THE AMERICAN LAW INSTITUTE

Restatement of the Law Third
Employment Law

Preliminary Draft No. 8

(May 26, 2011)

SUBJECTS COVERED

CHAPTER 3 Employment Contracts: Compensation and Benefits (revised)
CHAPTER 7 Workplace Privacy and Autonomy (revised)
APPENDIX Black Letter of Preliminary Draft No. 8

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This document is submitted to the Advisers for their meeting on June 16 (at 9:00 a.m.), 2011, and to the Members Consultative Group for their meeting on June 17 (at 10:00 a.m.), 2011, both meetings at ALI Headquarters, 4025 Chestnut Street, Philadelphia, Pennsylvania. As of the date it was printed, it had not been considered by the Council or membership of The American Law Institute, and therefore does not represent the position of the Institute on any of the issues with which it deals.

The American Law Institute

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Comments and Suggestions Invited

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The Council approved the start of the project in 2000. The first Tentative Draft was submitted to the membership at the 2008 Annual Meeting, but no final vote was taken on the draft due to lack of time.

Tentative Draft No. 2, containing revisions to Chapter 1. Existence of Employment Relationship; Chapter 2. Employment Contracts: Termination; and Chapter 4. The Tort of Wrongful Discipline in Violation of Public Policy, was approved at the 2009 Annual Meeting, subject to the discussion at the Meeting and to editorial prerogative.

Tentative Draft No. 3 contains Chapter 8. Employee Duty of Loyalty and Restrictive Covenants. Sections 8.01-8.04 and 8.06-8.08 were approved at the 2010 Annual Meeting, subject to the discussion at the Meeting and to editorial prerogative. There was insufficient time to discuss § 8.05 and §§ 8.09-8.11. A Tentative Draft of Chapter 6 on other torts affecting the employment relationship and of material in Chapter 8 was approved at the 2011 Annual Meeting.

An earlier version of some of the black letter and commentary contained in Chapter 3 of this Draft can be found in Preliminary Draft No. 7 (2010), and an earlier version of some of the black letter of Chapter 3 is contained in Preliminary Draft No. 6 (2009). An earlier version of some of the black letter and commentary on the privacy Sections contained in Chapter 7 of this Draft can be found in Preliminary Draft No. 6 (2009), and a version of Chapter 7 appeared as Chapter 5 in Preliminary Draft No. 3 (2005).

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REPORTERS' MEMORANDUM (May 20, 2011)

PRELIMINARY DRAFT NO. 8

RESTATEMENT OF THE LAW THIRD
EMPLOYMENT LAW

CHAPTERS 3 and 7

CHAPTER 3

Employment Contracts: Compensation and Benefits (SE)

This Chapter applies principles developed in the previous Chapter to the topic of compensation and benefits. Whether or not an employment relationship is terminable only for cause or at will, employees have a right to receive compensation they have earned and employers have a corresponding duty to pay such compensation. If there is a bona-fide dispute over how much compensation was earned, the employer should pay the amount of the compensation as to which there is no reasonable dispute.

This general framework is set out in § 3.01, which covers both wages or salary and commissions. The next two Sections address special issues that arise in the context of payment of bonuses and other incentive compensation (§ 3.02). As a general matter, whether employees have earned particular compensation, or are entitled to particular benefits, depends on the terms of any agreement between the employer and the employee or any binding promises (see § 2.02(b), Comment *c*) or binding policy statements of the employer (§§ 2.02(c) and 2.05). Benefits are treated separately (in § 3.03) because they are often handled through unilateral employer statements rather than agreements with employees.

Modification or revocation of compensation and benefits, as a prospective matter, is taken up in § 3.04. It follows the general approach of § 2.06. The general rule is that the agreement between the parties controls whether compensation or benefits can be changed prospectively. Vested or accrued rights under such an agreement, including rights based on an employer promise enforceable by promissory estoppel or an employer statement enforceable under § 2.05, cannot be revoked absent the consent of the affected employees backed by consideration.

Section 3.05 addresses the implied duty of good faith and fair dealing (§ 2.07), which operates to prevent employers from using any power to discharge or otherwise adversely affect the duration or conditions of employment to cause, or compel consent to, a forfeiture of earned compensation or benefits.

CHAPTER 7

Workplace Privacy and Autonomy (MTB)

This Chapter addresses the common-law protections for employee privacy and autonomy interests. The common law has protected privacy through the four well-known privacy torts developed in the Restatement Second of Torts. These protections extend to people in a variety of different situations, and their development in the context of employment warrants specific elucidation. Autonomy protections, on the other hand, are primarily a matter of employment law developed as a variant of the public-policy protections accorded to employees against certain adverse employer actions, such as termination, that interfere with public policy.

Topic 1—§§ 7.01 through 7.07—concerns privacy protections. Section 7.01 establishes the basic cause of action derived from the tort of intrusion upon seclusion. A violation of an employee's right to privacy requires satisfaction of two elements: (1) an employer intrusion upon an employee's protected privacy interest, (2) that is unreasonable and would be offensive to a reasonable person under the circumstances. Three categories of employer intrusion are defined in § 7.02 and further developed in §§ 7.03-7.05. Section 7.03 describes the employee's privacy interests in private information of a personal nature, and provides that an employer's requiring such information from the employee as a condition of employment constitutes an intrusion. Under § 7.04, an employer intrudes upon an employee's privacy interests when it intrudes upon the employee's body as well as physical or electronic locations in which the employee has a reasonable expectation of privacy. And § 7.05 explains when an employer's disclosure of confidential employee information constitutes an intrusion upon the employee's privacy interests in preventing such disclosure.

Determining an intrusion under §§ 7.03-7.05 is just the first step in the analysis. The employer is subject to liability under this Chapter only if the intrusion was also unreasonable and offensive. Section 7.06 provides the framework for this determination. An intrusion is unreasonable if there is no reasonable justification as to the manner and scope of the intrusion. The "how" of the intrusion is balanced against the "why"—namely, the legitimate business and public interests that the intrusion serves. Offensiveness is based on the extent to which the intrusion departs from the accepted norms for conducting such an intrusion. A significant departure is considered offensive.

Employees who are disciplined or discharged because they refuse to consent to what would be a tortious intrusion into their privacy can bring a tort action based on the protections for wrongful discharge or discipline in violation of public policy (§ 7.07).

Topic 2—§§ 7.08 and 7.09—sets forth the protections for employee autonomy. Section 7.08 identifies the protected employee autonomy interests: conduct, activities, or behavior that occurs outside of the workplace or does not interfere with the employer's legitimate workplace interests as well as moral, ethical, or other personal beliefs that do not interfere with the employee's workplace responsibilities. This Section also recognizes

that an employee is protected as to those activities which the employer has agreed or promised to treat as separate from and irrelevant to the employment relationship. Section 7.09 provides that the employee is protected against discharge or other material adverse action based solely on the employee's exercise of protected autonomy interests, as long as the employer does not have a good-faith belief that those interests interfere with the employee's workplace responsibilities.

