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Overview

- Basic work place privacy and the 4th Amendment
- What a body-worn camera ("BWC") is
- Pros and Cons of BWCs
- Management’s concerns
- Officers’ concerns
- Suggestions
DISCLAIMER

Nothing contained in this Seminar is intended to be legal advice. This Seminar is an overview. Before making a claim or taking a position under any circumstances a thorough review of all applicable laws, regulations, policies, contract provisions, and any other relevant authorities should be conducted, including consulting with experts and professionals in the jurisdiction for advice and counsel.
Right to Privacy

- The U.S. Supreme Court has ruled in *U.S. v. Katz*, 389 U.S. 347 (1967), that before a 4th Amendment violation can be found in public employment there must be:
  - An expectation of privacy that Society is willing to accept as reasonable

- The courts have analyzed the “right” to or “expectation” of privacy in a variety of contexts:
Workplace Privacy

  - Established the reasonable suspicion standard for workplace searches by employers
  - Followed precedent set by *New Jersey v. T. L. O.*, 469 U.S. 325 (1985), which made school student searches permissible based upon a “reasonable belief” of misconduct
  - Also created the “operational necessity” doctrine:
The operational realities of the workplace, however, may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor, rather than a law enforcement official. Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation ... An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees. Instead, in many cases offices are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits. Simply put, it is the nature of government offices that others—such as fellow employees, supervisors, consensual visitors, and the general public—may have frequent access to an individual's office.
Workplace Privacy

- requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome. Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable.
Workplace Privacy

  - No expectation of privacy in an automobile travelling on public thoroughfares

- **Phillips v. Township of Cumberland**
  - No expectation of privacy in police cruiser

- **Quon v. City of Ontario Police Department**
  - U.S. S.Ct., allowing for the expectation of privacy in agency issued pager/text message content still found warrantless search of pager transcript reasonable given employer’s limited search and legitimate interest in whether employer was being appropriately billed for pager use under its plan w/pager company
Workplace Privacy

- **Pennyfeather v. Tessler**
  - No expectation of privacy as to employer re information in personnel file freely given by employee

- **Greenwalt v. Indiana Dept. of Corrections**
  - 4th Amendment not applicable to fitness for duty evaluation
  - Tort of invasion of privacy more appropriate

- **Caldarola v. County of Westchester**
  - 4th Amendment “seizure of image” occurred when videotape of arrestee was made but the invasion of privacy was minimal
Workplace Privacy

- **DeMaine v. Samuels**
  - 4th Amendment not violated when trooper’s vehicle and personal belonging were searched pursuant to a written published policy putting trooper on notice of employer’s asserted right to such searches
  
  - IA searches of employees and their property is not measured under probable cause standard because criminal prosecution is not the objective of the search
  
  - Since IA search results in discipline only, appropriate standard is reasonableness, a more lenient standard
  
  - Expectation of privacy in troopers desk and car found not objectively reasonable
Workplace Privacy

- *Lynch v. NYPD*, 737 F.3d 150 (2nd Cir. 2013).

- Post-shooting breathalyzer test falls with the “special needs” exception to the Fourth Amendment, and requires neither probable cause nor a warrant. Primary purpose of the rule requiring the test was not the enforcement of the law, but rather deterrence of officers working under the influence of alcohol and public assurances.
BODY CAMERAS

- Very little case law to date.

- *Floyd v. City of New York (2013)*
  Judge found NYC’s “stop and frisk” tactics unconstitutional and ordered the officers to wear body cameras to deter the unconstitutional risk of stop and frisk.
**BODY CAMERAS**

- *Allen v. City of Oakland (2012)* In the midst of the “Occupy Oakland” protest, several officers were found to have turned off their lapel cameras while making arrests, in violation of a court order.

- Officers disciplined but not held in contempt by the court.
BODY CAMERAS

Topics for discussion:

1. Balancing: potential to invade privacy (of both the officer and the public) versus deterring alleged officer misconduct.

2. When is the camera on? Continuously running versus activated by the officer.
BODY CAMERAS

- When is the camera on?
- Considerations: Officers do not want to be accused of turning the cameras off to commit misconduct.
- However, if there is a continuous recording, it is stressful and oppressive to the officers.
BODY CAMERAS

- Who owns the video and what do we do with it?

