

Employee Privacy Laws: Utah

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A Q&A guide to employee privacy laws for private employers in Utah. This Q&A addresses employee privacy rights and the consequences for employers that violate these rights.

Federal, local or municipal law may impose additional or different requirements. Answers to questions can be compared across a number of jurisdictions (see *Employee Privacy Laws: State Q&A Tool* (<http://us.practicallaw.com/0-574-1493>)).

OVERVIEW OF STATE PRIVACY LAW

1. Please list each state law relating to employee privacy (for example, employee right to privacy, access to personnel files, electronic communications, surveillance and monitoring, medical examinations, and lawful off-duty activity laws), EXCEPT state laws on background checks and drug testing. For each, please describe:

- What activity the law protects.
- Which employers are covered.
- Which employees are covered, including any exceptions for interns, independent contractors, minors or others.
- Whether the law protects employees from their co-workers' actions in addition to their supervisor's actions.
- Whether it provides for a private right of action.
- For statutes and regulations, the entity that administers the statute or regulation(s).

GENETIC TESTING PRIVACY ACT: UTAH CODE §§ 26-45-101 TO 36-45-106

Protected Activity

An employer cannot, in connection with hiring, promotion, retention or other employment decisions:

- Access or consider private genetic information.
- Request or require a consent for release to access private genetic information.
- Request or require an individual or blood relative to submit to a genetic test.
- Inquire or consider whether an individual or blood relative has refused to take a genetic test.

(Utah Code § 26-45-103(1).)

However, an employer may seek an order compelling disclosure of private genetic information held by the individual or a third party in connection with an employment-based:

- Judicial or administrative proceeding in which the individual has placed his health at issue.
- Decision in which the employer has a reasonable basis to believe that the individual's health condition poses a real and unjustifiable safety risk requiring the change or denial of an assignment.

(Utah Code § 26-45-103(2).)

Covered Employers

All Utah employers are covered under the law, except:

- Domestic employers.
- Employers of agricultural employers or domestic servants.

(Utah Code §§ 26-45-103 and 34A-2-103.)

Covered Employees

The Genetic Testing Privacy Act does not define covered employees. However, the law appears to cover all applicants and employees. (See Utah Code §§ 26-45-103 and 34A-2-103).

Co-Worker Violations

The law does not address co-worker violations.

Private Right of Action

An aggrieved individual has a private right of action against an entity that has violated the individual's legal rights after June 30, 2003. If the individual prevails, the individual may recover damages and be granted equitable relief. (Utah Code § 26-45-105(1).)

An aggrieved individual also has a private right of action against an insurance company or employer. If the individual prevails, the defendants may be liable to the individual for each separate violation in an amount equal to:

- Actual damages.
- An additional:
 - \$100,000, if the violation is the result of a malicious act; or
 - punitive damages, if the violation is the result of a malicious act.
- Reasonable attorneys' fees

(Utah Code § 26-45-105(2).)

Administration

The law does not specify an administering entity. However, the Utah Attorney General (UT AG) may bring an action against a party that has or is about to violate the law (Utah Code § 26-45-106).

PROTECTION OF DRIVER'S LICENSES AND SOCIAL SECURITY NUMBERS: UTAH CODE §§ 34-46-102 TO 34-46-302

Protected Activity

Before an employer makes a job offer, the employer cannot request an applicant's:

- Social Security number.
- Date of birth.
- Driver's license number.

(Utah Code § 34-46-201(1).)

However, an employer may ask for this information before a job offer is made, only if all of the following apply:

- The information would be requested from any applicant who applies for the position.
- The employer requests the information for any of the following reasons:
 - to obtain a criminal background check, a credit history or a driving record;
 - to determine if the applicant was previously employed or previously applied for employment with the employer, but

only if the information is necessary to conduct a review of the employer's internal records; or

- to determine the applicant's eligibility for or for the applicant's participation in a government service, benefit or program that requires the information be collected on or before the day a job is offered.
- The applicant consents.

