, workers belittled him and made cruel comments about his condition. The settlement called for Nippon Express to pay $160,000 in damages, to donate $25,000 to AIDS research, and to provide management employees with training as to how to deal with a person who has been diagnosed with AIDS or HIV.[113]

As new and more effective drug therapies extend the lives and the productivity of HIV-positive employees, companies face new challenges. From 1992 to 1996, AIDS was the leading cause of death among 25- to 44-year-olds. By 1998, accidents were the leading cause; AIDS fell to second. After receiving new treatments, such as protease inhibitors, HIV-infected workers can often return to work and be productive again.[114] Many employers have helped their HIV-infected employees transition back to work. American Airlines corporate medical director, David McKenas, MD, said, "Many people are on the new medications. They are very successful. We are putting them back to work and they are doing great things for America."[115] Recently, American Airlines worked with the Federal Aviation Administration (FAA) to recertify an HIV-infected pilot. In the words of Dr. McKenas, "We checked him out and he is OK. The FAA has strict policies of people on medication flying commercially." Dr. McKenas went on to say that the pilot "runs marathons and is more muscular than I am. He is doing very well."[116] American's AIDS education program was developed in response to a well-publicized 1992 incident in which flight attendants requested new pillows and blankets after a flight on which many of the passengers were AIDS activists returning from an HIV/AIDS rally in Washington, DC.[117]

Eastman Kodak is another company with an effective HIV/AIDS policy. Since 1988, the company has offered general HIV/AIDS education and awareness programs, as well as specific training for managers who must deal directly with HIV-related issues. Joseph Laymon, vice president of human resources at Eastman Kodak, says the company will tolerate no discrimination in its workplace and will terminate an employee who violates the company's HIV/AIDS policy. Following is a quote from an Eastman Kodak employee who was diagnosed with HIV/AIDS. The quote was taken from the company's training manual, as reported in a February 1998 *HR Magazine* article by Jay Greene.

> *At first I was shaken, scared, afraid that my whole life had come apart. The stigma of HIV/AIDS was on my life and I didn't know what to do or who to tell or even who to trust. . . . My mind was a mess. But I met a lady, Lydia Casiano, who I felt very comfortable with. She works in the Human Relations Department at Kodak. She assured me of Kodak's policy of privacy and told me my job is still secure! . . . This year I've received a raise and have been given opportunities to improve myself and my workplace. We have given training classes to all [division] employees and I've told everyone about this condition. Today I work in an HIV friendly atmosphere because of the efforts made by the management and workforce of Kodak.*[118]

Other organizations known for their HIV/AIDS programs include IBM, Levi Strauss & Co., the National Basketball Association (NBA), and Polaroid.[119]

A cooperative program called Business Responds to AIDS (BRTA) was established as a joint initiative of the U.S. Centers for Disease Control and the business sector. BRTA recommends that, at minimum, organizations develop comprehensive programs that contain five key components,[120] as follows:

1. Workplace policy
2. Training (for managers, supervisors, and union leaders)
3. Employee education
4. Family education
5. Community involvement

What should be the corporate response to employee stakeholders on the AIDS issue? Companies should be sensitive to the needs of their employees who develop AIDS. In addition, companies should sponsor educational programs so that all workers can understand that AIDS cannot be transmitted by casual contact. Management will never be able to overcome fear and hostility if it does not engage in a thorough and ongoing educational program.[121]

Companies also need to be extremely sensitive to the privacy and due-process aspects of AIDS, and thus it is very important that companies adopt policies for dealing with AIDS cases *before* they arise. Managers need to be trained and educated in how to handle AIDS cases. Policies on AIDS should not be developed in an ad hoc, spur-of-the-moment fashion but as part of an overall strategy for dealing with workplace health and safety, privacy, and employee rights.

The Family-Friendly Workplace

One of the rationales that companies have given in recent years for having become more family friendly is that they are looking out for the mental and psychological health of their employees. Whether it be for altruistic or business reasons, workplaces today are becoming more family friendly. By using this term we are repeating a catch-all phrase that refers to a whole host of policies and programs that today's companies have been putting into place.

A special report in *The Wall Street Journal* characterizes this trend:

> *The message from Corporate America is clear and unmistakable. We are attuned to your families. The evidence is everywhere. Corporate child care centers are popping up around the country. "Work-family managers" appear on organization charts, and "flextime" has become a buzzword.*[122]

Although not everyone thinks that companies are becoming as family friendly as they are espousing to be, it is clear that workers are talking more and more about the importance of family-friendly policies, and many leading companies are responding. With the growth in the numbers of women, single parents, and two-paycheck couples in the workforce, it seems that corporate support for families, many of whom are stressed out from their busy lives, is on the growth curve. New issues are being raised: Family-support programs may be developing resentment among childless couples, family feuds at work are occurring more frequently, men want to be

sure they are treated as well as women, and corporate cultures are changing. Into the vocabulary of managers have emerged new terms for dealing with employee stakeholders: *employee assistance, parenting workshops, dependent-care spending accounts, flexible scheduling, family-care leave,* and so on.[123]

It is in the context of organizations becoming more "friendly" on their own that we want to discuss one of the most recent laws aimed at health-related issues in the workplace—the Family and Medical Leave Act.

Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) was made into law in 1993. This act was designed to make life easier for employees with family or health problems.

Under the FMLA,[124] employees are granted the following rights:

- An employee may take up to 12 weeks of unpaid leave in any 12-month period for the birth or adoption of a child, or for the care of a child, spouse, or parent with a serious health condition that limits the employee's performance.
- Employees must be reinstated in their old jobs or be given equivalent jobs upon returning to work; the employer does not have to allow employees to accrue seniority or other benefits during the leave periods.
- Employers must provide employees with health benefits during leave periods.
- Employees are protected from retaliation in the same way as under other employment laws; an employee cannot be discriminated against for complaining to other people (even the newspapers) about an employer's family leave policy.

