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**PREA**  
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**Human Resources and Administrative Investigations  
Notification of Curriculum Use  
April 2014\***

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**Training Curriculum:  
Human Resources and Administrative Investigations**

**MODULE 9:  
HUMAN RESOURCES AND THE LAW**

**The Project on Addressing Prison Rape  
January 2014**

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# Objectives

- Identify and describe the extent of potential agency legal liability for human resources matters
- Describe PREA's impact on existing and future collective bargaining agreements
- Identify proactive steps agencies can take to meet the PREA standards relating to human resources matters



# What is your context?

<b>Union</b>  Collective bargaining obligations	<b>Public employer</b>  Constitutional protections  4 <sup>th</sup> Amendment: privacy 1 <sup>st</sup> Amendment: freedom of association
<b>Non-Union</b>  Employer will have great discretion in adopting and modifying policies Some common law privacy issues	<b>Private employer</b>  e.g., subcontractor



# Key HR Issues in Prevention

## Union environments:

- Modifying Collective Bargaining Agreements

## Public employee environments

- Privacy (will discuss under investigations)
- Anti-fraternization rules – concerns about 1<sup>st</sup> Amendment Freedom of Association challenges



# PREA and Collective Bargaining

- Many comments received during rule making
- Final rules seek to clarify the interaction between PREA and labor law obligations
- These try to make it clear that key PREA obligations trump contractual commitments in collective bargaining agreements
- What PREA says . . .



## § 115.66 Preservation of ability to protect inmates from contact with abusers

(a) Neither the agency nor any other governmental entity responsible for collective bargaining on the agency's behalf shall enter into or renew any collective bargaining agreement or other agreement

- **that limits the agency's ability to remove alleged staff sexual abusers from contact with any inmates pending the outcome of an investigation or of a determination of whether and to what extent discipline is warranted**





## § 115.66 Preservation of ability to protect inmates from contact with abusers

**(b) Nothing in this standard shall restrict the entering into or renewal of agreements that govern:**

- **(1) The conduct of the disciplinary process**, as long as such agreements are not inconsistent with the provisions of §§ 115.72 and 115.76; or
- **(2) Whether a no-contact assignment that is imposed pending the outcome of an investigation shall be expunged from or retained in the staff member's personnel file following a determination that the allegation of sexual abuse is not substantiated.**



## § 115.72 Evidentiary standard for administrative investigations

The agency **shall impose no standard higher than a preponderance of the evidence** in determining whether allegations of sexual abuse or sexual harassment are substantiated.



## § 115.76 Disciplinary sanctions for staff

(a) Staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.

**(b) Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse.**

(c) Disciplinary sanctions for violations of agency policies relating to sexual abuse or sexual harassment (other than actually engaging in sexual abuse) **shall be commensurate with the nature and circumstances of the acts committed**, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.



## § 115.76 Disciplinary sanctions for staff

(d) All terminations for violations of agency sexual abuse or sexual harassment policies, resignations by staff who would have been terminated if not for their resignation, **shall be reported to law enforcement agencies**, unless the activity was clearly not criminal, and to any relevant licensing boards.



# What these rules mean for Collective Bargaining Agreements (CBA)

Agencies **cannot** agree to CBA terms

- Keeping employees in contact positions while an investigation is proceeding
- Imposing anything other than presumptive termination for sexual abuse
- Imposing any standard of proof of sexual abuse higher than a preponderance of the evidence, or more likely than not, or 51% probability, standard



# Modifying Collective Bargaining Agreements

**Legal rule:** Modifications in terms and conditions of employment must be bargained about with collective bargaining representative

- Some policy changes related to PREA technically will require at least “effects” bargaining; others won’t
- Rules about hiring will not require any bargaining (because applicants are not covered by the CBA)
- Rules about promotion, discipline and termination, surveillance, may require bargaining as § 115.66 states



# Suggestions About Minimizing Bargaining Obligation

In next collective bargaining agreement (CBA), **include a provision** that states that all matters involving coming into compliance with federal and/or state law and regulations are **reserved by management or fall within management's rights**