(Utah Code § 34-46-201(2).)

An employer:

- May only use the applicant's information for the specified purposes and to determine whether or not to hire the applicant.
- Cannot provide information about an applicant to a person other than the employer, except the employer may provide the information:
 - as required by law;
 - to a government entity for participation in a government service, benefit, or program;
 - if the applicant applies for another position with the employer;
 - for a performance review or promotion application, if the applicant is hired for the job and the employer also uses the information with other employees in a similar position.
- Cannot retain the information for more than two years if the applicant is not hired.

(Utah Code §§ 34-46-202 and 34-43-203.)

Covered Employers

A covered employer is a person or entity employing 15 or more employees in Utah for each working day in each of 20 calendar weeks or more in the current or preceding calendar year (Utah Code § 34-46-102(3)).

Covered Employees

The law covers all applicants of a covered employer. An applicant is defined as an individual who provides information to an employer to obtain employment (Utah Code § 34-46-102(1)).

Co-Worker Violations

The law does not address co-worker violations.

Private Right of Action

The law does not specify a private right of action under this law. However, an aggrieved individual may file a complaint with the Utah Labor Commission, Division of Antidiscrimination and Labor (UT DAL) (Utah Code §§ 34-46-102(2) and 34-46-301).

Administration

The UT DAL administers and enforces the law (Utah Code §§ 34-46-102(2) and 34-46-301).

INTERNET EMPLOYMENT PRIVACY ACT: UTAH CODE §§ 34-48-101 TO 34-48-301**Protected Activity**

An employer cannot:

- Request that an employee or applicant disclose a password, or a username and password, that would allow the employer access to the employee's or applicant's personal Internet account.
- Take adverse action, fail to hire or otherwise penalize an employee or applicant for not disclosing the information.

(Utah Code § 34-48-201.)

Covered Employers

All employers in Utah are covered under the law. An employer is defined as a person that has one or more workers or operators employed in the same business, or in or about the same establishment, under a contract of hire (Utah Code § 34-48-102(2)).

Covered Employees

All employees and applicants are covered under the law.

Co-Worker Violations

The law does not address co-worker violations.

Private Right of Action

An aggrieved individual may bring a civil action against an employer. If the individual prevails, the individual may be awarded up to \$500. (Utah Code § 34-48-301.)

Administration

The law does not specify an administering entity.

WORKERS' COMPENSATION ACT: UTAH CODE §§ 34A-2-101 TO 34A-2-1005 AND UTAH ADMIN. CODE R. 612-300-10**Protected Activity**

The Utah Workers' Compensation Act, which provides medical and disability benefits for employees who are injured or become ill because of their work, provides for protections for employee medical records.

Generally, a medical provider or any other party may only disclose the employee's medical records to certain specified persons or entities only after the injured employee's authorization (Utah Admin. Code r. 612-300-10).

But a medical provider may disclose medical records without the employee's authorization if the records:

- Are necessary to substantiate a bill submitted for payment or filing required Labor Commission forms, but only to certain specified entities.
- To either:
 - another physician for specialized treatment;
 - a new treating physician chosen by the employee; or

- another physician for a consultation regarding the claimed work related injury or illness.

(Utah Admin. Code r. 612-300-10(B).)

In addition, a medical provider who has treated an injured worker for a work related injury or illness must disclose information to an injured workers' employer as to when and what restrictions an injured worker may return to work (Utah Admin. Code r. 612-300-10(D).).

However, requests for medical records otherwise not specified in Rule 612-300-10 of the Utah Administrative Code require a signed approval by either:

- The Utah Labor Commission, Industrial Accidents Division.
- An administrative law judge, if the claim is being adjudicated.

An employer may only use medical records obtained under Rule 612-300-10 of the Utah Administrative Rules:

- To pay or adjudicate workers' compensation claims, if the employer is self-insured.
- To assess and facilitate an injured workers' return to work.
- As otherwise authorized by the injured employee.