RESTATEMENT THIRD, EMPLOYMENT LAW

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5/20/11

CHAPTER 3
EMPLOYMENT CONTRACTS: COMPENSATION AND BENEFITS (SE)

Introductory Note: Remuneration is a principal ingredient of the employment relationship; it is a major reason why employees work under the control of their employer; moreover, from the employer's standpoint, compensation is both a cost and essential motivational mechanism. This Chapter applies the principles developed in Chapter 2, as well as the framework provided by the Restatement Second of Contracts, to the subject of compensation and benefits. The amount, kind and frequency of compensation for services is principally determined by the agreement of the parties, broadly construed to include express and implied contracts as well as unilateral promises and policy statements by employers considered to have binding effect.

Many states have enacted laws spelling out the mode and frequency of payments (often called "wage payment" laws). Also, the federal Fair Labor Standards Act and state counterparts regulate minimum wage, compensable time, overtime pay, and rest and meal breaks. In addition, the Employment Retirement Income Security Act of 1974 ("ERISA") broadly preempts the area of employee pension and welfare benefit plans. Despite these statutes, the common law remains the foundational source because the legislation contains certain exclusions from coverage and, more importantly, does not itself deal with the underlying contract issues but, rather, overlays its requirements on contractual relationships defined by state decisional law.

§ 3.01 Right to Earned Compensation

(a) Whether the employment relationship is terminable at will or terminable only for cause, employees have a right to be paid the compensation they have earned.

(b) Whether compensation has been earned is determined by the agreement between the employer and employee or any binding promises or policy statements of the employer.

(c) Employers are under an obligation to pay in a timely fashion the compensation employees have earned. If there is a bona fide dispute as to whether the compensation claimed has been earned, employers are under an obligation to pay in a timely fashion the compensation that is not in dispute.

Comment:

a. Scope. The overarching principle of this Chapter is that employers have an obligation to pay, and employees have a right receive, promised remuneration for their earned services. This general principle is set out in § 3.01, which covers wages, salary, commissions and benefits. This principle applies whether employment is terminable at

will or for cause only. The next Section addresses special issues that arise in the context of payment of bonuses and other incentive compensation (§ 3.02). As a general matter, whether employees have earned particular compensation, or are entitled to particular benefits, depends on the terms of any agreement between the employer and employee and any binding promises under promissory estoppel (see § 2.02(b) comment c) or binding unilateral policy statements of the employer (see §§ 2.02(c) & 2.05). Benefits are treated separately in (§ 3.03) because their terms are often, but not always, announced and implemented through unilateral employer policy statements rather than agreements with employees.

Modification or revocation of compensation and benefits, as a prospective matter, is taken up in § 3.04. It follows the approach of §2.06. The general rule is that the agreement between the parties, including any binding employer promise or policy statement, controls whether compensation or benefits can be changed prospectively. Vested or accrued rights under such an agreement, including agreements based on a promise enforceable by promissory estoppel or a statement enforceable under § 2.05, cannot be revoked absent the consent of the affected employees backed by consideration.

Section 3.05 addresses the implied duty of good faith and fair dealing (§ 2.07) which applies to constrain employers from using any power to discharge or otherwise adversely affect the durations or terms of employment to cause, or compel consent to, a forfeiture of earned compensation or benefits.

At all times, applicable statutes control, sometimes displacing, sometimes supplementing, the relevant common law principles. The most common legislation are state wage-payment laws, which often assume that the parties have entered into an enforceable agreement with respect to the item of compensation in question; where such an agreement is absent, the wage-payment law normally does not apply.

Recovery for contractual losses typically requires mitigation of damages. See § 9. __.

b. Relationship to wage-payment laws. Many states have wage-payment laws that determine the mode and frequency of payment of "wages". Where these statutes apply, they control. As a general matter, however, they do not preclude common law development. The wage-payment laws are generally based on the background common law principles of contract, and look to the common law to determine whether the employer has an underlying binding obligation. Moreover, some statutes exclude certain categories of employees (e.g., commissioned salesmen or high wage-earners) or certain forms of compensation (e.g., incentive payments, future unearned payments), thus requiring full application of contract law in those cases.

c. At-will vs. for cause relationships. Section 3.01(a) states the general principle: Even if, under the principles stated in Chapter 2, the employment relationship is terminable at the will of either party, the employer nevertheless is obligated to pay the agreed-upon, earned compensation for services rendered by the employee.

Illustrations:

1. Employer X and employee E enter into an employment agreement providing for a $50,000 "annual salary". E begins work on January 1. Three months into the relationship, on March 1, X serves E with notice of termination of the agreement, effective immediately. Under applicable law, the employment agreement is terminable at the will of either party, with or without cause. X's payroll practice was to pay its employees on the first of each month for the prior month's services. X paid E on February 1 for service rendered in January. X owes E one month's salary.

2. Same facts as Illustration 1, except that X terminates E's employment for cause on March 1, effective immediately. X owes E one month's salary.

d. Earned compensation. The employer's obligation to pay compensation depends on whether the employee has earned the compensation. In the case of a salary or wage, the employee is typically being paid for a period of service, and the compensation is earned with completion of that period, as in Illustrations 1-2. In the case of employee compensation in the form of commissions, however, the employee is paid for sales made or other unit of output produced, and whether compensation is earned depends on whether on the sale has been made or other unit of output is produced in accordance with the terms of the agreement between the parties.

Illustrations:

3. X, in the freight forwarding business, hired E as a commissioned sales person in February 2010. The employment agreement states that E is "guaranteed compensation on the basis of 50 % of the profit generated by accounts you are instrumental in obtaining freight business" for X. On November 15, 2009, E obtains a potentially significant increase in freight business from Road Masters, a customer of X whose business historically yielded $300,000 average annual profit for X. For calendar year 2010, Road Masters business accounted for $500,000 in profit for X. If the agreement provides for profits generated by preexisting, as well as entirely new, accounts, X is entitled to 50% of $200,000 increase in profits from the Road Masters account, or $100,000, in commissions for 2010.

4. E sells newspaper subscriptions for X via telephone solicitations. Under the Sales Agreement E signed, he is to receive a commission only on "commissionable orders," defined as "a sale that is recorded on X's home delivery registry where the customer maintains the subscription for a minimum of 28 days without giving a specific stop date." E is owed commissions only on subscriptions where customers do not transmit a stop date within the 28-day period.

5. Upon commencing employment for X on January 1, 2010, E, who sells wire manufactured by third parties, signed a "Manufacturer's Representative Agreement,"

which provides for a one-year term and then successive periods of one year unless either party gives 30 days' written notice of termination of the Agreement. The Agreement further provides for commissions "payable with respect to orders accepted by X up to and including the termination date and X shall have the right to appoint a new Sales Representative for the Territory, effective immediately upon such termination date."

E's employment is terminated on March 14, 2011 pursuant to the Agreement. E sues for commissions with respect a substantial order from Y, a major purchaser of wire, that E initiated but was not accepted by X until after the termination of his employment. E is not entitled to commissions on the post-termination sale to Y. Whether E should receive those commissions because Y's termination of E's employment is a breach of the implied covenant of good faith and fair dealing is discussed in § 3.05 & Illustration 9.

e. Agreement between the parties, or any binding promises or policy statements of the employer. As developed in Chapter 2, an agreement is based on consideration or bargained-for exchange and thus enforceable under the general law of contracts (§ 2.03). In addition, employers can be bound by promises that reasonably induce detrimental reliance by employees (§ 2.02(b) & comment c) and by policy statements they promulgate to govern workplace conditions (§ 2.05).

f. Extensive course of dealing. Past practices of the employer can in appropriate cases inform the agreement of the parties.