Employers also have rights under the FMLA.[125] These rights include the following:

- Companies with fewer than 50 workers are exempt.
- Employers may demand that employees obtain medical opinions and certifications regarding their needs for leave and may require second or third opinions.
- Employers do not have to pay employees during leave periods, but they must continue health benefits.
- If an employee and a spouse are employed at the same firm and are entitled to leave, the total leave for both may be limited to 12 weeks.

The FMLA will not necessarily be easy to implement, however, because of special and technical key definitions of such terms as "serious health condition," "medical certification," "reasonable prior notice," and "equivalent position."[126]

Many contentious issues will be faced by employers as they attempt to implement the FMLA. A few of these issues are as follows: Can employees substitute accrued sick leave for unpaid leave? Just what constitutes an "equivalent" job when a leave-taker returns and her or his own job has been taken? What sorts of employee illnesses are "serious" enough to justify leave?

The FMLA institutionalizes at the federal level the employee's right to unpaid leave for health and family reasons. However, more than 35 states had their own

leave laws before the FMLA was passed. Therefore, many companies have had experience in facing some of the difficult cases that could arise from the implementation of this law. In addition to the complex legal environment for employee issues that many companies already face, the FMLA promises to bring new challenges on a continuing basis.[127]

Early indications are that many employers are not complying with the FMLA. In a 1994 study of 300 employers, it was found that 4 in 10 were failing to allow the 12 weeks of leave and to guarantee jobs or continue benefits during leave—the most basic requirements of the law. In this same study,[128] it was found that many companies, in the percentages indicated, employed the following policies or practices that mitigate against the FMLA's full implementation:

- Companies don't develop an appeals process to resolve disputes (53 percent)
- Companies don't train supervisors to comply with the law (22 percent)
- Companies don't communicate with employees about the law (20 percent)
- Companies don't have formal policies on length of family leave (15 percent)
- Companies don't continue health plans as required (10 percent)
- Companies don't guarantee jobs of employees on leave (9 percent)

In summary, many companies are being slow to comply with the FMLA, and thus employees are on their own in pursuing their rights under the law. If past records of response to law are any indication, businesses will be slow to respond, but they will learn to comply at an accelerating rate as lawsuits begin to impact them. At this writing, various efforts to pass additional family-friendly workplace legislation have been stymied by partisan conflict. The eventual outcome of these efforts is certain to influence the direction corporate policies will take.

SUMMARY

Critical employee stakeholder issues include the rights to privacy, safety, and health. These issues should be seen as extensions of the issues and rights outlined in Chapter 14.

With the development of new technologies, workplace privacy has increasingly become a serious workplace issue. The level of concern surrounding workplace privacy is evidenced by the frequency with which it has been a topic in the print and broadcast media. As Barbara Walters warned employees in a January 12, 1998, segment of ABC News's "20/20," "Your time is theirs and what you do on their computer or their phone is their business." The news magazine showed examples of truck drivers being monitored by satellite so closely that the company knew when, where, and how fast they drove, as well as how much gas they still had in their tanks. In another segment, companies were shown hiring undercover operators to watch and sometimes test their employees. Last, the news magazine explained why e-mail and voice mail can be monitored, even after messages are deleted. This wealth of available technology presents new challenges for companies as they weigh the

importance of knowing their workers' activities against the importance of maintaining trust and morale.

Of equal, if not more, importance to employee stakeholders are the issues of workplace safety and health. The workplace safety problem led to the creation of OSHA. In spite of its difficulties, OSHA is still the federal government's major instrument for protecting workers on the job. State-promulgated right-to-know laws, as well as federal statutes, have been passed in recent years to provide employees with an added measure of protection, especially against harmful effects of exposure to chemicals and toxic substances. The Supreme Court's 1991 decision to ban corporate fetal protection policies created continuing challenges for business.

Two major health issues in the current business/employee relationship are smoking in the workplace and AIDS. The smoking issue, although less critical than AIDS, is currently the more pervasive problem. AIDS has become the most serious health issue that business or our society has ever faced. Wise managers will now begin to develop policies for dealing with these issues, both of which have privacy and due-process implications. One of the latest challenges to employers is the Family and Medical Leave Act of 1993.

KEY TERMS

Employee Assistance Programs (EAPs) (page 481)

family-friendly workplace (page 499)

privacy (page 472)

right-to-know laws (page 486)

DISCUSSION QUESTIONS

1. In your own words, describe what privacy means and what privacy protection companies should give employees.
2. Enumerate the strengths and weaknesses of the polygraph as a management tool for decision making. What polygraph uses are legitimate? What uses of the polygraph are illegitimate?
3. What are the two major arguments for and against honesty testing by employers? Under what circumstances could management most legitimately argue that honesty testing is necessary?
4. Which two of the four guidelines on the issue of privacy presented in this chapter do you think are the most important? Why?
5. Identify the privacy, health, and due-process ramifications of both the workplace smoking issue and the AIDS issue.

ENDNOTES

1. Asra Q. Nomani, "Murder in Workplace Is a Major Part of the Latest Death-on-the-Job Statistics," *The Wall Street Journal* (August 11, 1994), A4.
2. Barbara Wagner, "Privacy in the Workplace," *World* (April/June, 1987), 48.
3. *Ibid.*
4. Jeffrey Rothfeder and Michele Galen, "Is Your Boss Spying on You?" *Business Week* (January 15, 1990), 74.