In addition, an employer obtaining medical records under Rule 612-300-10 must maintain the medical records separately from the employee's personnel file. (Utah Admin. Code r. 612-300-10(I).)

Covered Employers

All employers in Utah are covered under the law, except:

- Domestic employers.
- Certain employers of agricultural laborers or domestic servants.

(Utah Code § 34A-2-103.)

Covered Employees

All employees, including minors and undocumented immigrants, are covered under this law. However, the law does not cover:

- Workers whose employment is both:
 - casual; and
 - not in the usual course of the worker's employer's trade, business or occupation.
- Certain categories of employees, including:
 - certain agricultural workers;
 - certain domestic workers; and
 - real estate brokers.

(Utah Code § 34A-2-104.)

Co-Worker Violations

The law does not address co-worker violations.

Private Right of Action

There is no specific private right of action under the Utah Worker's Compensation Law for violation of the privacy provisions.

Administration

The Utah Labor Commission (UT LC) administers and enforces the law (Utah Code § 34A-2-112).

UTAH INTERCEPTION OF COMMUNICATIONS ACT: UTAH CODE §§ 77-23A-1 TO 7-23A-16 AND 7-24B-1 TO 7-24B-9

Protected Activity

A person may intercept wire, electronic or oral communication only if either:

- The person is a party to the communication.
- One of the parties to the communication has given prior consent to the interception.

(Utah Code § 77-23a-4(7).)

A person cannot obtain, alter or prevent authorized access to a wire or electronic communication while it is in an electronic storage system if the person intentionally either:

- Accesses without authorization a facility through which an electronic communications service is provided.
- Exceeds an authorization to access the facility.

(Utah Code § 77-23b-2(1).)

However, a person or entity may divulge the contents of a communication:

- To an addressee or intended recipient of the communication or an agent of the addressee or intended recipient.
- With the lawful consent of either:
 - the originator;
 - the addressee; or
 - the communication's intended recipient.
- To a person employed or authorized, or whose facilities are used to forward the communication to its destination.
- As may be necessarily incident to the rendition of the service or the protection of the rights or property of the provider of that service.
- To a law enforcement agency in certain situations.

(Utah Code § 77-23b-3(2).)

Covered Employers

All Utah employers are covered under the law.

Covered Employees

All employees are covered under the law.

Co-Worker Violations

The law does not address co-worker violations.

Private Right of Action

An aggrieved person whose wire, electronic, or oral communication is intercepted, disclosed or intentionally used in violation of the law may file a civil action to recover relief from the violating party. The aggrieved party, if prevailing, may obtain:

- Preliminary and other equitable or declaratory relief as is appropriate;
- Damages and punitive damages in appropriate cases; and
- Reasonable attorneys' fees and court costs.

(Utah Code § 77-23a-11.)

Administration

The law does not specify an administering entity. However, the UT AG enforces the law (Utah Code § 77-23a-12.)

PERSONNEL FILES

2. For any law in Question 1 regarding employer maintenance of personnel files, please describe:

- What constitutes a personnel file in your jurisdiction.
- Which records employers must maintain and for how long.
- Any records that must be kept separately.
- Any records that should not be included in an employee's personnel file.
- How records must be maintained (for example, in digital or paper form, or in locked drawers or rooms).
- Any requirements or prohibitions regarding destruction of records.

DEFINITION OF PERSONNEL FILE

In Utah, a personnel file includes, but is not limited to:

- An applicant's application form.
- Other records having to do with:
 - hiring;
 - promotion;
 - demotion;
 - transfer;
 - layoff or termination;
 - rates of pay or other terms of compensation; and
 - selection for training or apprenticeship.

(Utah Admin. Code r. 606-6-2(C).)