Illustration:

6. X provides recruitment, marketing and staffing services for other companies. X employed E from April 2002 to December 2009 as an vice-president of X responsible for arranging media advertisements for clients. E's commissions were calculated on the basis of the following formula. When a client agreed to a media buy, X would advance a payment to the media company and the client would reimburse X and pay a fee for E's services. When the client was billed, E would receive 20 percent of the amount minus certain charges such as E's entertainment and travel expenses, finance charges for any late payments by the client, and half of the salary of E's assistant. E was aware of these charges and acquiesced in these charges during her employment. In December 2009, E resigned her position with X and sues for reimbursement of these charges as a breach of contract. There is no written agreement between X and Y.

The parties' extensive course of dealings for over seven years and regular written compensation statements issued by X to E, and acquiesced in by E, support a finding that X and E had agreed that commissions owed to E reflected adjustments for late payment by clients, half of the cost of E's assistant and other work-related charges. (Implied contract terms are discussed in § 2.03, comment g.)

g. Payment of undisputed amount. It is a corollary of § 3.01(a) that the employer is obligated to pay that portion of the compensation that is undisputably owed. State wage

payments generally prohibit any deduction by employers from wages that are not expressly authorized by the employee, but this prohibition is not found in the common law.

*h. Quantum meruit***.** If there is no agreement between the parties or binding employer promise or policy statement governing compensation for services, principles of quantum meruit may apply to prevent unjust enrichment.

§ 3.02 Bonuses and Other Incentive Compensation

(a) If so provided in an agreement between the employer and the employee or any binding promises or policy statements of the employer, bonuses and other incentive compensation are a form of compensation which employees have a right to be paid if they have earned such compensation. Absent such an agreement or any binding promises or policy statements, bonuses and incentive compensation are awards made in the employer's discretion.

(b) Whether bonuses or other incentive compensation have been earned is determined by the agreement between the employer and employee or any binding promises or policy statements of the employer.

(c) Employers are under an obligation to pay in a timely fashion the bonus and other incentive compensation employees have earned. If there is a bona fide dispute as to whether the compensation claimed has been earned, employers are under an obligation to pay in a timely fashion the compensation that this is not in dispute.

Comment:

a. Compensation or discretionary award? Employers award bonuses and other types of incentive compensation as a means of rewarding or motivating their employees. Whether bonuses are a form of compensation that employees have a right to receive or, rather, are merely awards that the employer makes solely in its own discretion depends on the agreement between the employer and employees, including any binding promises or policy statements of the employer. This is necessarily a fact-intensive inquiry. Important factors include (1) whether the documents establishing the bonus expressly state that the bonus is a discretionary award; (2) whether the bonus is an important part of the employee's overall compensation; (3) whether the criteria for receiving the bonus are keyed to objective measures of employee performance or conduct (such as remaining with the employer for a particular period of time) or firm performance rather than purely subjective assessments of the employer; and (4) the course of dealing between the parties.

Illustrations:

1. In January 2008, X, an investment bank, hired E to help develop its fledgling underwriting business. The parties entered into a contract guaranteeing E's employment in 2008 and 2009 under the following terms: E would receive a base salary of $200,000 plus a bonus that would raise his "total compensation" to 33% of the first $4.5 million of gross revenues that X derived from deals on which E worked (the "Percentage Bonus"), but that in no case would E receive less than $1 million total compensation. In both years, E could also receive an "extra" bonus "at X's discretion."

X discharged E in August 2009. E received a total of $1.4 million for the two years, but claims he was entitled $2.97 million under the Percentage Bonus formula, excluding any discretionary bonus. The Percentage Bonus for the 2008 and 2009 was compensation earned by E.

2. E was hired in January 2007 as a commodities trader for the natural gas desk at X, an investment bank. E received a formal offer letter which he signed, dated and returned to X's personnel department. The letter stated that E's annual salary would be $150,000 and he would be eligible to participate in X's Investment Bank Incentive Plan (Incentive Plan or Plan). It further stated:

> The payment and amount of any incentive compensation award under the Incentive Plan is in the complete discretion of the firm. Subject to your being actively employed as of the date of the payout, you will be eligible under the Incentive Plan to receive an annual incentive bonus which is intended to motivate future performance and which may be based on individual achievement, business unit and overall corporate results and awarded under the terms of the Plan and in our sole discretion. … If your employment terminates for any reason before the award date, whether the termination is initiated by you or the firm you will not earn or receive any award. … No employee or officer of the firm is authorized to make any oral promises to you about an incentive compensation award.

In January 2009, E quits his position to apply to law school. X's payout date for 2007-2008 period, under the Incentive Plan, is March 15, 2009. E is not entitled to a bonus under the Plan.

3. Same facts as Illustration 2, except that X is terminated without cause on March 15, 2009. E is not entitled to a bonus under the Plan.

b. Bonuses to motivate continued service or other employee conduct. Sometimes employers provide bonuses not so much to incentivize employee performance as to ensure that employees will continue working for the employer during some period of corporate change. Such bonuses normally constitute earned compensation once the conditions of the bonus are satisfied.

Illustrations:

4. Concerned that key performers might leave for competitors because of rumors of a corporate takeover, X, a major financial services company, promulgated an Incentive Compensation Plan (ICP) for certain executives, including E. The plan provided eligible employees with restricted company stock at substantially reduced prices in lieu of a portion of the executive's compensation. Employees participating in this program, including E, signed agreements stating that should they resign before their restricted shares of stock vested, they would forfeit the stock and the portion of the compensation they directed be paid in the form of restricted stock.

E quits his employment with X before any of his shares of restricted stock under the ICP vest. E forfeits his shares of the stock and the portion of compensation he directed be paid in the form of such stock.

5. Same facts as Illustration 4, except that E remains employed after vesting date for the restricted stock. E is entitled to the shares which have vested under the ICP.

§ 3.03 Benefits

(a) If so provided in an agreement between the employer and the employee or any binding promises or policy statements of the employer, benefits are a form of compensation which employees have a right to receive, in accordance with any applicable plan documents.

(b) Employers are under an obligation to provide employees, in accordance with any applicable plan documents, the benefits the employers have agreed or promised, as a matter of agreement, practice, or policy statement, to provide. If there is a bona fide dispute as to whether the requirements of the applicable plan documents have been satisfied, employers are under an obligation to provide the benefits for which eligibility is not in dispute.

Comment:

a. ERISA preemption. Federal legislation – namely, the Employment Retirement Security Act of 1974 (ERISA) – broadly preempts state regulation of employee pension and welfare benefit plans**.** State contract law continues to play an important role because ERISA does not cover benefit plans funded by government employers and does not cover payroll practices and terms of individual employment agreements. In addition, respecting employee welfare benefit plans – plans that do not provide retirement benefits – ERISA provides very little substantive law requiring the courts to develop an "ERISA common law" which heavily depends on state contract (and trust) law.

b. Benefit plans. Employers provide employees with benefits not only as a motivational mechanism but also because tax advantages and economies of scale allow employers to provide benefits desired by employees at substantially lower costs than they would incur on their own in the open market. In order to derive these economies of scale, the employer establishes plans that cover a relatively number of employees and provide common terms for covered employees.

c. Employer unilateral policy statements. In the benefits context, employers are likely, though not invariably, to set the terms of benefit plans through unilateral policy statements rather than agreements with employees. The statements are intended generally to establish binding commitments while they are in effect (see § 2.04).