- If the cameras are recording hours and hours of video, including innocuous video inside people’s homes or of people walking down the street, what is the department supposed to do with all the video?
BODY CAMERAS

- How long should video be retained?
- Departments should develop retention schedules that keep video for short times (weeks) unless “flagged” for issues involving use of force, incidents that lead to arrest or if there has been a citizen or other complaint filed about the encounter.
BODY CAMERAS

- Should officers be required to notify suspects or members of the public that they are being recorded on a body camera?
- Should officers who enter private homes be required to notify the occupants of the camera or give the occupants the opportunity to request it be shut off?
BODY CAMERAS

- When could video footage be released to the public?
- Would even innocuous encounters be subject to public records requests?
- Could officers or the public object to the release of video that does not involve a complaint, use of force, etc?
BODY CAMERAS

- What about sensitive witness statements or victim statements, for instance domestic violence victims who are already reluctant to speak to the police?
- Would the continuous recording further deter the most vulnerable witnesses and victims from reporting crimes?
PROs and CONs

- There are clearly benefits to both officer and the public when BWCs are used.
- Conspiracy and cover-up allegations will ALWAYS play a role in our litigious society.
- Transparency & accountability have always been “slogan-like” terms used in government service.
- BWCs will NOT answer all questions.
- BWCs may even lead to additional questions and merely fuel a different debate.
PROs

- Real-time evidence gathering
- Efficiency of prosecution
  - Criminal cases (of suspects & officers)
  - Internal Affairs cases
- Civil defense of officers and agencies
- “Impartial Eye-Witness” (video doesn’t lie)
- Increased professionalism
- Public trust
PROs

The IACP **CLAIMS**:

- In-car cameras exonerated officers in 93% of cases
- 5% of the complaints were sustained
- Many complainants dropped their complaints upon learning there was a video
- *The Impact Of Video Evidence On Modern Policing*
  
The IACP also **CLAIMS**

- Rialto, CA PD: Citizen misconduct claims fell by 87.5%
- 59% fewer incidents of use of force
- *End of Program Evaluation: On-Officer Body Camera System, Axon Flex Program Evaluation and Recommendations, 12/2/13"
CONs

- Officers are made to feel as though they cannot be trusted, they are not professionals.
- Mistrust among fellow-employees (surreptitious recordings)
  - Comments against management
  - Union meetings
  - Casual contact with supervisors
- Privacy concerns of officers in non-law enforcement contacts (breaks, locker rooms, rest rooms)
CONs

- The un-recorded incident
  - Time or emergent conditions not giving officer time to engage the equipment
  - Defective equipment
    - The inevitable conspiracy theory
    - An additional policy leading to discipline

- “Routine audits” of videos
  - Fishing expeditions for policy violations
  - Unreported conduct caught on video
Thoughts from Dr. Bill Lewinski of Force Science Institute:

- Cameras and eyes see/perceive differently
  - Peripheral vision
  - Danger cues
  - Depth of field
  - Speed
  - Transition from high to low light (& vice-versa)
  - Body parts or objects block the view
  - Time stamping
  - Angular perspectives
  - Instant replay second guessing (Graham v. Connor)

Video should be a substitute for a thorough investigation.

10 Limitations of Body Cameras You Need To Know About, A Special Report From Force Science Institute
The FOP’s Concerns

- “Always-On” as opposed to officer activated
- Failing to record
  - Intentional or negligent
  - Defective equipment
- Officer privacy
- Discussions between officers and investigators
- Responsibility for damaged equipment
- Amnesty for self-reporting minor violations
  - What is a “Minor Violation?”
  - How many bites at the apple?
The FOP Concerns

- Storage of videos in an un-editable format
- Officers should have unlimited access to their own videos with a discreet user name and password
  - Prior to any questions
  - Especially after a critical incident
- Policies **AND** Procedures must be carefully drafted to address **ALL** of the above
- Look to other jurisdictions
- Several Cities have begun using BWCs and there is a wide variety of policies
Some Cities Using BWCs

- New Orleans
- San Diego
- NY DNR
- Albuquerque
- Evansville
- Chicago
- Austin
- Denver
- Duluth
- Fort Collins
- Las Vegas
- Madison
- Phoenix
- Rialto
- Spokane
Model Policies

- It is impossible to draft a policy for all agencies
- One size does not fit all
- A couple of models to consider
  - The FOP Proposed Model BWC Policy
    - www.fop.net or call or email for a copy
  - LRIS
  - IACP
    - www.iaco.org (fee payment required)
Collective Bargaining

Mountlake Terrace, #11702-A (Wash. PERC 2014). Employer used recording from “public safety” video camera to discipline an employee. The disciplinary use of recordings is mandatory for collective bargaining because it is a “substantial change to employee working conditions.”
Collective Bargaining

GPS Systems. General Teamsters Local 959, Case No. 11-1609 (Alaska LRA 2013). ‘The parties’ collective bargaining agreement contains a broad management rights clause that gives the employer the authority to decide all equipment and machinery to use in its operations, regardless of the effect on employment. By agreeing to this clause, the union waived its right to bargain over GPS devices, which are either equipment, machinery, or both. The union also waived the right to bargain any effects of the devices.’
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THANK YOU