

Employment, Labor and Benefits/Privacy and Security Alert: Conducting Workplace Surveillance - California Supreme Court Identifies Guidelines for Employers

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The California Supreme Court has brought some clarity to the question of when an employer can lawfully conduct surveillance of an employee in certain closed-off areas of the workplace, such as a private office. Previously, the law had been clear only at each end of the employee privacy spectrum. On one end, the case law made it clear that employers have the right to videotape employees in the workplace if such surveillance takes place in open and accessible spaces within the sight and hearing of coworkers, supervisors, and the general public (*e.g.*, department store shopping areas). On the other end of the spectrum, the case law provides employees with a right of privacy in the workplace from an employer's surveillance in areas with restricted access or limited view reserved for inherently personal acts (*e.g.*, locker rooms and restrooms). Left unanswered was the gray area in between.

In *Hernandez v. Hillsides*, the California Supreme Court has now provided more clarity, and confirmed that while employees have a right of privacy in an enclosed office, no invasion of privacy rights occurs when employers monitor employees in such an enclosed area for legitimate business reasons, so long as the surveillance is properly limited in scope and intrusiveness.

Hidden Cameras, Abused Children, and Pornography

In *Hernandez v. Hillsides*, clerical employees of a private non-profit residential facility that housed 66 neglected and abused boys and girls in Pasadena filed a lawsuit claiming invasion of privacy, and intentional and negligent infliction of emotional distress. The female clerical Plaintiffs shared an enclosed office where they worked on computers during the day. The director of the facility learned that someone was logging on to one of the Plaintiffs' computers late at night to look at pornographic websites. The director did not suspect the Plaintiffs since the activity occurred after hours, but was worried that one of the program directors who had access to the children was the culprit. In order to catch the culprit and protect the children, the director, without the Plaintiffs' knowledge, installed a camera in the Plaintiffs' office (on top of a bookshelf amongst plants) along with a motion detector (placed on the lap of stuffed animal) that connected remotely to a television in a storage room. The camera was never used during the day, was plugged in only at night after the Plaintiffs had left for the day, did not record the Plaintiffs, and was operated only three times in the span of 21 days. Having not recorded anyone during that time period, the director decided to uninstall the camera, but before he could, the Plaintiffs

discovered it. Despite the director showing Plaintiffs the video that demonstrated no recording of the Plaintiffs had taken place, litigation ensued.

The trial court granted summary judgment to the Defendants on the basis that there could be no “intrusion” where the Plaintiffs were never actually videotaped. The Court of Appeals overturned, holding that the Plaintiffs met the elements of an invasion of privacy claim: (1) they suffered an intrusion into a zone of privacy and (2) the intrusion was so unjustified and offensive as to constitute a privacy violation.

Supreme Court Finds a Right of Privacy but No Intrusion

The California Supreme Court disagreed and reinstated summary judgment for the Defendants. Notably, the Court held that while the Plaintiffs had suffered an intrusion into a zone of privacy, no reasonable jury could find that the intrusion was unjustified or offensive.

In reviewing the broad spectrum of potential “private” spaces in the workplace, the Court held that privacy is heightened in enclosed offices where an employee does not expect to be overheard or observed, especially if no notice of a potential surveillance was provided. In this case, the Plaintiffs’ office could be shut and locked and the blinds could be drawn, and the Plaintiffs could have some expectation of conducting personal activities (such as changing into athletic clothes or adjusting clothing) without being observed. As a result, the Plaintiffs had a right to privacy in their enclosed office.

The Court then turned to the second element of the claim: whether the intrusion was “highly offensive to a reasonable person” or an “egregious breach of social norms.” The Court examined all the surrounding circumstances, including the “degree and setting” of the intrusion (*i.e.*, place, time, and scope of the intrusion) and “the intruder’s motives and objectives.” Applying those standards, the Court noted that:

- the surveillance was limited in scope—a camera was only pointed at the specific computer in question
- it was limited in time—surveillance was conducted only after hours when the Plaintiffs were gone, and only on three occasions in a 21-day span
- it was conducted for a legitimate purpose—to protect the children
- it had safeguards in place to protect the information—there was limited access to the equipment in the storage room by a select few
- the intrusion itself was limited—while the camera was present, it never actually recorded the Plaintiffs.

Action Items for Employers

To avoid the ensuing litigation and bolster any potential arguments against a claim for invasion of privacy, California employers should build the possibility of surveillance into their personnel

policies, by clearly reserving to themselves the right to conduct reasonable surveillance and monitoring of all employees' activities in the workplace. But employers should carefully assess the business necessity of surveillance in places where the California courts have recognized an employee's reasonable expectation of privacy, including in restrooms, locker rooms, enclosed offices, and any location that can be closed off. If an employer is going to conduct surveillance of an employee in these areas, it should consult with counsel first to make sure that there is a legitimate purpose for the surveillance, and that it is as limited in scope as possible to accomplish the objective.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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