Illustration:

1. Anticipating a significant reduction in force, X, a manufacturer, informs his employees via the company email that salaried employees who are designated for this round of layoffs (ending December 31, 2010) will receive three months of salary and healthcare benefits continuation, in addition to one week of severance pay for each year of service. Nonsalaried employees receive only the one week of severance pay for each year of service (Reorganization Plan Benefits).

E, a salaried employee of X, is laid off on August 1, 2010. X is entitled to the Reorganization Plan Benefits.

§ 3.04 Modification of Compensation or Benefits

(a) Except as provided in (c) below, an employer may prospectively modify or revoke any compensation or benefits based on its past practices or policy statement by providing reasonable notice of the modification or revocation to the affected employees.

(b) Such modifications and revocations apply to all employees hired, and all employees who continue working, after the effective date of the notice of modification or revocation.

(c) Such modifications and revocations cannot, absent the consent of affected employees (backed by consideration), adversely affect rights under any agreement between the employer and the employee or employees (§ 2.03) or adversely affect any vested or accrued employee rights that may have been created by an agreement (§ 2.03), employer statement (§ 2.04), or reasonable detrimental reliance on an employer promise (§ 2.02, comment c).

Comment:

a. This Section applies the principles developed in § 2.06.

Illustration:

1. Same facts as in § 3.03, Illustration 1, except that X announces that for the second round of layoffs commencing January 1, 2011 and ending March 15, 2011, the Reorganization Plan Benefits have been changed to provide only 2 months of salary and healthcare benefit continuation plus severance pay; the severance pay component is not changed (Modified Reorganization Plan Benefits).

F learns on January 2, 2011 that he is scheduled for layoff on February 15, 2010. F will receive the Modified Reorganization Plan Benefits and has no claim to the earlier plan benefits because they were limited to employees laid-off during the first round.

b. The special case of vested or accrued employee rights. As developed in § 2.06, Comment *b*, an employer cannot by unilateral action modify or rescind enforceable employee contractual rights. Such rights normally arise from express agreements covered by §§ 2.02(a)-(b) & 2.03. In appropriate circumstances, unilateral employer policy statements may also create vested or accrued employee rights that cannot be unilaterally modified or rescinded; any adverse change would require an agreement by the employee backed by consideration. Factors in determining whether an employer policy statement creates a vested or accrued employee right include the statement's language, other policies of the employer, the employer's course of conduct, and usages in the particular industry or occupation.

Illustrations:

2. Upon commencing employment for X Corporation on January 1, 2000, E, an insurance salesperson, was told he would be paid under an "Accrued Commission Plan" in effect for all of X's sales force. That plan provided a sales commission of 7% on the premiums of the policies sold or renewed. On January 1, 2004, X modified the compensation plan so that commissions would be based not on a percentage of premiums, but rather on a stated flat rate for each policy sold or renewed. E has challenged the application of the "flat rate" commission system to renewals of policies sold while the original plan was in effect. E's claim against X should go to the trier of fact because the foregoing facts create a bona fide dispute as to whether the original plan set a fixed system for compensating X's salespersons only for sales of policies made while that plan was in effect or whether it also governed all future renewals of those policies – despite the announced change in the change in the compensation plan.

3. Seven tenured professors at X State University were hired before 1990 and have been paid on a calendar year basis (envisioning 11 months of duties) rather than academic year levels, which were lower. These professors were therefore paid as if they were performing 11 months of duties when they worked only 9-month academic year

schedules. All professors hired since 1990 have been paid on an academic year basis unless they in fact perform 11 months of duties. On January 1, 2010, the University informed the seven professors that beginning January 1, 2011, they would be paid only on an academic year basis. Unless these professors can show they have an agreement with X, express or implied, to be paid on a calendar year basis for the duration of their careers with the University, they are subject to the University's changed policy effective January 1, 2011.

§ 3.05 Implied Duty of Good Faith and Fair Dealing

(a) Both the employer and employee, whether or not the relationship is terminable for cause or at will, owe a nonwaivable duty of good faith and fair dealing to each other, which includes an agreement by each not to hinder the other's performance under, or to deprive the other of the benefit of, the employment relationship (§ 2.06).

(b) The employer's duty of good faith and fair dealing includes the duty not to terminate or seek to terminate the employment relationship or implement other adverse employment action, for the purpose of

(1) preventing the vesting or accrual of an employee right or benefit, or

(2) retaliating against the employee for refusing to consent to a change in earned compensation or benefits.

Comment:

a. Nonwaivable duty. This Section and § 2.06 treat the implied duty of good faith and fair dealing as a nonwaivable duty. The reference here is not to the function of the implied duty as a gap-filler to supply terms necessary to effectuate the underlying agreement of the parties; in such cases, the express terms of the agreement as a practical matter may leave little scope for implied terms. However, to the extent the implied duty of good faith and fair dealing functions as a condition of the enforceability of a contract, it cannot be waived or modified by the express terms of the agreement. This Section and § 2.06 involve the implied duty in the latter sense.

b. Opportunistic firings. The implied duty of good faith and fair dealing not only promotes basics notices of fairness but enables the parties to enter into certain relationships where performance is not simultaneous – where, for example, the employees renders services but the employer's obligation to pay for those services does not ripen until certain conditions subsequent have been satisfied. To the extent that the express terms of the agreement address the matter in question, as a practical matter there may be less scope for implied terms.

Illustrations:

1. Employer X assigns its sales people – all at-will employees – to specific territories. X does not require its sales people to sign an employment agreement. As a matter of practice, each sales employee is paid 75% of the applicable commission upon executing a sales agreement with the customer, and the remaining 25% of the commission after the equipment is delivered to the customer and 30 days have transpired without a customer complaint. In addition, the 25% is paid only if the employee is still on X's payroll at that latter date. E, an at-will sales person employed by X, has procured a substantial order for X's equipment from a large customer, and has received 75% of the applicable commission. On January 1, the equipment is delivered to the customer. On January 15, E is fired without cause. E has an action against X for the remaining 25% of the applicable commission (but not for reinstatement) if E was discharged in order to prevent E's obtaining the 25% commission.

2. Same facts as Illustration 1, except that each sales employee, including E, signed an agreement upon being hired that states that the "the 25% component of the commission is paid only if the employee is still on X's payroll 30 days after the equipment has been delivered without an employee complaint ("Customer Satisfaction Date"). If the employee is not on the payroll as of the Customer Satisfaction Date, the 25% component is to be paid to the employee servicing the customer account on that date." E has no claim against X for the remaining 25% of the commission.

c. Employer retaliation. As stated in § 3.04(c), employers cannot by unilateral action modify accrued or vested rights of employees. The implied duty of good faith and fair dealing also prevents the employer from taking adverse action against employees who refuse to agree to an adverse change in compensation or benefit which they are owed. Employers can try to obtain the consent of employees to such changes but they breach the implied covenant if they compel such consent as a condition of employment or subject the employee to an adverse employment action for refusing to consent to such changes.

