Drug testing is a more recent and explosive phenomenon. But public education about problems with drug testing—the fallibility of the tests, the invasion of privacy, the ineffectiveness of the tactic—pave the way for public support for restrictions in the future.

Conclusion

From labor's view monitoring is business as usual with a vengeance. It is as old as labor and capital and as new as microchips and artificial intelligence. It takes management-by-control and pushes it to the microsecond. It's The Sorcerer's Apprentice in the 21st century. Monitoring is bad working conditions, bad management, and bad labor relations. We will do all we can to ban its abuses and help management see the error of its ways.

IV. A MANAGEMENT VIEWPOINT

JAMES S. PETRIE*

As if in anticipation of this afternoon's discussion, Arbitrator Russell A. Smith wrote the following in one of his published decisions:

> Modern electronics has produced a variety of possibilities which, if used to the fullest extent, could disclose, surreptitiously, an employee's every move and every conversation while in the plant. . . . Some of these developments in employee surveillance might well raise the important question whether there is not, indeed, a "right of privacy" which employees may invoke to protect some, at least, aspects of their industrial life.[1]

Interestingly, Arbitrator Smith wrote these words in 1965, 23 years ago, in an award sustaining the suspension of a telephone operator based on information obtained through telephone surveillance.

Five years later Academy members heard Arbitrator Hugo Black discuss what he called "explosive advances in the technology of surveillance" and the sudden increase in the concern

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*Vedder, Price, Kaufman & Kammholz, Chicago, Illinois.

[1]*Michigan Bell Tel. Co.*, 45 LA 689, 695 (Smith, 1965).

of courts and lawmakers with rights of privacy.[2] At that time, his review of arbitrator decisions dealing with the admissibility of evidence obtained secretly by electronic devices showed no pattern.

Somewhat more recently, at the Academy's 31st Annual Meeting in 1978, Arbitrator Edgar A. Jones discussed "implications to the right of privacy" in his disquisition on the unreliability of polygraph test results.[3] Since then many states have passed laws restricting the use of polygraphs, and both the House and Senate have approved legislation to prevent most private employers from using polygraph exams to screen job applicants or, under the House version, for any purpose.

Our topic covers more than monitoring through polygraph testing, and employee privacy remains a subject of interest to management and labor.[4] Since it is not a new subject to arbitrators, there is an abundance of arbitral authority (and a fair share of wisdom) from which to draw in resolving disputes over monitoring and privacy.

Employee Privacy Rights

What are employee rights of privacy? Do they spring from the 4th, 5th, and 14th Amendments to the Constitution, which provide immunity from unreasonable search and self-incrimination, and protect due process? One occasionally hears the phrase "Constitutional right to privacy" but the federal Constitution contains no express reference to privacy rights. Ten or so states (including California, Washington, and Alaska)

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[2]Black, *Surveillance and the Labor Arbitration Process*, in Arbitration and the Expanding Role of Neutrals, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 1, 10.

[3]Jones, *"Truth" When the Polygraph Operator Sits as Arbitrator (or Judge): The Deception of "Detection" in the "Diagnosis of Truth and Deception,"* in Truth, Lie Detectors, and Other Problems in Labor Arbitration, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1979), 135–142.

[4]Two bills on employee monitoring were introduced in the House during 1987 and are still pending. H.R. 1895, introduced by Rep. Robert Kostenmeier (D-Wis.), requires employers to notify employees when their work on video display terminals is being monitored. H.R. 1950, a so-called beep bill introduced by Rep. Don Edwards (D-Cal.), requires that telephone monitoring of employees be accompanied by a regular, audible warning tone.

mention a right to privacy in their constitutional provisions, but without delineating what that right is.[5]

The U.S. Supreme Court has recognized that "a right of personal privacy, or a guarantee of certain areas or zones of privacy" exists under the Constitution, with roots in the penumbras of the Bill of Rights.[6] However, this "right" (which serves to impose restrictions upon state action) is not absolute, and state regulation is appropriate in areas protected by that right. The Supreme Court has recognized that the state as an employer has a greater interest in regulating its employees than it has in regulating its citizens.[7]

