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VIA EMAIL: Rick.W.Watson@sasktel.net

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Service and Hospitality Safety Association  
#14 – 395 Park Street  
Regina, Saskatchewan  
S4N 5B2

**ATTENTION: Rick Watson**

Dear Sir:

**Re: Employee Privacy Issues**

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This is further to our meeting of September 3, 2008. I understand from you that on September 17 you are speaking at a conference that will touch, among other things, on areas of employee privacy rights in the workplace and, in that regard, you have asked a number of general questions concerning the right to privacy in order to assist you in your presentation. As we discussed, Rick, although I can provide some general principles you also have to bear in mind and make the group aware that different rules may apply in different workplaces. In work palaces governed by federal jurisdiction, for example, the provision of PIPEDA (the Personal Information Protection and Electronic Documents Act) will govern the relationship and the employer has certain obligations as set forth in the act to respect and employee's privacy.

Generally speaking, the following basic rules apply to federally regulated employers but also provide good guidance for all employers:

- The employer should say what personal information it collects from employees, why it collects it, and what it does with it.
- Collection, use or disclosure of personal information should normally be done only with an employee's knowledge and consent.
- The employer should only collect personal information that is necessary for its stated purpose, and collect it by fair and lawful means.
- The employer should normally use or disclose personal information only for the purposes, unless it has the employee's consent to do something else with it, or is legally required to use or disclose it for other purposes.

- Employees' personal information needs to be accurate, complete and up-to-date.
- Employees should be able to access their personal information, and be able to challenge the accuracy and completeness of it.

In addition, if the employment relationship is governed by the provisions of a collective bargaining agreement the terms contained in that agreement may include fairly clear guidelines as to what is and is not allowed such as policies on drug testing, internet use and the like. The information that I will provide in response to your questions in general information but you cannot lose sight of those situations that might be governed by different and very explicit rules as a result of negotiations between the parties. My comments should also be taken to generally apply to private sector employers.

### **1. Is the boss allowed to search your locker?**

Saskatchewan is one Canadian jurisdiction which has passed legislation to protect individual privacy. *The Privacy Act* applies to the relationship between employees and employers in the private sector. For your information and because it is brief I am attaching to this letter a copy of *The Privacy Act*.

Generally speaking, there is a general right to privacy while on the job. However, employers are permitted to search property located on their own premise so long as the search is reasonably required due to the nature of the employer's business, the search is expected, and the employees have consented to the search. In some cases employers have been allowed to inspect employee's lockers if the invasion of privacy is deemed insignificant. Employees cannot be subjected to random searches unless the employer's particular business renders it particularly vulnerable to theft or drug abuse. An employee who refuses to submit to a search cannot be disciplined by his or her employer.

### **2. Is the boss allowed to search your car if it is on his property?**

The same privacy laws apply to search of an employee's vehicle which is located on employer property. An employee has a reasonable expectation of privacy with respect to his/her personal belongings, even if those belonging are located on the employer's premises. There are a few situations where the employer is permitted to search an employee's vehicle without employee consent. This includes employers such as Corrections Canada, which is statutorily permitted to search employee's vehicles for contraband materials due to the nature of their enterprise. Generally speaking, however, Canadian employers cannot search an employee's vehicle without the employee's consent, and an employee cannot be sanctioned for refusing the employer's request to search his or her vehicle.

### **3. Is the boss allowed to search your desk?**

Under the expectation of privacy, an individual employee is allowed to maintain personal files on his/her desk. Any monitoring and surveillance of employees, including searching of their desks, is subject to the employee's express or implied consent. Federal privacy legislation and provincial privacy legislation in Saskatchewan creates a civil cause of action for the invasion of an individual's privacy, including employees. However, legislation does recognize that the nature and degree of an individual employee's rights must be reasonable in the circumstances given the lawful interests of others. For example, if an individual works in sensitive environment

where certain items are not allowed on the premises, the employer may be able to search an employee's desk if there is a reasonable suspicion that contraband materials are held there.

**4. Is the boss allowed to read your mail?**

It is unlikely that an employer would be allowed to read mail directed to an employee except to the extent that the correspondence can be considered to relate to employment rather than being of an entirely personal nature. If, for example, an employee for some reason received personal correspondence at the office the employer would likely be unable to review that correspondence without the employee's consent. If, however, an employee made a certain inquiry with respect to a matter conducted at the workplace, and received correspondence in reply related to that inquiry then there might be a reasonable argument that the employer has a right to review that correspondence because of its relationship to the employee's job and the fact that the employer "owns" the work product.