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5/16/11

CHAPTER 7
WORKPLACE PRIVACY AND AUTONOMY (MTB)*

Introductory Note:

This Chapter concerns the protections afforded through the common law to employee privacy and autonomy interests that supplement the more specific and limited statutory and regulatory protections for those interests. Privacy and autonomy are distinct, but related concepts, in that protection of privacy can facilitate personal autonomy. The common law has protected privacy through the four well-known privacy torts developed in the Restatement Second of Torts. These protections extend to people in a variety of different situations, and their development in the context of employment warrants specific elucidation. Autonomy protections, on the other hand, are primarily a matter of employment law developed as a variant of the public policy protections accorded to employees against certain types of adverse employer actions, such as termination.

The focus in this Chapter is on employer liability rather than the liability of employees to one another. In most jurisdictions a violation of privacy protections constitutes a tort eliciting appropriate tort remedies. In other jurisdictions, the courts use the rubric of the "public policy" cause of action, a violation of which typically results in tort remedies; this cause of action, referred to as the tort of "wrongful discipline in violation of public policy," is the subject of Chapter 4 of this Restatement. In a few jurisdictions, the courts may limit the aggrieved employee to contract remedies. Employee privacy is also the subject of federal and state constitutional provisions and of federal and state statutes that cover particular areas of protection.

* This Chapter is a preliminary draft and has not been approved by membership or the Council of The American Law Institute.

In the union-represented sector, moreover, collective bargaining agreements have been interpreted to protect certain privacy interests. This Chapter covers only the common law of workplace privacy and autonomy and does not address federal or state constitutional or statutory law, or collective bargaining developments. However, case law relating to these developments may inform and help shape the common law. Where a subject is not covered in this Chapter, the reader should consult other provisions of this Restatement and the Restatement Second of Torts.

TOPIC 1
PROTECTION OF EMPLOYEE PRIVACY

§ 7.01 Employee Right of Privacy

An employer violates an employee's right of privacy by an intrusion upon a protected privacy interest that is unreasonable and would be offensive to a reasonable person under the circumstances.

Comment:

a. Scope. The term "privacy" has myriad meanings, both in common parlance and as legal jargon. The roots of American common law privacy protections are generally attributed to the description of Warren and Brandeis of the "right to be let alone," which they described as "the right of determining, ordinarily, to what extent [a person's] thoughts, sentiments, and emotions shall be communicated to others." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195, 198 (1890). At the core of the privacy concern is information about the person – information that the person wishes to shield to a certain extent, if not completely. As described by the California Supreme Court, privacy protections seek to prevent "improper interference (usually by means of observation or communication) with aspects of life consigned to the realm of the 'personal and confidential' by strong and widely shared social norms." Hill v. NCAA, 865 P.2d 633, 647 (Cal. 1994).

Both in his academic writings and his work as Reporter of the Restatement Second of Torts, Dean William Prosser articulated the familiar common law privacy protections that are enforced today. Those causes of actions are explained and further elucidated in Restatement Second of Torts §§ 652A-652E. The four distinct types of privacy protections are generally known as (1) intrusion upon seclusion, (2) public disclosure of private facts, (3) publicity placing

a person in a false light, and (4) misappropriation of a person's name or likeness. The great majority of jurisdictions have made these four privacy torts part of their common law. Of the four common law privacy torts, the first two are most obviously relevant in the employment context. The "false light" tort is related to the tort of defamation, discussed in Chapter 6 of this Restatement. The "intrusion upon seclusion" tort is considered in §§ 7.01—7.06. The publicity to private facts tort is subsumed into the discussion of the privacy interest against disclosure to third parties and is discussed specifically at § 7.05. Retaliation for refusal to accede to a tortious invasion of privacy is covered in § 7.07, while §§ 7.08—7.09 sets out protected employee autonomy rights.

b. Intrusion upon seclusion in the employment context. Section 7.01 sets out the basic principle of common law protection for employee privacy interests against unreasonable, offensive employer intrusions. This provision is based on the "intrusion upon seclusion" tort developed in Restatement Second of Torts § 652B and adopted by most jurisdictions. The intrusion tort runs against a person who "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another" if the intrusion would be "highly offensive to a reasonable person." Similarly, Section 7.01 recognizes liability for employer intrusions on protected employee privacy interests that are unreasonable and offensive in scope or manner (defined further in § 7.06).

The tort of intrusion upon seclusion applies not only to intrusions by law enforcement or others with whom the aggrieved person may have no preexisting relations but also to unwarranted, offensive intrusions by parties to ongoing relationships, such as the employment relationship. Because of the nature of the ongoing employment relationship, the privacy interests of the employee will differ from the privacy interests of unaffiliated parties. The close and

continuous contact between an employer and its employees may lead to different configurations and weighting of employee privacy interests as compared to members of the general public. As employees agree to serve the interests of the employer (at least in part) (see § 1.01), the employer often will need to examine the work of the employee to determine the quantity, quality and timely provision of that service. In addition, employers generally own and control the workplace and its instrumentalities; this gives rise to a level of employer responsibility for conduct within the workplace and, correspondingly, different expectations of privacy than may be present in other contexts. At the same time, employees retain their privacy rights when they enter into an employment relationship. An articulation of how the common law strikes a balance between the employer's right of control over its premises and equipment and the employee's rights of privacy and autonomy is the subject of this Chapter.

c. Balance between employee privacy interests and other factors. It is well recognized that the right to privacy is not an absolute right, but is a rather a set of privacy interests that the common law protects against unreasonable, offensive intrusion by others. As § 7.01 provides, the basic claim of invasion of the employee right of privacy requires not only (a) an intrusion upon the employee's protected privacy interest, but also that (b) the employer intrusion upon that interest be unreasonable and offensive. In applying the intrusion upon seclusion tort to the workplace, courts balance the nature and scope of the intrusion against the employer's justification for the intrusion (See § 7.06 for further exploration.) This approach has also carried over to other contexts, including the constitutional rights of government employees.

d. Protected privacy interests. The three major privacy interests recognized in the employment context are set forth in § 7.02 and explored individually in the subsequent sections. They are the interest in the employee's private information of a personal nature (§ 7.03), the

interest in the employee's person and the employer-provided physical and electronic work locations in which the employee has a reasonable expectation of privacy (§ 7.04), and the interest in the employee's private information disclosed in confidence to the employer (§ 7.05).

e. Unreasonable and offensive. In its formulation of the intrusion tort, § 652B of the Restatement Second of Torts recognizes that the intrusion must be "highly offensive to a reasonable person" to constitute a tortuous invasion of privacy. Similarly, § 7.01 of this Restatement captures the "highly offensive" requirement by providing that an employer intrusion has to be unreasonable and offensive – as defined in § 7.06 – for the intrusion to be considered an actionable invasion of privacy subjecting the employer to liability.