Owen Fairweather's "Practice and Procedure in Labor Arbitration" ascribes first use of the phrase "right of privacy" to a law review article written by Louis Brandeis and Samuel Warren in 1890.[8] Fairweather cites awards by Arbitrators Sembower and Lewis, holding that polygraph testing is an invasion of employee privacy.[9]

Generally, however, American arbitrators have proceeded cautiously in affording Constitutional protections in the employment setting, noting fundamental differences between the rights and responsibilities of governmental bodies and the rights and responsibilities of employers, unions, and employees under a labor contract. There is no clear parallel between the rights of citizens on the street and workers in a plant or office, or between a peace officer and a supervisor.[10] Some arbitrators have acquiesced in Constitutional-type arguments in excluding the results of polygraph tests or employee confessions; others have

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[5]California includes "privacy" among the listed inalienable rights of its citizens. West's Ann. Cal. Code Const. Art. 1, §1. A tortious invasion of that right has been described as the public disclosure of private facts regarding a matter which would be offensive and objectionable to a reasonable person of ordinary sensibilities. *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665, 154 C.A.3d 1040 (App. 1 Dist. 1984). Washington's constitution provides that no person "shall be disturbed in his private affairs" (Rev. Code Wash. Ann. Const., Art. 1, §6), while Alaska recognizes the "right of the people to privacy" (Alas. Stat. Const. Art. 1, §22).

[6]*Roe v. Wade*, 410 U.S. 113, 152 (1973).

[7]*Kelly v. Johnson*, 425 U.S. 238, 245 (1976). *See Shawgo v. Spradlin*, 701 F. 2d 470 (5th Cir. 1983), *cert. denied sub nom. Whisenhunt v. Spradlin*, 464 U.S. 965 (1983), where the court of appeals held that policemen have no constitutionally protected right to privacy against undercover investigations into their violations of departmental regulations.

[8]Fairweather, Practice and Procedure in Labor Arbitration, 2d ed. (Washington: BNA Books, 1983), 426.

[9]*General Am. Transp.*, 31 LA 355 (Sembower, 1958); *Town & Country Food Co.*, 39 LA 332 (Lewis, 1962).

[10]*Champion Spark Plug Co.*, 68 LA 702, 705 (Casselman, 1977).

refused to apply the Constitutional protection against unreasonable search to prevent a private employer from searching employees in the workplace.[11] A Canadian arbitrator has held that legal rights set forth in the Canadian Charter of Rights and Freedoms, including the right to be secure against unreasonable search, are limited to matters of "state action" and do not extend to private contractual rights and obligations of Canadian citizens.[12]

Why, then, the persistent notion of privacy rights in the workplace? One arbitrator, conceding that Constitutional restraints on unlawful searches apply to governmental authorities and not to contract disputes between private parties, says:

> [N]evertheless the rights to privacy and personal dignity are so fundamentally a part of the American tradition that they should at least be given consideration by a labor arbitrator in passing on search problems in plants.[13]

In the current edition of their oft-cited treatise, *How Arbitration Works*, the Elkouris discuss the subject of employee privacy (which they broaden to include dignity and peace of mind) in the contexts of disclosing information for company records, wearing name tags, work force surveillance, providing reasons for going off the clock, and submitting to inspections.[14] They cite two published awards describing privacy as being at best a limited right that safeguards employees from the publication of their private statements or private actions.[15]

Does that limited definition of privacy make more manageable the arbitrator's job of recognizing and protecting employee privacy rights? Consider this hypothetical: You must decide whether there was just cause to discharge an employee (suspected of smoking marijuana on the job) for refusing to submit to urine analysis. The union representative argues that the grievant was free to decline testing because the test would have violated a right of privacy. The management representative

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[11]*See* Hill and Sinicropi, Evidence in Arbitration, 2d ed. (Washington: BNA Books, 1987), Chaps. 12, 13.

