

Workplace searches: company policy considerations



A strong workplace search policy can safeguard a company against employee theft and other wrongdoing. But it can't safeguard against employee lawsuits if it isn't applied fairly and consistently.

To make sure their search policies and practices don't end up as fodder for such lawsuits, employers must recognize the difference between legal searches and unreasonable invasions of privacy; how to minimize employee expectations of privacy; and factors to consider before making the decision to conduct a workplace search.

FAQs about workplace searches

1. *Is a search of an employee's office, desk, etc., an unreasonable invasion of his/her privacy?*

To assess whether a workplace search is legal, most courts look to see whether the search was conducted under reasonable circumstances. Courts will also determine whether the seriousness of an allegation against an employee justifies a workplace search.

Here are a few more legal issues you should consider before conducting a search of an employee's workspace.

- Never physically force an employee to submit to a search, or you might be accused of assault or battery, false imprisonment, intentional infliction of emotional distress, etc.
- Do not call an employee whom you are going to search by defamatory names such as "liar" or "thief."
- Follow your company's policy regarding the conducting of searches to the letter. Present employees with a copy of the policy, so they are aware of your right to search their work areas, lockers, etc., in order to monitor compliance with company rules.
- Reassure employees that in requesting a search, you are not accusing them of theft or some other crime. Explain that you are simply conducting the search as part of a thorough investigation.
- If you allow employees to supply their own personal locks for filing cabinets, storage areas, lockers, etc., require that they give you a copy of the key or combination to avoid problems down the road if a search is ever necessary.

2. *How can an employer minimize employees' expectations of privacy so they don't cry foul in court if and when a search is necessary?*

Here are some ways to modify employees' privacy expectations and to keep your workplace searches on the up-and-up.

- Write a policy informing employees that you reserve the right to search company premises and company property, with or without notice. Clarify that you can enter an employee's desk or file cabinet for reasons other than suspicion of theft, such as retrieving a document while he/she is out of the office. Disseminate the policy to all workers and post in a common area.
- Make it clear that searches of employees' personal property (e.g., briefcase) may be conducted, but only when there is suspicion of theft or wrongdoing. Forgo the desire to include a random search provision in your policy. Even if it's in writing and employees are aware of it, it could create more trouble than it's worth.
- Rethink allowing employees to use private locker combinations or passwords. This can create an expectation of privacy in employees' minds. If you require that employees provide you with the combinations, passwords, keys, etc., it helps drive home the point that the corresponding lockers, computers, desk drawers, etc., are subject to searches.
- Where theft is common, have employees sign a written waiver at hire permitting searches that would require workers to open their bags or empty pockets upon leaving the facility, for example. Or post a sign stating that anyone entering the site agrees to allow the company the right to search. Or establish a clean room where employees have to change into special clothes without pockets before entering the facility.
- Limit searches to the area directly implicated by the evidence. If an employee has been seen placing company property in a personal locker, the search should be limited to that locker and not expanded to include all the employee's personal possessions.
- Before conducting a search, check security cameras, review logs, and interview witnesses to verify accuracy of information. Suspicion must be based on legitimate evidence; a vague allegation that some unspecified company policy has been violated will not justify a search. Keep records of the evidence.
- Designate a limited number of trained individuals who understand how to get employee consent. Unaware managers may make the mistake of going through pockets and purses themselves if employees refuse to comply, or they may try to prohibit uncooperative employees from leaving the premises. Consider calling the police, and leaving the searches to the experts. You may make failure to comply with a search a terminable offense.
- Be discreet. Conduct searches in private. Otherwise, you may risk sending a defamatory message.
- Do not accuse employees of theft or other wrongdoing. Explain that the search is merely part of an investigation.

3. What guidelines do the courts typically use for determining whether or not an employee consented to a search of his/her personal property on company property?

Generally speaking, the courts use the following six guidelines for determining whether an employee has consented to a search of his/her private property on company property:

1. notice that certain conduct would trigger a search;
2. voluntary employee involvement in the conduct or search;
3. a search justified by a vital company interest;
4. a search being reasonably effective in securing that interest;
5. a search only as intrusive as absolutely necessary;
6. a limit to the discretion of those conducting the search.

4. What factors should an employer consider before making a decision to conduct a search?

Consider the following when making search and seizure decisions.

- Don't mount a search unless you have good evidence to suspect an employee has committed an offense.
- Employees should be warned that refusing to submit to a search could cost employees jobs. If someone continues to resist, and the case is very serious, consider bringing local police onto the scene. Be very cautious. Don't attempt to hold employees against their will, or you could face charges of false arrest and

even false imprisonment.

- If employees decide to quit rather than submit to a search, ask them to sign a statement to that effect. If they don't sign, make sure you get statements from witnesses who will attest to that fact.
- Add your company's policy on search and seizure to your employee handbook. Spell out exactly what the company's policy is, including investigation strategies, disciplinary procedures, punishments, etc.