f. Constitutional and statutory protections. This Chapter deals with common law protections for employee privacy interests. It does not cover federal and state constitutional and statutory provisions except to the extent they may inform common law principles. Although decisions involving government workers do not generally apply to workers in private firms because of the absence of constitutional and civil service protections in the private sector, principles developed in the course of elaborating such protections can help shape common law rulings. Thus, for example, a Fourth Amendment ruling on whether government employees have a reasonable expectation of privacy in their offices may be invoked, by analogy, in an intrusion upon seclusion tort decision as to whether there are protected privacy interests in the offices of private sector employees.

g. Privacy and the tort of intentional or reckless infliction of emotional harm. The tort of intentional or reckless infliction of emotional harm has been the cause of action used by come complainants to seek relief for invasions of privacy. The basic elements of the tort, also known as "outrage," are set forth in Restatement Third of Torts § 45. As the Restatement counsels, the

tort is designed to counter "extreme and outrageous" conduct that causes "severe" emotional disturbance. Because of the overlapping concerns with offensive behavior that causes emotional injury, wrongs that may involve a privacy cause of action may also be litigated through the intentional infliction of emotional harm tort. There are two primary distinctions between the intrusion tort and the outrage tort: (1) the privacy tort requires the invasion of a particular privacy interest, while the outrage tort applies to any outrageous behavior, and (2) courts have generally required a higher level of outrageousness or offensiveness, along with more tangible injury, when considering the outrage tort. However, as with other torts, there is some overlap and both causes of actions may be brought when applicable.

REPORTERS' NOTES

Comment a. Scope. The foundational texts on the common law's protections for privacy are William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960), as well as Samuel B. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). In his work on privacy, Prosser distilled legal responses to privacy invasions into four different types: (1) intrusion upon seclusion, (2) unreasonable publicity to private life, (3) publicity that places another in a false light, and (4) appropriation of name or likeness. Prosser, *Privacy*, at 389. Prosser incorporated the four privacy torts into the Restatement of Torts, and these four causes of action remain the primary common-law bases for the protection of privacy. Restatement Second of Torts § 652A.

Employees, however, are different than the average privacy tort victim. Warren and Brandeis were motivated from their negative experiences with the "yellow journalism" of the day, and their work emphasizes the protection of the "inviolate personality" against invasions by strangers. See Prosser, *Privacy*, at 383 (describing Warren's annoyance at press coverage of his social affairs) & 389 (noting that Brandeis & Warren were concerned with the "evils of publication"); Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L.J. 123, 125 (2007) (discussing Warren & Brandeis's general focus). Employees, on the other hand, are not strangers to their employer; they are close contractual partners. Recent scholars have recognized the layered nature of privacy interests, and the fact that information might be disclosed for some purposes but private as to all other purposes. Privacy is not one particular right, but rather a set of interests that need protection. See Daniel Solove, Understanding Privacy ix (2008) (arguing that privacy has no single definition but is rather "a plurality of different things"). For example, Solove has identified four basic categories of activities that harm privacy interests: (1) information collection, (2) information processing, (3) information dissemination, and (4) invasion. Id. at 103.

The California Supreme Court provided the following taxonomy of privacy in its discussion of that state's constitutional protections:

> Whatever their common denominator, privacy interests are best assessed separately and in context. Just as the right to privacy is not absolute, privacy interests do not encompass all conceivable assertions of individual rights. Legally recognized privacy interests are generally of two classes**:** (1) interests in precluding the dissemination or misuse of sensitive and confidential information ("informational privacy"); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ("autonomy privacy").

Hill, 865 P.2d at 654. This distinction, however, blurs the importance of information in both categories. It also fails to distinguish the interest in being left alone (freedom from intrusion) with the interest in affirmatively making one's own decisions (freedom of autonomy). This Chapter follows the more traditional distinctions between autonomy and privacy and, within privacy, the distinctions between intrusion and disclosure.

Comment b. "Intrusion upon seclusion" in the employment context. Restatement Second of Torts § 652B states in full:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs and concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Forty-one states and the District of Columbia recognize the intrusion upon seclusion tort, generally as part of the package of four privacy torts developed by the Restatement Second of Torts. The following are cases from these states that recognize the intrusion upon seclusion tort within the employment context. See Ex parte Birmingham News, Inc., 778 So. 2d 814, 818 (Ala. 2001) ("Alabama has long recognized the tort of invasion of privacy. . . . It is generally accepted that invasion of privacy consists of four limited and distinct wrongs: (1) intruding into the plaintiff's physical solitude or seclusion . . . ."); Wal-Mart, Inc. v. Stewart, 990 P.2d 626, 632 (Alaska 1999) ("We have recognized that all persons are entitled to the common-law 'right to be free from harassment and constant intrusion into one's daily affairs.' This common-law right is delineated in the Restatement, whose approach we adopted in our *Luedtke* opinion."); Hart v. Seven Resorts, 947 P.2d 846, 853 (Ariz. Ct. App. 1997) ("This court has recognized the four-part classification of the tort of invasion of privacy laid out in the Restatement (Second) of Torts §§ 652A, *et seq*."); Wal-Mart Stores v. Lee, 74 S.W.3d 634, 644 (2002) ("[T]his court adopted the approach of the Restatement (Second) of Torts*,* which delineates four separate torts grouped under 'invasion of privacy'."); Sanders v. American Broadcasting Companies, 978 P.2d 67, 71 (Cal. 1999) ("In *Shulman,* we adopted the definition of the intrusion tort articulated in . . . the Restatement Second of Torts section 652B."); Slaughter v. John Elway Dodge Southwest/Autonation, 107 P.3d 1165, 1171 (Colo. Ct. App. 2005) ("Colorado courts have recognized the existence of three such torts: (1) unreasonable intrusion on the seclusion of