[12]*Re Lornex Mining Corp. and USW*, 14 L.A.C. (3d) 169, 191 (Chertkow, 1983). *But see Re Greater Niagara Transit Comm'n and Amalgamated Transit*, 26 L.A.C. (3d) 1 (Board, 1986), where evidence excluded in a criminal trial by operation of the Charter was held not admissible in a subsequent arbitration.

[13]*Dow Chemical Co.*, 65 LA 1295, 1298 (Lipson, 1976).

[14]Elkouri and Elkouri, How Arbitration Works, 4th ed. (Washington: BNA Books, 1985), 784–791.

[15]*National Broadcasting Co.*, 53 LA 312, 317 (Scheiber, 1969); *FMC Corp.*, 46 LA 335, 338 (Mittenthal, 1966).

confidently counters that privacy rights extend only to disclosure of private statements or actions. The enterprising union representative readily agrees, emphasizing that what is at issue is the grievant's interest in keeping private information about his biochemical makeup, and then proceeds to read the following from two recent federal district court decisions:

> One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds, except as part of a medical examination.[16]

[and]

> While body fluids and body wastes are normally disposed of by flushing them down a toilet . . . workers do maintain a legitimate expectation of privacy in their urine until the urine is actually flushed.[17]

My point is that attempting to define the nature or scope of employee privacy rights is a difficult task and one that, to my knowledge, no arbitrator has undertaken successfully. Physicists have never seen some of the particles of force which bind the nuclei of atoms, but they can describe and differentiate among such virtual particles based on characteristics like spin and electrical charge. By and large, arbitrators are less scientific and more hesitant. Although few, if any, clearly have seen privacy rights, most agree that they exist and serve somehow to bind the nucleus of responsible labor-management relations. Instead of defining those rights, arbitrators assume that they will know them when they see them, perhaps confident that when you've seen one you've seen them all.

Why Employers Monitor Workers

It may be more helpful to examine briefly why employees and their bargaining representatives lay claim to privacy rights. To the extent these rights exist, issues concerning their protection or enforcement arise only if there is a claimed infringement by

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[16]*McDonell v. Hunter*, 612 F.Supp. 1122, 1127 (C.D. Iowa, 1985).

[17]*Treasury Employees v. Von Robb*, 649 F.Supp. 380, 387 (E.D. La. 1986). This and other cases are compiled in an article by Colorado attorney Craig Cornish on high tech surveillance of employees through drug testing and polygraphs appearing in Volume Three (1987) of the Civil Rights Litigation and Attorney Fees Annual Handbook, published by the National Lawyers Guild and Clark Boardman Co., Ltd.

the employer. What actions taken by management have been or are likely to be challenged as an invasion of employee privacy?

A short but reasonably comprehensive list includes the following:

1. polygraph testing (although the combination of statutory proscription and arbitral rejection may soon make commercial lie detection a thing of the past);
2. programmed or random searches or, if you prefer, inspection of employee lockers, purses, and vehicles;
3. surveillance, electronically through closed-circuit television or by undercover agents;
4. telephone interception, what its detractors label as wiretapping or eavesdropping and what management calls service quality control;[18]
5. monitoring of computer keyboarding to measure work speed and accuracy, usually against a known departmental or work group standard; and
6. body fluid screening tests, for example, of blood or urine, to determine the extent of alcohol or drug use.

Upon close analysis, two threads can be seen running through these areas of employee monitoring. The first is that the need for monitoring is detection or control of a suspected activity or condition that is considered detrimental to the employer's business interests.