- \*Check whether your current CBA has such language;
  - If it does then rely on it to assert no duty to bargain about policy changes to comply with PREA obligations



# More on Collective Bargaining

- **Send notice of policy changes** adopted in light of PREA to the union by mail, hope it does not respond
  - Many arbitrators will rule that this amounts to consent by the union
- **Review past practice**; if the union has not asserted a right to bargain about federal regulatory matters that affect terms and conditions of employment in the past you have a good argument that this is the parties' past practice
- If you determine you do need to bargain, assert that the bargaining is **effects** bargaining only, since the **decisions** to institute policy changes required by PREA, thus **required by law**





# Anti-fraternization Policies in the Public Employee Context

- HR concern has always been that some restrictions could violate public employees' **1<sup>st</sup> Amendment** rights to freedom of association
- However, except for one "outlier" lower court opinion, all of the case law has determined that in the **corrections** context (both penal and police) **upholds employers' rights to impose such policies, even when they are quite restrictive**



# What's OK?

Termination of a state corrections officer who was married to a man who was previously incarcerated in the state prison system for a felony.

No

Yes

# What's OK?

Termination of a state corrections officer who was married to a man who was previously incarcerated in the state prison system for a felony.

*Keeney v. Heath*, 57 F.3d 579 (7th Cir. 1995)

No

Yes

# What's OK?

Termination of probation officer for buying a car at a dealership where a probationer under her supervision worked, though he was not involved in the sale.

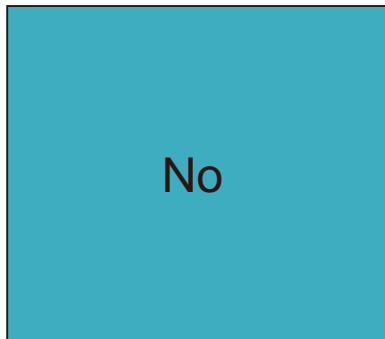
No

Yes

# What's OK?

Termination of probation officer for buying a car at a dealership where probationer under her supervision worked though he was not involved in the sale.

*Montgomery v. Stefaniak*, 410 F.3d 933 (7th Cir. 2005)



# What's OK?

Termination of probation officer who exchanged letters with a man she had previously dated who was serving life sentence in prison outside her jurisdiction.

No

Yes

# What's OK?

Termination of probation officer who exchanged letters with a man she had previously dated who was serving life sentence in prison outside her jurisdiction.

*Akers v. McGinnis*, 352 F.3d 1030, 1034 (6th Cir. 2003).

No

Yes



# Here's the outlier case:

## *Reuter v. Skipper*, 832 F. Supp. 1420 (D. Or. 1993)

- A female corrections officer was placed on administrative leave due to her intimate association with an ex-felon. She brought a claim alleging violation of her First Amendment rights.
- The court granted her motion for summary judgment, relying upon the fact that the parties had developed an intimate relationship which *predated* the enactment or implementation of the sheriff's rules that made association with a person who was convicted of a felony within the past ten years a "presumptive conflict of interest."





## Here is the more typical court attitude:

### *Poirier v. Massachusetts Dept. of Correction*, 558 F.3d 92 (1st Cir. 2009)

- Female corrections officer developed a relationship with male inmate and continued the relationship. She requested permission for the inmate to reside with her and was fired for unauthorized contact. Poirier claims that the DOC and its commissioner violated her First Amendment right, specifically the right to intimate association, and her Fourteenth Amendment right.
- The court found the officer's rights were not violated and dismissed her complaint.



# Investigations

- What are the types of investigations that exist?
- How does your agency handle investigations?
- What is an unsubstantiated claim?
- How does your agency determine what constitutes an unsubstantiated claim?
- What are the pros and cons of an external investigator(s).



## 28 CFR § 115.71: Criminal and administrative agency investigations

(a) When the agency conducts its own investigations into allegations of sexual abuse and sexual harassment, it shall do so **promptly, thoroughly, and objectively** for all allegations, including third-party and anonymous reports.