another…."); Goodrich v. Waterbury Republican-American, Inc., 448 A.2d 1317, 1329 (Conn. 1982) ("In recognizing this right of action today, we note that the law of privacy has not developed as a single tort, but as a complex of four distinct kinds of invasion of four different interests of the plaintiff… .The four categories of invasion of privacy are set forth in 3 Restatement (Second), Torts § 652A as follows: (a) unreasonable intrusion upon the seclusion of another . . . ."); Barker v. Huang, 610 A.2d 1341, 1349 (Del. 1992) ("Following Professor Prosser, we therein delineated the four varieties of the tort: (1) intrusion on plaintiff's physical solitude . . . ."); Wolf v. Regardie, 553 A.2d 1213, 1216-17 (D.C. 1989)("Invasion of privacy is not one tort, but a complex of four, each with distinct elements and each describing a separate interest capable of being invaded. The four constituent torts are (1) intrusion upon one's solitude or seclusion. . . ."); Allstate Ins. Co. v. Ginsberg, 863 So.2d 156, 162 (Fla. 2003) ("In 1996, this Court set forth what was included within the common law tort of invasion of privacy. . . (2) intrusion—physically or electronically intruding into one's private quarters . . . ."); Yarbray v. S. Bell Tel. & Tel. Co., 409 S.E.2d 835, 836 (Ga. 1991) (noting that an earlier court had "adopted the analysis of the tort of 'invasion of privacy' accepted by a number of legal scholars, dividing that right into: (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs . . . ."); Baker v. Burlington N., 587 P.2d 829, 832 (Idaho 1978) ("Idaho adopted Dean Prosser's approach to the tort of invasion of privacy . . . ."); Johnson v. K Mart Corp., 723 N.E.2d 1192, 1196 (Ill. App. Ct. 2000) ("We now expressly recognize a cause of action for the tort of invasion of privacy by intrusion upon seclusion in this state."); Burns v. Masterbrand Cabinets, Inc., 874 N.E.2d 72, (Ill. App. 2007) (recognizing the tort and noting that "all four of the other appellate districts in the state have explicitly recognized that a cause of action exists for the tort of intrusion upon seclusion"); Branham v. Celadon Trucking Services, Inc., 744 N.E.2d 514 (Ind. Ct. App. 2001) ("The general tort known as invasion of privacy has four strands: (1) unreasonable intrusion upon the seclusion of another. . . ."); Koeppel v. Speirs, 779 N.W.2d 494 (Iowa 2010) ("Iowa has adopted the tort of invasion of privacy, as set forth in the Restatement (Second) of Torts (1977), which provides the right to privacy can be invaded by unreasonable intrusion upon the seclusion of another."); Froelich v. Adair, 516 P.2d 993, 996 (Kan. 1973) ("We conclude invasion of privacy by intrusion upon seclusion should be recognized in this state."); McCall v. Courier-Journal and Louisville Times Co., 623 S.W.2d 882, 887 (Ky. 1981) ("We believe that the…bases and nature of the tort of invasion of privacy, would best be furthered by our adoption of the principles of that tort as enunciated in the Restatement (Second) of Torts (1976)."); Melder v. Sears, Roebuck and Co., 731 So.2d 991, 1000 (La. Ct. App. 1999) ("This right embraces four different interests, each of which may be invaded in a distinct manner: . . . (2) an unreasonable intrusion by the defendant upon the plaintiff's physical solitude or seclusion . . . ."); Nelson v. Maine Times, 373 A.2d 1221, 1223 (Me. 1977) ("[W]e recognized for the first time four kinds of interests, the invasion of which may give rise to a tort action for breach of another person's right to privacy."); Allen v. Bethlehem Steel Corp., 547 A.2d 1105, 1108 (Md. Ct. Spec. App. 1988) ("Maryland currently recognizes four forms of invasion of privacy: 1. an unreasonable intrusion upon the seclusion of another . . . ."); Beaumont v. Brown, 257 N.W.2d 522, 527 (Mich. 1977) ("Since 1948 Michigan has continued to recognize the right of the individual to privacy . . . The Court of Appeals in a learned discussion of the law of invasion of privacy noted that Prosser . . . recognized four types of invasion of privacy.'"), *overruled on other grounds by* Bradley v. Saranac Community Schools Bd. of Educ., 565 N.W.2d 650 (Mich. 1997); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 233, 235 (Minn. 1998) ("The Restatement (Second) of Torts outlines the four causes of action that comprise the

tort generally referred to as invasion of privacy . . . . Today we join the majority of jurisdictions and recognize the tort of invasion of privacy."); Deaton v. Delta Democrat Pub. Co., 326 So.2d 471 (Miss. 1976) (recognizing the four Restatement privacy torts); Brown v. Mullarkey, 632 S.W.2d 507, 509 (Mo. Ct. App. 1982) ("[This] court approved the language in the Restatement (Second) of Torts s 652A (1977) that there are four situations in which an action will lie for invasion of privacy."); Board of Dentistry v. Kandarian, 886 P.2d 954, 957 (Mont. 1994) ("An invasion of privacy cause of action is defined as a 'wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.'"); People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1278 (Nev. 1995) ("The four species of privacy tort are: 1) unreasonable intrusion upon the seclusion of another . . . ."); Karch v. Baybank FSB, 794 A.2d 763, 773 (N.H. 2002) (evaluating privacy claims of "intrusion upon a plaintiff's physical and mental solitude or seclusion"); Stengart v. Loving Care Agency, Inc. 990 A.2d 650, 660 (N.J. 2010) (discussion intrusion upon seclusion tort in Restatement Second of Torts § 652B); Moore v. Sun Publ'g Corp., 118 N.M. 375, 383, 881 P.2d 735, 743 (Ct.App.1994) (adopting the four Restatement privacy torts); Toomer v. Garrett, 574 S.E.2d 76, 90 (N.C. Ct. App. 2008) ("The tort of invasion of privacy by intrusion into seclusion has been recognized in North Carolina and is defined as the intentional intrusion 'physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns ... [where] the intrusion would be highly offensive to a reasonable person.'"); Eddy v. Brown, 715 P.2d 74, 77 (Okla. 1986) ("Count two of plaintiff's petition alleges a claim for invasion of privacy, or more specifically, the torts of unreasonable intrusion upon his seclusion and of unreasonable publicity on his private life. Oklahoma has adopted the legal norms of the Restatement of Torts (Second) § 652A."); Greenwood v. Taft, 663 N.E.2d 1030, 1035 (Ohio Ct. App. 1995) ("[T]he following types of invasion of privacy are actionable: . . . (3) the wrongful intrusion into one's private activities."); Trout v. Umatillia County School Dist., 712 P.2d 814, 817 (Or. Ct. App. 1984) ("Prosser and Keeton . . . identified the four kinds of claims grouped under the 'privacy' tort."); Doe v. Wyo. Valley Health Care Sys., 987 A.2d 758, 765 (Pa. Super. Ct. 2008) ("Under Pennsylvania law, invasion of privacy involves four separate torts: (1) unreasonable intrusion upon the seclusion of another . . . ."); Corder v. Champion Road Machinery Intern. Corp., 324 S.E.2d 79, 82 (S.C. Ct. App. 1984) ("In order to state a cause of action for [invasion of privacy] the plaintiff must allege: . . . (3) the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."); Roth v. Farner-Bocken Co., 667 N.W.2d 651, 660-61 (S.D. 2003) ("To recover on an invasion of the right to privacy claim, a claimant must show an 'unreasonable, unwarranted, serious and offensive intrusion upon the seclusion of another' . . . Furthermore, '[t]he invasion must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities.'"); Givens v. Mulliken *ex rel.* Estate of McElwaney, 75 S.W.3d 383, 411 (Tenn. 2002) ("Although we reach no decision as to whether the other forms of invasion of privacy listed in the Restatement (Second) of Torts are actionable—the plaintiff's complaint does not raise issues related to commercial appropriation or unreasonable publicity—we agree with the Court of Appeals that a plaintiff may recover damages in Tennessee for an unreasonable intrusion into his or her private affairs."); Cain v. Hearst Corp., 878 S.W.2d 577, 578 (Texas 1994) ("Texas did not recognize any of the four types of invasion of privacy until our decision in Billings v. Atkinson . . . which involved the first category of invasion of privacy as developed by Prosser and recognized by the Restatement: an intrusion into the plaintiff's seclusion . . . ."); Stien v. Marriott Ownership Resorts, Inc ., 944

P.2d 374, 380 (Utah Ct. App. 1997) (recognizing the four distinct variations of invasion of privacy claims, including intrusion upon seclusion); Denton v. Chittenden Bank, 655 A.2d 703, 707-08 (Vt. 1994) ("Invasion of privacy is 'an intentional interference with [a person's] interest in solitude or seclusion, either as to [the] person or as to [the person's] private affairs or concerns, of a kind that would be highly offensive to a reasonable [person.]'"); Mark v. Seattle Times, 635 P.2d 1081, 1094 (Wash. 1981) ("The protectable interest in privacy is generally held to involve at least four distinct types of invasion: intrusion, disclosure, false light, and appropriation."); and Benson v. AJR, Inc., 599 S.E.2d 747, 752 (W.Va. 2004) ("[W]e held that '[a]n "invasion of privacy" includes (1) an unreasonable intrusion upon the seclusion of another; . . . .'").