Let me preface discussion of this point by mentioning a recent U.S. Supreme Court decision in a search case raising Fourth Amendment issues.[19] Concerned about possible improprieties, a state hospital had searched the office of a resident psychiatrist. The Court held that although government employees have a reasonable expectation of privacy as regards their offices, desks, and files, invasion of that expectation by public employers must be balanced against the need for supervision, control, and the efficient operation of the workplace. The Court observed that a supervisor's search of an employee's office is justified when there are reasonable grounds for suspecting that the search will uncover evidence that the employee is guilty of work-related misconduct; further, the search is permissible in scope when the

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[18]The phrase "service quality control" is used in Chapter 119 of the Omnibus Crime Bill, which generally prohibits the interception and disclosure of wire, oral, or electronic communications but permits telephone service providers to utilize random monitoring for "mechanical or service quality control checks." 18 U.S.C. §2511(2)(a)(i).

[19]*O'Connor v. Ortega*, 55 USLW 4405, 1 IER 1617 (1987).

measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the nature of the suspected misconduct.[20]

Management does not, just for the fun of it, search the handbags of employees as they leave work or monitor docks where equipment and supplies are shipped and received. These steps are taken to reduce or eliminate the theft of company property and to identify and terminate the culprits. An undercover agent is not hired to infiltrate the work force looking for drug sales unless management has good reason to suspect that employees are dealing drugs in the plant. The private investigator who videotapes evidence of an employee's physical well-being does so because the employee is off work and drawing medical leave benefits without being able to produce objective evidence of a claimed injury or disability.

Drug and alcohol abuse by employees is an extremely serious problem and has led to widespread implementation by management of employee assistance programs. However, the success of substance abuse and abatement efforts depends on more than the willingness of affected employees to admit themselves to rehabilitation clinics. The deleterious effect of drugs on physical dexterity and mental acuity creates a danger that extends to coworkers and the public. Programmed or random testing can reduce or avoid that danger.

Telephone monitoring certainly has a legitimate basis. Typically applied to operators and service representatives who maintain regular telephone contact with customers, the primary object of monitoring is to maintain a high standard of employee performance and determine what assistance or training is needed to improve job skills and knowledge. In the telecommunication industry, directory and toll service operators are monitored regularly on their use of courtesy phrases, warmth and sincerity of vocal expression, attentiveness to customer needs, correct call processing, and speed of call handling. Monitoring picks up signs of customer abuse, such as cut-offs or other denials of service, fraud or failure to follow proper billing procedures that leads to loss of revenue, and listening in on customer-to-customer conversations.

The second connecting thread is that the end product of employee monitoring, whatever the form, is evidence. This fact

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[20]*Id.*, 1 IER at 1623.

causes some inexperienced arbitrators concern, anticipating that sooner or later they will be selected to resolve one or both of the following issues: whether management has a right to implement a monitoring program designed to generate such evidence, and whether the evidence thus generated provides just cause for discipline or discharge.

Let me address the first issue, where labor raises privacy considerations in challenging management's right to monitor employee activity. This should not be a difficult issue to resolve because controlling principles already have been laid down.

Management Rights Versus Employee Privacy Rights

Employers have a legitimate interest in safeguarding their property and maintaining honesty and efficiency in the operation of their businesses, and have an undeniable right to protect themselves from employee misconduct.[21] This right has been enforced in cases involving searches,[22] closed-circuit television surveillance,[23] and telephone monitoring.[24]

A compelling statement of management's right to monitor (vis-à-vis an employee's claimed right to privacy) was made by Arbitrator Richard Mittenthal in *FMC Corp.* The case involved the employer's right to install a closed-circuit television camera to observe employees in a receiving area from which the employer suspected it was losing material through theft. With your indulgence, I quote at length from Arbitrator Mittenthal's award:

> The right of privacy concerns an individual's right not to have his statements, actions, etc. made public without his consent. But this serves only to protect him against the publication of his *private* statements or *private* actions. It should be evident that an employee's actions during working hours are *not private* actions. Management is properly concerned with the employee's work performance, what he does on the job and whether he obeys the plants rules and regulations [footnote omitted]. This and other information about employees is obtained through line supervisors. One of the supervisor's principal functions is to observe the employees at work. Surely, such supervision cannot be said to interfere with an employee's right of

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[21]*Hennis Freight Lines*, 44 LA 715 (McGury, 1964); *Attwood Corp.*, 48 LA 331, 334 (Keefe, 1967).