(b) Where sexual abuse is alleged, the agency shall use investigators who have received special training in sexual abuse investigations pursuant to §115.34.



# Implications

- Must have a system for receiving reports of sexual abuse
  - Internally
  - Externally
  - Anonymously
  - By a third party
- Information about how to file such reports should be made available
- A regular system for investigating them should be developed



## 28 CFR § 115.71:

# Criminal and administrative agency investigations

(e) **The credibility** of an alleged victim, suspect, or witness shall be assessed on an individual basis and **shall not be determined by the person's status as inmate or staff.**

(f) Administrative investigations:

(1) Shall include **an effort to determine whether staff actions or failures to act contributed to the abuse**

(h) **Substantiated allegations of conduct that appear to be criminal shall be referred for prosecution**

(j) **The departure of the alleged abuser or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation**



# 28 CFR § 115.72: Evidentiary standard for administrative investigations

The agency **shall impose no standard higher than a preponderance of the evidence** in determining whether allegations of sexual abuse or sexual harassment are substantiated.



# Some Key Legal Issues in Investigations

- Constitutional law protections in criminal law context
- Privacy issues
  - Public employers
  - Private employers
- Union context
  - Rights to union representative in investigative interview



# Constitutional Law Issues

## 5<sup>th</sup> Amendment

- *Garrity* issues

## 4<sup>th</sup> Amendment

- Surveillance





# *Garrity v. New Jersey* 385 U.S. 493 (1967)

Holding: The government **cannot use information** in a subsequent criminal proceeding that has been **obtained from an employee who was threatened with negative job consequences** for failure to cooperate in an investigation.

Under *Garrity*:

- Corrections staff **can** be required to answer questions **in an administrative investigation**
- And can be fired for refusing to answer or based on the answers they give
- But the government **cannot subsequently use these answers in a criminal proceeding**

Therefore, the agency must initially decide between criminal OR administrative investigations, and stage properly.



# PREA Observes the *Garrity* Rule:

**28 CFR § 115.71:** Criminal and administrative agency investigations

(c) Investigators shall gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence; any available electronic monitoring data; shall interview alleged victims, suspected perpetrators, and witnesses; and shall review prior complaints and reports of sexual abuse involving the suspected perpetrator.

**(d) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for criminal prosecution.**



# Privacy Rights, Mostly in the Public Employee Context

Public employees have some 4<sup>th</sup> Amendment protections

Private employees subject to **criminal** investigation also have constitutional protections

Private employees subject to administrative investigations have some common law privacy protections, but only against intrusions that would “shock the conscience”

- Cases addressing email and social media surveillance



# Fourth Amendment – Public Employee Privacy Rights

- In the employment context, courts will use a **balancing test** – courts will **weigh the intrusion on employee’s privacy rights against the weight of the employer’s interest**
  - Comes up in searches of employee property or person and in employee surveillance
- This protects only the employee’s “reasonable expectation of privacy”
- So a key issue under the balancing test is the “reasonableness”
  - Of the employee’s expectation
  - Of the employer’s intrusion



# Ways to Make Investigation Methods More Reasonable

## Surveillance

- Provide general notice regarding areas under surveillance
- Methods
  - Random vs. targeted
  - If targeted surveillance, should have some objective cause or reasonable suspicion
- Balance between intrusiveness and employer need
  - Avoid highly intrusive searches or surveillance
    - *E.g.*, avoid video in bathroom stalls or changing areas



# Reasonableness Depends on Work Context

Whether employee has reasonable expectation of privacy depends heavily on work context:

- Corrections officers working in secured areas have low expectations of privacy
- Probation officers and others working in the community may have higher expectations of privacy
  - *E.g.*, in personal or apparently “personal” cars and offices
- Extremely intrusive searches such as body cavity searches need high justification
  - In contrast, random urine drug tests of employees working with inmate population are okay



# Avoiding Fourth Amendment/ Privacy Rights Challenges

- Provide general notice about employee surveillance methods
- Restrict surveillance methods to those **reasonably necessary**
- Use even-handed procedures for selecting surveillance targets
- Think through/document the need for the search or surveillance method and tailor it to that need
  - *E.g.*, is video needed or will audio capture the misconduct being investigated?