REQUIRED RECORDS AND MAINTENANCE PERIOD

An employer must preserve personnel files for six months from the later of either:

- The date of the making of the record.
- The date of the personnel action involved (for example, if the employee was involuntary terminated, the employer must keep the records for six months after the termination date).

(Utah Admin. Code r. 606-6-2(C).)

In addition, if an employee files a discrimination complaint against the employer, the employer must keep all personnel records that are relevant to the complaint and to the charging party until final disposition of the complaint. This means the date of the final

agency action or the end of the appeals process (Utah Admin. Code r. 606-6-2(C)).

SEPARATE RECORDS

Under the Utah Workers' Compensation Law, an employer obtaining medical records under Rule 612-300-10 of the Utah Administrative Code must maintain the medical records separately from the employee's personnel file. (Utah Admin. Code r. 612-300-10(I)).

EXCLUSIONS FROM PERSONNEL FILES

Utah law does not address exclusions from personnel files.

HOW TO MAINTAIN RECORDS

Utah law does specify how employers must maintain personnel records.

DESTRUCTION OF RECORDS

Utah law does not specify any requirements or prohibitions on destroying personnel records.

3. For any law in Question 1 regarding employer access to personnel files, please describe:

- Who may access the files, such as employees, applicants and former employees.
- Whether individuals may copy the files or only inspect them.
- When access must be granted (and whether it must be granted within a set period of time).
- Any limitations on access.

None of the laws listed in Question 1 address employee access to personnel files. Employees of private employers in Utah do not have a statutory right to inspect their own personnel records unless the employer and employee agree otherwise. Although outside of the scope of this Q&A, public employees in Utah have a right to access their personnel file (Utah Code § 67-18-3).

MEDICAL OR OTHER TEST RESULTS

4. For any law in Question 1 that protects employees from medical examinations, including AIDS/HIV tests, or other tests, such as psychological or personality tests, please describe any limitations on access to test results or the protection of records.

GENETIC TESTING PRIVACY ACT: UTAH CODE §§ 26-45-101 TO 36-45-106

An employer cannot, in connection with a hiring, promotion, retention, or other related decision:

- Access or take into consideration private genetic information about an individual.
- Request or require an individual to consent to a release to access private genetic information about the individual.

- Request or require an individual or the individual's blood relative to submit to a genetic test.
- Inquire into or take into consideration the fact that an individual or the individual's blood relative has taken or refused to take a genetic test.

An employer may only obtain an individual's genetic information in very limited circumstances. For example, it is generally permissible if the genetic information involves a health condition that could pose a real and unjustifiable safety risk. (Utah Code § 26-45-103.)

If the employer obtains an order compelling the disclosure of private genetic information, the order must limit disclosure:

- To the parts of the record containing information essential to fulfill the order's objective.
- To people whose need for the information is the basis of the order.
- As necessary for the individual's protection.

(Utah Code § 26-45-103(2).)

WORKERS' COMPENSATION ACT: UTAH CODE §§ 34A-2-101 TO 34A-2-1005 AND UTAH ADMIN. CODE R. 612-300-10

Protection of Records

Generally, a medical provider or any other party may only disclose the employee's medical records to certain specified persons or entities only after the injured employee's authorization, with limited exceptions (Utah Admin. Code r. 612-300-10; see Question 1). A medical provider who has treated an injured worker for a work related injury or illness must disclose information to an injured workers' employer as to when and what restrictions an injured worker may return to work (Utah Admin. Code r. 612-300-10(D)).

However, requests for medical records otherwise not specified in Rule 612-300-10 of the Utah Administrative Code require a signed approval by either:

- The Utah Labor Commission, Industrial Accidents Division.
- An administrative law judge, if the claim is being adjudicated.

In addition, an employer obtaining medical records under Rule 612-300-10 must maintain the medical records separately from the employee's personnel file. (Utah Admin. Code r. 612-300-10(I)).