[22]*Aldens, Inc.*, 51 LA 469 (Kelliher, 1968).

[23]*Casting Eng'rs*, 76 LA 939 (Petersen, 1981); *Colonial Baking Co.*, 62 LA 587 (Elson, 1974).

[24]*Michigan Bell Tel. Co.*, 45 LA 695 (Smith, 1965).

> privacy. The same conclusion should apply in this case. For all the Company has done is to add a different method of supervision to the receiving room—an electronic eye . . . in addition to the human eye. Regardless of the type of supervision (a camera, a supervisor, or both) the employee works with the knowledge that supervision may be watching him at any time. He has a much better chance of knowing when he is being watched where there is no camera. But this is a difference in degree, not a difference in kind. For these reasons, I find there has been no interference with the employees' right of privacy.[25]

The propriety of a monitoring program should be determined first by reference to the parties' labor agreement. That document alone may be decisive of whether management has the right to implement the program unilaterally or after meaningful discussion with the union. If the labor agreement is silent or ambiguous on the subject, past practice or bargaining history may disclose the intent of the parties.

The potentially difficult issue is whether the program can be implemented unilaterally. One arbitrator noted that drug abuse programs with provisions for testing are highly technical and, for that reason, difficult to negotiate through collective bargaining.[26] Another, although recognizing concern about interference with employees' "private lives," warned that ignoring the employee who uses drugs invites trouble and may create liability for failure to safeguard the welfare of other employees.[27] Nevertheless, for lack of supporting contract language, several recent awards have struck down alcohol and drug policies unilaterally drawn and implemented.[28]

Before deciding whether the program was properly implemented, you may be asked to consider applicable legislation. Last year Vermont enacted a law prohibiting drug and alcohol testing without probable cause. The law applies to public and private sector employees and job applicants, and requires testing employers to offer employee assistance programs.[29]

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[25]*Supra* note 15, at 338.

[26]*Young Insulation Group*, 90 LA 341 (Boals, 1987).

[27]*Boise Cascade Co.*, 90 LA 105, 109 (Hart, 1987).

[28]*Phillips Indus.*, 90 LA 223 (DiLeone, 1988); *Laidlow Transit*, 89 LA 1001 (Allen, 1987), which draws support from a guideline memorandum issued last September by NLRB General Counsel Rosemary Collyer, stating the Board's position that testing of employees and applicants is a mandatory subject of bargaining, and that a negotiated program permitting testing for cause does not serve as a waiver of the union's right to bargain over a rule expanded to permit random testing.

[29]21 V.S.A. §§ 511–520 (1987).

Even where implementation of the program does not violate the labor contract or applicable law, the intended scope or reasonableness of the program may be challenged. Relevant to this issue is management's business justification for monitoring, such as suspected theft of property or drug use or dealing on the premises, and whether the program is designed to achieve the intended result in a reasonable manner.

By way of illustration, an arbitrator ordered a company to discontinue its use of closed-circuit television to view all production employees continuously during the workday, in part because there was no evidence that such monitoring was needed. The supervisor-employee ratio was 1:5, and the employer did not claim any problems of supervision or change in methods or operations to justify its action. The arbitrator said his opinion (written, incidentally, 23 years ago) was not based on the union's arguments of employee privacy rights or unlawful surveillance, but he was offended by the indignity of having one's every move monitored for no apparent purpose.[30]

However, in a recent case[31] the company installed a metal detector and implemented random inspection procedures after an employee had pulled a knife on a security guard and property had been stolen. The union grieved, asserting among other things that these procedures intruded on the privacy and dignity of employees. The arbitrator upheld the procedures, finding that the company was entitled to take defensive measures and that the measures taken were not unduly intrusive on the privacy and dignity of employees. He equated privacy with the Fourth Amendment protection against unreasonable search, and was concerned about maintaining dignity during the search (such as having female employees searched by female guards or supervisors) and about limiting the inspection only to the purposes of safety and theft prevention. The decision concluded that "[t]he underlying principle must be reasonableness under the circumstances, and the dignity of each employee must be respected to the greatest extent possible consistent with the proper purposes of the program."[32]

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[30]*Eico, Inc.*, 44 LA 563 (Delany, 1965).