# Union Employees: Right to Representation

- Under federal labor laws both private and public sector bargaining unit members generally have the **right to have a union representative present** in interviews if they request this
  - In private sector, these are called *Weingarten* Rights
  - Similar rights have been recognized under the Federal Service Labor-Management Relations Statute
- In some states, state labor laws covering public employees grant rights to union representation in interviews
- These representatives **may not disrupt the proceedings or instruct the witness not to answer**; they are there to assist the employee but not to obstruct the process





# Termination/Discharge or other Significant Discipline

- What do we know about terminating employees?
- What do we know about disciplining employees?
- What are some methods of discipline available in the correctional context?



# Remember PREA: 28 CFR § 115.17: Hiring and promotion decisions

(g) Material omission regarding [sexual] misconduct, or the provision of materially false information, shall be **grounds** for termination

\*\*\*And of course engaging in sexual misconduct is **just cause** for termination



# Issues by Context

## **Public Employment**

- Due process rights

## **Union context**

- Rights to follow grievance and arbitration procedures

## **Private, Non-union employees**

- Employment “at will” – an employee can be fired at any time for any reason that is not illegal
  - *E.g.*, any reasons as long as there is no discriminatory discharge and no discharge in “violation of public policy”



# Due Process Rights In Public Employment

- Generally there is a **right** to a pre-termination hearing
  - But, where there is a strong employer need to remove the employee from the workplace, this hearing can generally be held after the employee is removed from work
  - Some cases even say there is no need to pay salary during suspension, but many employers do continue the employee on payroll pending the hearing
  - Also must check state civil service statutes



# Fifth/Fourteenth Amendment Due Process Rights

- Public employees sometimes have a kind of **property interest in their employment**, which may entitle them to some type of notice and hearing, either prior to, or after termination.
- What these rights are generally are defined in civil service statutes.
- Sometimes a constitutional challenge may be raised; there courts will balance:
  - The employee's interest
  - The risk of an error affecting the employee's protected interests through the procedures the employer uses; and
  - The public employer's interest in resolving the situation quickly.



# What's Okay?

Suspension of corrections officer without pay or hearing where he was accused of providing marijuana to an inmate.

Okay

Not Okay



# What's Okay?

Suspension of corrections officer without pay or hearing where he was accused of providing marijuana to an inmate?

*Virgili v. Allegheny County*, 132 F. Appx. 947 (3d Cir. 2005)

Okay if hearing  
provided later



Not okay

# Another Case

*Macklin v. Huffman*, 976 F. Supp. 1090 (W.D. Mich. 1997)

- Prison food service employee was accused of **sexual misconduct**, and **suspended without pay for two weeks pending investigation**.
- Balancing the minimal intrusion on the employee's rights against the prison's substantial interest in the investigation and its safety concerns, the court held that **the employee did not have a right to a hearing prior to his suspension**.





# Union Context

- In this context, employment is **not** at will
- Termination generally must be for “just cause”
- This question is resolved through the grievance and arbitration procedure defined in the collective bargaining agreement



# Grievance and Arbitration

- Unions are under a **duty of fair representation** (“DFR”)
  - They can be sued (for back pay) if they do not process an employee’s grievance
- A union may take a case of a “bad apple” employee to arbitration even though it may not actually support him or her,
  - Here they may be acting under their DFR
- Explore the possibility of getting the union on board as a **partner** in preventing sexual misconduct
  - Many unions detest sexual inmates just as management does because they damage the reputation of the profession



# Summary

## Summary

- (1) Potential Agency Liability
- (2) PREA's Impact on Existing/Future CBAs
- (3) Constitutional and State Law Issues