EMPLOYEE ELECTRONIC COMMUNICATIONS

5. For any law in Question 1 that governs the monitoring or recording of employees' electronic communications, please describe what monitoring or recording is permitted or prohibited in each of the following media:

- Telephone.
- Internet.
- Email.
- Other.

UTAH INTERCEPTION OF COMMUNICATIONS ACT: UTAH CODE §§ 77-23A-1 TO 7-23A-16 AND 7-24B-1 TO 7-24B-9**Telephone Communications**

A person or entity may intercept a wire, electronic or oral communication only if either:

- The person or entity is a party to the communication.
- One of the parties to the communication has given prior consent.

(Utah Code § 77-23a-4(7).)

A person cannot obtain, alter or prevent authorized access to a wire or electronic communication while it is in an electronic storage system if the person intentionally either:

- Accesses without authorization a facility through which an electronic communications service is provided.
- Exceeds an authorization to access the facility.

(Utah Code § 77-23b-2(1).)

Internet Usage

See Telephone Communications.

Email Communications

See Telephone Communications.

Other Forms of Communication

See Telephone Communications.

INTERNET EMPLOYMENT PRIVACY ACT: UTAH CODE §§ 34-48-101 TO 34-48-301**Telephone Communications**

Telephone communications are not covered by the law.

Internet Usage

An employer **may**:

- Request or require an employee to disclose a username or password to gain access to:
 - an electronic communications device that the employer supplies or pays for in whole or in part; or
 - an account or service that the employee obtained by virtue of the employee's employment relationship and used for the employer's business purposes.
- Discipline or discharge an employee for transferring any of the following to an employee's personal Internet account without the employer's authorization:
 - proprietary or confidential information; or
 - financial data.
- Conduct an investigation if:
 - there is specific information on the employee's personal Internet account, to ensure compliance with applicable laws, regulatory requirements or prohibitions against work-related employee misconduct; and

- the employer has specific information about an unauthorized transfer of the employer's proprietary information, confidential information or financial data to an employee's Internet account.
- Restrict or prohibit an employee's access to certain websites while using:
 - an electronic communication device supplied by or paid for (in whole or in part) by the employer; or
 - an employer's network or resources.
- View, access or use information about an employee or applicant that:
 - can be obtained without the employee's username or password to a personal Internet account; or
 - is available in the public domain.

(Utah Code § 34-48-202.)

An employer **cannot**:

- Request that an employee or applicant disclose a username or password that allows the employer to access to the employee or applicant's personal Internet account.
- Penalize an employee or applicant for not disclosing a username or password for the employee or applicant's personal Internet account.

(Utah Code § 34-48-202.)

Email Communications

The law does not address email communications.

Other Forms of Communication

The law does not address other forms of communication.

SEARCHES, SURVEILLANCE AND BIOMETRIC INFORMATION**6. For any law in Question 1 that governs searches and surveillance, please describe:**

- Any limits on employer searches (such as searches in common areas or individual offices).
- What kind of surveillance, tracking or monitoring of workplaces or employees is permitted (such as GPS or video, or surveillance of an employee's computer or phone usage) and whether there are any limitations on the areas that can be monitored or recorded.
- Any limits on the use of biometric information (such as fingerprints, retina or voiceprint scans used for identification).

WORKPLACE SEARCHES

None of the laws listed in Question 1 address employer workplace searches.

SURVEILLANCE AND TRACKING

None of the laws listed in Question 1 address employer surveillance, tracking and monitoring of workplaces. However, Utah employers are limited in what communications they can monitor (see Question 5).

BIOMETRIC INFORMATION

Utah law has not addressed any limits on an employer's use of biometric information.

NOTICE TO EMPLOYEES

7. For each privacy law listed in response to Question 1, what obligations does an employer have to inform its employees of their rights?

None of the laws in Question 1 address an employer's obligations to inform its employees of their rights.

CONSEQUENCES FOR VIOLATION

8. For each privacy law listed in response to Question 1, what are possible consequences for employers that violate the law?