[31]*General Paint & Chem. Co.*, 80 LA 413 (Kossoff, 1983).

[32]*Id.* at 418–419. *See also Shell Oil Co.*, 84-1 ARB ¶8021 (Brisco, 1983) (noting the need in search cases to balance the legitimate interests of management and the personal dignity of employees, the arbitrator found that the disputed inspection had been conducted "with as much regard for personal privacy as the legitimate ends of the search permitted."), at 3104.

Admissibility of Evidence Obtained by Monitoring

Assuming that the monitoring program has been implemented properly and is reasonable, its application to employees may be the subject of arbitration, for example, where an employee has been disciplined or discharged for activity uncovered through monitoring. In this type of case, the challenge likely will be to the admissibility of the evidence so obtained. That evidence may be on videotape, in an undercover agent's report, from a telephone tap, or in a laboratory analysis. The grievant may assert innocence and claim that the employer's evidence was obtained in violation of some privacy right. The factors to be considered in deciding whether to admit the proffered evidence seem well established and can be gleaned from prior awards.

In 1973 Arbitrator David Dolnick upheld the discharge of an employee for theft of company merchandise found during a search of his car.[33] Prior to arbitration a criminal charge against the grievant had been dismissed. The evidence of theft was suppressed because the search had been conducted illegally. Arbitrator Dolnick nevertheless admitted and considered the evidence, cogently describing in his decision the arbitrator's unique role as trier of fact.

He pointed out that arbitration is a civil proceeding, and the hearing is not conducted in a court of law. The arbitrator's authority is derived from and defined by the parties' labor agreement, not the federal or state constitution. Strict rules of evidence do not apply, thus, arbitrators have broad discretion to judge relevancy and assess credibility. As a result, evidence not admissible in a court of law may have significant value in preserving labor peace and encouraging sound labor-management relations.[34]

The receipt and weighing of evidence obtained through monitoring should not turn on whether that evidence was obtained in violation of an asserted employee privacy right but on whether it is essentially reliable, that is, probative of the activity for which the discipline or discharge was imposed. For example, urine test results provided to an employer by an outside laboratory have been found admissible as a business records exception to the hearsay rule and credited in the absence of expert testi-

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[33]*Aldens, Inc.*, 61 LA 663 (Dolnick, 1973).
[34]*Id.* at 664.

mony that the results are wrong or unreliable.[35] But test results obtained without safeguards to maintain a chain of custody over the specimen tested, or results so low that they are compatible with passive exposure, have not been admitted as reliable evidence of drug use.[36]

Arbitrators routinely admit photographs into evidence, usually without requiring much authentication (such as testimony from a witness familiar with the subject matter of the photograph that it correctly represents the object or scene depicted), but they are sensitive to the possibility of distortion in cases where a photograph's accuracy may be an important consideration. Videotapes are sequential photographs and are subject to no greater authentication. At least one arbitrator has held that a videotape camera is not an eavesdropping device prohibited by state law.[37]

A number of state statutes impose limitations on the admissibility of evidence obtained through interception of oral communications,[38] and it may be argued that these restrictions apply to arbitration proceedings. However, if an employee is overheard on the telephone during working hours planning or admitting to misconduct, the fact that the conversation is personal, or is conducted on a telephone from which personal calls are allowed, should not deter an arbitrator from considering such evidence.