**5. Is the employer allowed to read your emails and to monitor your computer?**

Generally, it is legally allowed for an employer to monitor an employee's email and internet use because the computer and the computer system usually belong to the employer. The general view is that an employee has no expectation of privacy with respect to any communications which involve the use of company owned property. Employers are wise to implement and internet and email policy so that employees have a clear understanding as to what type of internet and email use is prohibited. Such policies will also generally advise employees that the company reserves the right to monitor email and internet usage and that access is provided primarily for business purposes and not for personal use.

**6. Is the boss allowed to subject you to random drug testing?**

Although the response to this question is generally similar to that concerning internet and computer usage an employer would likely not be allowed to wiretap an employee's telephone without their consent except in the clearest of circumstances because it is such an intrusive interference to the employee's privacy.

**7. Is the boss allowed to subject you to random drug testing?**

The law with respect to random drug and alcohol testing is fairly clear. Random drug testing for employees in any positions, including those in safety-sensitive positions as well as pre-employment drug testing, cannot be justified as reasonable necessary to accomplish the employer's legitimate goal of a safe workplace free of impairment. Drug tests are fundamentally flawed because they cannot measure present impairment. Because no test has yet been developed to show how much of a drug was used or when the drug was used, a positive drug test does not provide any particular evidence of impairment while on the job. Moreover, automatic dismissal as a result of a positive test is considered to be too severe and not sufficiently sensitive to individual capabilities.

Random alcohol testing for employees in safety-sensitive positions is legitimate where supervision is limited or non-existent, provided the employer has met its duty to accommodate the needs of those who test positive.

Testing for alcohol and specified drugs after a significant work accident, incident or near-miss or where reasonable cause exists to suspect alcohol or drug use or possession is acceptable if necessary as one facet of a larger assessment of drug abuse.

**8. Is the boss allowed to obtain your medical file from your doctor?**

An employer cannot access a medical file that is held by an employee's private doctor. The relationship of a doctor and a patient is protected by the doctor's duty of confidentiality. Generally the right to access information would have to be provided for by way of consent, in accordance with some statutory provision or in a collective agreement or an employment contract. However, if the employee's doctor is also employed as a company doctor, there are cases in which an employer can access an individual employee's medical information if it pertains to the individual's physical ability to perform his/her duties. The employee must be informed that the company doctor may share information gained from their examination, and must consent to the examination on this basis before the company doctor can share any of the employee's medical information. A company doctor can only share this information if it would directly impact the employee's physical ability to perform his or her employment duties.

Generally speaking, where an employer is asked to take steps to accommodate a disabled employee, the employee will have an obligation to provide the employer with relevant medical information to enable the employer to assess the request and determine whether it can be accommodate short of undue hardship.

**9. Is the boss allowed to demand a criminal record check?**

An employer in Saskatchewan can ask for a criminal record check. Federally regulated employers can only ask for information regarding criminal offences for which a pardon has not been granted. Employers under both jurisdictions can request a criminal record check if the information is necessary due to the nature of the employee's position. For example, it is acceptable for a truck driving company to ask an employee if he/she has been convicted of any highway traffic offenses. An employer under both jurisdictions can request a record of any unpardoned criminal convictions. Again, as with any other private information, the employee must consent to the criminal record check for it to be conducted.

Criminal reference checks may sometime be required under statute for certain types of employment. Commonly, employees working with children or dependent adults are compelled by statute to submit to criminal reference checks as a condition of their employment. In many instances, however, an employer will have established its own clear policy requiring criminal reference checks for employees engaged in certain types of employment, such as where they will have access to cash.

**10. Is the boss allowed to demand a credit bureau check?**

A potential employer can request a credit bureau check if the check is necessary to establish the credibility of the employee. Again, as with any personal information, the employer must obtain the employee's consent before conducting the check. It should be noted, that in Saskatchewan, *The Credit Reporting Act* establishes a number of restrictions and requirements on the ability to obtain credit information including that the individual must consent to the request for a credit report for employment purposes.