GENETIC TESTING PRIVACY ACT: UTAH CODE §§ 26-45-101 TO 36-45-106

An aggrieved applicant or worker may file a civil action against the violating employer. For each violation, the employer may be liable for:

- Actual damages.
- An additional \$100,000, if the violation was the result of an intentional and willful act.
- Punitive damages, if the violation was the result of a malicious act.
- Reasonable attorneys' fees.

(Utah Code § 26-45-105.)

In addition, the Utah Attorney General may bring an action to restrain or enjoin an employer from violating the law. An employer may also be required to pay:

- A civil fine of up to \$25,000 for each violation.
- Reasonable attorneys' fees and costs.

(Utah Code § 26-45-106.)

PROTECTION OF DRIVER'S LICENSES AND SOCIAL SECURITY NUMBERS: UTAH CODE §§ 34-46-102 TO 34-46-302

An employer that violates this law may face a proceeding by the Utah Labor Commission and may be required to either or both:

- Comply with a cease and desist order.
- Pay a fine of up to \$500.

(Utah Code § 34-46-301(3).)

INTERNET EMPLOYMENT PRIVACY ACT: UTAH CODE §§ 34-48-101 TO 34-48-301

An employer may be required to pay the aggrieved individual up to \$500 (Utah Code § 34-48-301).

WORKER'S COMPENSATION ACT: UTAH CODE §§ 34A-2-101 TO 34A-2-1005 AND UTAH ADMIN. CODE R. 612-300-10

An employer may be required to pay a civil fine of up to \$500 for violating the law.

UTAH INTERCEPTION OF COMMUNICATIONS ACT: UTAH CODE §§ 77-23A-1 TO 7-23A-16 AND 7-24B-1 TO 7-24B-9

An employer may be liable to the aggrieved individual for:

- Preliminary and other equitable or declaratory relief.
- Damages and punitive damages.
- Reasonable attorneys' fees and costs.

(Utah Code § 77-23a-11.)

An employer may also face a restraining order or prohibition from an action by the Utah Attorney General. (Utah Code § 77-23a-12.)

CONSENT

9. For each privacy law listed in response to Question 1, is employee consent required? If not, will employee consent protect the employer from liability?

GENETIC TESTING PRIVACY ACT: UTAH CODE §§ 26-45-101 TO 36-45-106

The law does not address an employer's obligation to obtain consent from employees.

PROTECTION OF DRIVER'S LICENSES AND SOCIAL SECURITY NUMBERS: UTAH CODE §§ 34-46-102 TO 34-46-302

An employer may only obtain the applicant's Social Security number, date of birth and driver's license number if the applicant consents and all of the following apply:

- The request for information would be made of any applicant who applies for the position.
- The employer requests the information for any of the following reasons:
 - to obtain a criminal background check, a credit history or a driving record;
 - to determine if the applicant was previously employed or previously applied for employment with the employer, but only if the information is necessary to conduct a review of the employer's internal records; or
 - to determine the applicant's eligibility for or for the applicant's participation in a government service, benefit, or program that requires the information be collected on or before the day a job is offered.

(Utah Code § 34-46-201(2).)

INTERNET EMPLOYMENT PRIVACY ACT: UTAH CODE §§ 34-48-101 TO 34-48-301

The law does not address an employer's obligation to obtain consent from employees.

WORKER'S COMPENSATION ACT: UTAH CODE §§ 34A-2-101 TO 34A-2-1005 AND UTAH ADMIN. CODE R. 612-300-10

The law does not address an employer's obligation to obtain consent from employees.

UTAH INTERCEPTION OF COMMUNICATIONS ACT: UTAH CODE §§ 77-23A-1 TO 7-23A-16 AND 7-24B-1 TO 7-24B-9

A person may intercept wire, electronic or oral communication only if either:

- The person is a party to the communication.
- One of the parties to the communication has given prior consent to the interception.

(Utah Code § 77-23a-4(7).)