Many arbitrators have adopted the position that without corroboration by direct or circumstantial evidence, the report or testimony of an undercover agent is insufficient to sustain a discharge in the face of the grievant's credible denial.[39] I do not infer from this that undercover agents are considered unreliable witnesses. I find consistent with this position the following statement from a decision sustaining the discharge of three employees for drug use on their employer's premises, based on the largely unrefuted testimony and written reports of an undercover agent:

> I find no more reason for disbelieving an undercover agent than for believing him or her. Such an agent comes before me just as any

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[35]*Jim Walters Resources*, 90 LA 369 (Koven, 1988).
[36]*Young Insulation Group, supra* note 26.
[37]*Casting Eng'rs, supra* note 23.
[38]*E.g.*, California's Invasion of Privacy Act, which prohibits intentional telephone eavesdropping without the consent of all parties. West's Cal. Penal Code §§630 *et seq.*; *similarly* Washington's Privacy Act, West's Rev. Code Wash. Ann. §9.73.030.
[39]*See Modine Mfg. Co.*, 90 LA 193 (Goldstein, 1987) and cases cited.

other witness does. I do not a priori either credit or discredit such testimony. What weight I shall give it is to be determined by all of the usual factors I utilize in giving weight to the testimony of any witness.[40]

A final comment on entrapment, a defense frequently raised but not readily accepted by arbitrators when evidence obtained through monitoring is the basis for discipline or discharge: A planned monitoring procedure is not entrapment just because it is planned.[41] As one arbitrator has written, "fundamental principles of due process . . . implied in a 'just cause' provision and . . . reinforced by common sense and notions of fair play . . . require that employers refrain from inducing employees to commit misconduct and then firing [them]."[42] Entrapment requires inducing a person to commit an act not contemplated by that person for the purpose of instituting punishment. The absence of a predisposition to commit the act is essential.

Summary

I will conclude by summarizing what I cover with management clients when they call for advice about implementing or enforcing an employee monitoring program. As to implementation, I determine what the program is intended to achieve. What is management's business justification for monitoring employees, and is the program designed to achieve the intended result in a reasonable manner? I determine whether management has the right to implement the program unilaterally or after meaningful discussion with the union. In particular, what does the labor agreement say, whether in the management rights clause, maintenance of conditions clause, health and safety clause, or in any other provision that bears on the propriety of management's intended action? I look for any indication that the program may violate state or federal law.

If I conclude that the proposed program is supported by a legitimate business need, that it will accomplish the desired result in a reasonable manner, and that there are no contractual

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[40]*Georgia-Pacific Corp.*, 84-2 ARB ¶8540 at 5364 (Seidman, 1984). This arbitrator admitted evidence that the agent had passed a polygraph test, and that the grievants had refused to submit to polygraph testing, as demonstrating the due process nature of the employer's investigation and explaining why the employer had credited the agent in reaching its decision to discharge the grievants.

[41]*Attwood Corp., supra* note 21; *Borg-Warner Corp.*, 3 LA 423, 434–435 (Gilden, 1944).

[42]Ernest E. Marlatt, in an unpublished award.

or legal impediments to its implementation, I advise the client to put the program into effect. Under these circumstances, concern about whether the program may infringe on privacy rights of workers is counterbalanced by management's need to run its business efficiently and profitably and thereby provide earnings and job security for the entire work force. But, if the program overreaches by extending beyond its legitimate purpose and subjecting workers to unnecessary probing into matters of a purely private nature, the pendulum may swing back in the employees' favor. The program may need to be redesigned if it will lead to public disclosure of private facts in a manner or in a matter that a reasonable person of ordinary sensibilities finds reprehensible.

Enforcement of the program involves similar considerations. If the program overrides or significantly extends a prior policy, notice may be necessary before any enforcement. I probe to see if the program, however meritorious its purpose may be, is likely to produce or has produced reliable evidence. My concern is not about whether the evidence may be or has been obtained by infringing on privacy rights. Rather, and in anticipation of arbitration, my concern is that the evidence must be probative of the misconduct on which any discipline or discharge action is based.

The source of my advice to clients on employee monitoring largely is the body of published arbitral law on the subject which I have discussed in this presentation. That same precedent should be the arbitrator's source for resolving grievances asserting that employee monitoring infringes on a right to privacy.