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Labor and Employment Law Update

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WORKPLACE PRIVACY RIGHTS AND EMPLOYEE VIDEO SURVEILLANCE ARE FURTHER EXAMINED BY THE CALIFORNIA SUPREME COURT

Recently, the California Supreme Court decided a case involving workplace surveillance, which provides some new guidance for employers about employee privacy rights. Although people enjoy a right of privacy from both government and private actors (such as employers), the Court has handed down various decisions that have clarified that right — especially in the workplace. The Court has previously ruled on employment-related privacy rights issues including drug testing, use of employer-owned computers, e-mail, telephones, and keystroke monitoring. In the recent case of *Hernandez v. Hillsides, Inc.*[1], the Court further identified exceptions to employee privacy rights by providing direction related to video surveillance. The Court began by stating, "while privacy expectations may be significantly diminished in the workplace, they are not lacking altogether."

In *Hillsides, Inc.*, the plaintiffs were two female administrative employees of a non-profit residential facility for neglected and abused children. The plaintiffs shared an office that could be made private if the blinds were drawn and the door closed. The women would use the office to change their clothes and conduct other personal activities, expecting total privacy. However, management discovered that the plaintiffs' computer was being used — in the late evening after normal business hours — to access pornographic web sites. Management placed a hidden video surveillance camera in plaintiffs' office to monitor the computer. The camera could be turned on and off, or placed on a motion-detection setting. Management did not inform any employees of the camera — in order to find out who the third-party offender actually was.

Plaintiffs were never actually videotaped by the surveillance camera because it was not turned on during normal business hours. However, when plaintiffs learned of the hidden camera, they sued their employer for violations of their rights to privacy and for negligent infliction of emotional distress. Upon review, the Court was asked to determine whether or not the plaintiffs'

[1] *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272.

protected zone of privacy had been intruded upon by their employer, and if so, whether it was so unjustified and offensive as to constitute a privacy invasion.

The Court explained that whether an individual has a reasonable expectation of privacy is a question of social norms and factors related to the specific context. Circumstances that rise to the level of a "serious invasion" should be "an egregious breach" of one's expected right to privacy — with a high level of "offensiveness." And even if a plaintiff can prove these factors, defendants can still show that the intrusion was justified and escape liability. Essentially, the Court advised that each situation is different and must be examined in the context of time, place, and circumstances.

In analyzing the "offensiveness" of the employer's behavior in *Hillsides, Inc.*, the Court described a spectrum of workplace privacy - with open-cubicle work spaces having the least amount of privacy expectations and employee restrooms providing a high expectation of privacy. The Court found that the *Hillsides* employees' office fell somewhere in the middle - because they had the ability to close the door and blinds in order to conduct personal activities without observation. The Court further noted that the invasion of plaintiffs' privacy was high, because secret video tape and monitored surveillance was considered very invasive to reasonable sensibilities.

However, given the facts that the camera was only turned on after business hours when plaintiffs were gone, that the camera was only focused on the computer in question, that the employer's intent was legitimate — to protect children — and because the video tape could only be accessed by limited members of management, the Court held that the privacy invasion was not "highly offensive to a reasonable person." The employer prevailed and was not liable for either of plaintiffs' claims for invasion of privacy or emotional distress.

Hillsides provides valuable lessons to employers related to classified employees working outside of classrooms. First, employers should add the possibility of video surveillance into their privacy policies.[2] In the event video surveillance is necessary, employees will have already been put on notice. This will reduce or eliminate a reasonable expectation of privacy. Second, employers should make sure they have a "legitimate purpose" for conducting surveillance and limit the scope of surveillance to the amount necessary to accomplish the objective for which the surveillance is intended. For example, cameras in break rooms could be justified if vandalism or theft is occurring, but not simply to monitor the socializing of employees. Finally, employers should recognize that any employee environment that can be closed off may create a higher expectation of privacy in the employee.

[2] CSBA's BP 3515 provides sample policy language and additional guidance.

In the context of education and certificated employees, the *Hillsides* case does little to reconcile Education Code section 51512 related to classroom surveillance. That section reads as follows:

> "The Legislature finds that the use by any person, including a pupil, of any electronic listening or recording device in any classroom of the elementary and secondary schools without the prior consent of the teacher and the principal of the school given to promote an educational purpose disrupts and impairs the teaching process and discipline in the elementary and secondary schools, and such use is prohibited."

Other recent cases have held that footage shot by students on their cell phones showing a teacher's unruly classroom could be used against the teacher in discipline hearings. However, those videos were secretly taken by students — not through a district surveillance camera; and in those cases, the students were disciplined for obtaining the footage. Moreover, classroom surveillance may violate collective bargaining agreements. Additionally, the privacy guidelines in *Hillsides* will apply to teachers outside of the classroom setting, where Education Code section 51512 does not apply.

If you have any concerns or questions about your privacy policy, or employee monitoring or surveillance, please contact us.

— *Tenielle E. Cooper*