A person or entity may divulge the contents of a communication with the lawful consent of either:

- The originator.
- The addressee.
- The communication's intended recipient.

(Utah Code § 77-23b-3(2).)

RECORDKEEPING**10. What are the recordkeeping obligations for each privacy law listed in response to Question 1?**

For personnel files generally, employers must keep personnel files for six months from the later of the date of either:

- Making of the record.
- The personnel action involved.

(Utah Admin. Code r. 606-6-2(C).)

For:

- An employee's involuntary termination, the employer must keep the terminated employee's personnel records for six months from the date of termination.
- A discrimination complaint against the employer, the employer must keep all personnel records relevant to the complaint and to the charging party until final disposition of the complaint.

(Utah Admin. Code r. 606-6-2(C).)

GENETIC TESTING PRIVACY ACT: UTAH CODE §§ 26-45-101 TO 36-45-106

The law does not address recordkeeping obligations.

PROTECTION OF DRIVER'S LICENSES AND SOCIAL SECURITY NUMBERS: UTAH CODE §§ 34-46-102 TO 34-46-302

An employer must protect information about an applicant obtained through the selection process by both:

- Maintaining a policy on the information's:
 - retention;
 - disposition;
 - access; and
 - confidentiality.
- Allowing the applicant to see the policy on request, including before the applicant is required to provide the information.

The employer cannot retain the information for more than two years if the applicant is not hired within that two-year period. (Utah Code § 34-46-203.)

INTERNET EMPLOYMENT PRIVACY ACT: UTAH CODE §§ 34-48-101 TO 34-48-301

The law does not address recordkeeping obligations.

WORKER'S COMPENSATION ACT: UTAH CODE §§ 34A-2-101 TO 34A-2-1005 AND UTAH ADMIN. CODE R. 612-300-10

Any party obtaining medical records under Rule 612-300-10 of the Utah Administrative Rules:

- Cannot disclose the medical records without a valid authorization, except as required by law.
- Must maintain the medical records separately from the employee's personnel file.

(Utah Admin. Code r. 612-300-10.)

UTAH INTERCEPTION OF COMMUNICATIONS ACT: UTAH CODE §§ 77-23A-1 TO 7-23A-16 AND 7-24B-1 TO 7-24B-9

The law does not address recordkeeping obligations.

EMPLOYEES' LAWFUL, OFF-DUTY ACTIVITY**11. To the extent not described in Question 1, please state whether an employee's lawful, off-duty use of or activity in any of the following is protected and describe any limits to the protections:**

- Tobacco use or use of other consumable goods.
- Online activities, including posting on social media sites.
- Other activities, including gun ownership or political activities.

TOBACCO OR CONSUMABLE GOODS USE

Utah law does not address whether employers can make employment decisions based on employees' lawful, off-duty use of tobacco or other consumable goods.

ONLINE ACTIVITIES

See Question 1: Internet Employment Privacy Act: Protected Activity.

OTHER ACTIVITIES

There are no other restrictions on lawful, off-duty activities in Utah.

INVASION OF PRIVACY CLAIMS**12. For invasion of privacy claims in your jurisdiction, please describe:**

- The elements of an invasion of privacy claim, or factors relevant to the analysis.
- Affirmative or other defenses available to the employer.
- Examples of circumstances in which employees have been found to have a reasonable expectation of privacy in the workplace.

CLAIM ELEMENTS

The Utah Supreme Court recognizes four privacy torts:

- Misappropriation.
- False light.
- Publication of private facts.
- Intrusion.

(*Cox v. Hatch*, 761 P.2d 556, 563 (Utah 1988); Restatement (Second) of Torts § 652.)

Misappropriation or Right of Publicity

Misappropriation is when a party appropriates to the party's own use or benefit the name or likeness of another (*Cox*, 761 P.2d at 564; Restatement (Second) of Torts § 652C). To state a claim of misappropriation, an employee must show:

- That the employer appropriated the employee's name or likeness.
- That the employee's name or likeness has intrinsic value.
- That the appropriation was for the employer's use.

