

# Privacy

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## General Privacy Rights

Employers are permitted to monitor **work-related use** of electronically generated communications when monitoring serves a **legitimate business interest**.

- See Also:
  - Stored Communications Act
  - Federal Wiretap Act
  - Other “alphabet soup” (FCRA, ECPA, HIPAA, GINA, ADA, FMLA, NLRA)



# Employee Privacy Rights

- Intrusion on seclusion:
  - Triggered by intruding upon employee privacy interests (where employee has reasonable expectation of privacy); and
  - Is highly offensive to a reasonable person in the employment context.
  - What is “reasonable” degree of invasiveness and business reason for the intrusion.

## Intrusion Upon Seclusion

- Compare *Johnson v. Kmart Corp.* (Ill. Ct. App. 2000) (undercover investigator posing as a janitor solicited intensely personal information from workers at the workplace was actionable)
- With *Salazar v. Golden State Warriors* (N.D. Cal. 2000) (use of night-vision infrared scoping device to tape plaintiff snorting cocaine in an SUV outside a private wedding was not actionable)

## What are legitimate business reasons to seek information about employees?

- Prevent theft
- Protect trade secrets
- Prevent harassment
- Prevent improper, illegal or immoral behavior
- Safety concerns
- Increase productivity

## Is Recording Conversations in the Workplace Legal?

- Maine is a “one party consent” state.
- Employers can prohibit employees from recording conversations in the workplace in a written policy.
- If employees record workplace conversations related to a termination in violation of policy, employer can cite as “after-acquired evidence” in support of the termination.
- Consider context of recording: is there an expectation of privacy? Legitimate business interest?



## GPS Tracking

- Today's GPS technology makes it easy for employers to track the location of employees.
- Many legitimate reasons for doing so:
  - Monitoring efficiency/productivity
  - Validating time records and ensuring compliance with overtime requirements
  - Compliance and safety
  - Suspected employee wrongdoing

# GPS Tracking: Factors to Consider

- Company Car vs. Personal Car
- Company Device vs. Personal Device
- BOYD Policy?
- MDM Software
- What kind of notice is given?





## GPS Tracking: Factors to Consider

- *Cunningham v. New York State Dept. of Labor*, 21 N.Y.3d 515 (NY Ct. App., 2013): Installing a GPS device on a vehicle personally owned by a state employee suspected of falsifying time records was an unreasonable search.
- What about hiring a private investigator to follow the employee?
- What about tracking through smartphone?

## Other Types of Tracking

- Keystroke monitoring
- Screen mirroring
- Other devices such as company-issued wellness devices
- Time-tracking productivity devices
- On-premises tracking (e.g., security cameras)
- Email and Instant Messaging

# Presenter

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