(Restatement (Second) of Torts § 652C; see *Cox*, 761 P.2d at 564.)

For more information, see State Q&A, Right of Publicity Laws: Utah (<http://us.practicallaw.com/w-000-3199>).

False Light

A false light claim arises when a party gives publicity to a matter concerning another that places the other before the public in a false light. To state a claim, an employee must show that:

- The false light in which the employee was placed would be highly offensive to a reasonable person.
- The employer had knowledge or acted in a reckless disregard as to the falsity of the publicized matter and the false light in which the employee would be placed.

(Restatement (Second) of Torts § 652E; see *Cox*, 761 P.2d at 563.)

Publication of Private Facts

The Utah Supreme Court held that, to prevail on a claim relating to the publication of private facts, the employee must show that:

- The disclosure of private facts must be a public disclosure and not a private one.
- The facts disclosed were also private, not public, facts.
- The matter made public would be one that would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.

(*Shattuck-Owen v. Snowbird Corp.*, 16 P.3d 555, 558 (Utah 2000).)

Under the Restatement, an employee would also have to show that the matter publicized is not of a legitimate concern to the public (Restatement (Second) of Torts § 652D). However, the Utah Supreme Court has not adopted this requirement.

Intrusion

To prevail on an invasion of privacy claim for intrusion, an employee must show that:

- There was an intentional substantial intrusion (physically or otherwise) on the employee's solitude or seclusion.
- The intrusion would be highly offensive to the reasonable person.

(*Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 378 (Utah Ct. App. 1997).)

EMPLOYER DEFENSES

Utah courts have not explicitly specified any defenses to an invasion of privacy claim. However, the Utah Supreme Court has stated that consent could possibly be a defense (*Cox*, 761 P.2d at 561, n. 4).

REASONABLE EXPECTATION OF PRIVACY

Utah courts have not explicitly stated what constitutes a reasonable expectation of privacy in the employment context. However, Utah courts have held that an employee has a reasonable expectation of privacy when the privacy invasion would be offensive to a reasonable person. For example, in *Walston v. United Parcel Service*, the US District Court for the District of Utah, following Utah law, held that an employee had a legitimate intrusion claim against his employer when the employer secretly placed a tape recorder above the employee's workplace, as the intrusion would be highly offensive to a reasonable person (2008 WL 5191710, at *3 (D. Utah Dec. 10, 2008)).

OTHER EMPLOYEE PRIVACY LAWS

13. Please list and briefly describe any additional employment-related workplace privacy laws not previously addressed.

DECEPTION DETECTION EXAMINERS LICENSING ACT: UTAH CODE ANN. §§ 58-64-101 TO 58-64-701 AND UTAH ADMIN. CODE R. 156-64-502

The Deception Detection Examiners Licensing Act provides for limitations on the types and duration of polygraph testing (Utah Code Ann. §§ 58-64-101 to 58-64-701). In a pre-employment pre-test interview or actual examination, an employer cannot ask the person who is undergoing the polygraph test about the person's:

- Political alignments.
- Sexual orientation or activity.
- Religious beliefs.
- Union sympathies.

(Utah Admin. Code r. 156-64-502(12).)

In addition, an employer cannot conduct:

- A pre-employment examination of less than 60 minutes.
- A polygraph examination of less than 90 minutes for all other types (except for concealed information examinations) of polygraph examinations.

- More than five pre-employment examinations within a 24-hour period.

(Utah Admin. Code r. 156-64-502(8), (9).).

In addition to the laws stated in Question 1, Utah may have additional laws on background checks and drug testing. For information on state laws on:

- Background checks, see Background Check Laws: Utah (<http://us.practicallaw.com/7-526-1885>).
- Drug testing, see Drug Testing Laws: Utah (<http://us.practicallaw.com/2-518-3507>).

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