Five states – Hawaii, Massachusetts, Nebraska, Rhode Island, and Wisconsin – have constitutionalized or codified privacy protections that include or mirror the intrusion upon seclusion tort. See R.I. Gen. Laws § 9-1-28.1(a)(1) (protecting as a right to privacy "the right to be secure from unreasonable intrusion upon one's physical solitude or seclusion"); NEB. REV. STAT. § 20-203; Polinski v. Sky Harbor Air Serv., 640 N.W.2d 391, 396 (Neb. 2002) ("Section 20-203 provides as follows: 'Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy.'"); Wis. Stat. Ann. § 995.50(2)(a) (defining invasion of privacy as *inter alia* "[i]ntrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass"); Zinda v. Louisiana Pacific Corp., 440 N.W.2d 548, 555 (Wis. 1989) ("[Wis. Stat. Ann. § 995.50] provides three separate torts which correlate to a limited degree with the four categories identified by Prosser and the Restatement."). Hawai'i's constitution protects the right to privacy in the same manner as the common law tort. Chung v. McCabe Hamilton & Renny Co., Ltd. 128 P.3d 833, 848 (Haw. 2006) ("[T]he right-to-privacy provision of [Article I, section 6 of the Hawai'i Constitution] relates to privacy in the informational and personal autonomy sense, which encompasses the common law right to privacy or tort privacy.") Massachusetts has codified the right to privacy at MASS. GEN. LAWS 214 § 1B. The courts will, at times, use the Restatement privacy torts to help give meaning to the statute. See Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 N.E.2d 912 (Mass. 1991) (citing to Restatement Second of Torts § 652B to interpret the statute).

Finally, four states— New York, North Dakota, Virginia and Wyoming—have not provided for liability based on intrusion upon seclusion. New York has codified the right to privacy in N.Y. CIV. RIGHTS LAW §§ 50 & 51, which applies to public employees. New York's privacy protections do not extend beyond these provisions. *See* Farrow v. Allstate Ins. Co., 862 N.Y.S.2d 92, 93 (N.Y. App. Div. 2008) ("New York State does not recognize the common-law tort of invasion of privacy except to the extent it comes within Civil Rights Law §§ 50 and 51."). North Dakota does not appear to yet recognize the right to privacy tort. *See* Hougum v. Valley Memorial Homes, 574 N.W.2d 812, 816 (N.D. 1998) ("Here, assuming without deciding a claim for intrusion upon seclusion exists in North Dakota, we conclude Hougum failed to raise disputed issues of material fact to support such a claim."); Witzke v. Gonzales, No. 06-C-2485, 2007 WL 6363409 (N.D. Dist. Apr. 12, 2007) ("Unfortunately, it does not appear that a claim of intrusion upon seclusion is available in North Dakota."). Virginia has codified only the "appropriation of likeness" privacy tort. See Va. Code Ann. §§ 8.01-40; WJLA-TV v. Levin, 564 S.E.2d 383, 394 n.5 (Va. 2002) ("By codifying only the last of these torts, the General Assembly

has implicitly excluded the remaining three as actionable torts in Virginia."). Wyoming has no reported decisions on the matter.

The intrusion upon seclusion tort has played an important role in the protection of privacy in the employment context. As explored in the subsequent sections, the tort is not limited simply to employer's observation of the employee's home, or the employer opening employees' mail. Although the home is the quintessential "private" space in the American legal lexicon, employees has important privacy interests in their private information (§§ 7.03 & 7.05), as well as physical and electronic locations that exist at the worksite. The fact that an employer owns the property wherein the work takes place has not precluded the finding of privacy interests at that workplace. For example, see K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. App. 1984) (finding expectation of privacy in employer-provided locker); Restuccia v. Burk Tech., 1996 WL 1329386 (Mass. Super. Ct.) (expectation of privacy in employer-provided email account). For cases recognizing the intrusion upon seclusion tort in the employment context, see Wal-Mart Stores, Inc. v. Lee, 74 S.W.3d 634 (Ark. 2002) (privacy of employee home in the face of employer search); Busby v. Truswal Systems Corp., 551 So.2d 322 (Ala. 1989) (privacy of employee's personal information); Watkins v. United Parcel Service, Inc., 797 F.Supp 1349 (S.D. Miss. 1992) (privacy of employee information). Legislative history for the Nebraska privacy statute § 20-203, which basically restates the intrusion upon seclusion tort, states that "[t]his section is premised upon a place or a physical location to which one is reasonably entitled to a sense of privacy, a home, an office, a restroom, a telephone booth that you are occupying or the like . . . ." Floor Debates, L.B. 394, Neb. Leg., 86th Sess. 2368 (March 29, 1979), quoted in Ritchie v. Walker Manufacturing Co., 963 F.2d 1119, 1123 (8th Cir. 1992) (noting that the employee's "statutory right of privacy therefore extends to Ritchie's place of employment").

In its Fourth Amendment jurisprudence, the Supreme Court has found that employees have a privacy interest in their workspaces, even though they do not own them. In Mancusi v. DeForte, 392 U.S. 364 (1968), the Supreme Court found that a union official had a reasonable expectation of privacy in his workplace as to a search by the police. The official shared the office space with other union employees and thus had no expectation of privacy as to his fellow employees. But collectively they had an expectation that government would not intrude into the office space. As the court noted, even though the space was shared, the official "still could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups." *Mancusi*, 392 U.S. at 369. Thus, "the area was one in which there was a reasonable expectation of freedom from governmental intrusion." *Id.* at 368. In addition, the Court found in *O'Connor v. Ortega*, 480 U.S. 709 (1987), that the employee had a reasonable expectation of privacy in his file cabinets and desk drawers, even in relation to his employer and coworkers (rather than the police). The plurality stated: "The employee's expectation of privacy must be assessed in the context of the employment relation. . . . Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." Id. at 717-18 (plurality opinion).

That is not to say, of course, that all the locations and instrumentalities of work are entitled to privacy protections. Some will be clearly protected; other clearly not protected; and

other will vary depending on the context. The Supreme Court recently addressed the challenges of changing workplace and personal technologies in City of Ontario v. Quon, 560 U.S. ___, 130 S. Ct. 2619 (2010). The court noted the "difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable." *Id.* at 2630. It noted:

> Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own.

Id. The Court acknowledged that "[t]he judiciary risks error by elaborating too fully on Fourth Amendment [privacy] implications of emerging technology before its role in society has become clear." *Id.* at 2629.

Comment c. Balance between employee privacy interests and other factors. Common law rights to privacy are not absolute, and must be balanced not only against each other, but also against a variety of other important interests. See Hill v. NCAA, 865 P.2d 633, 648 (Cal. 1994) ("Thus, the common law right of privacy is neither absolute nor globally vague, but is carefully confined to specific sets of interests that must inevitably be weighed in the balance against competing interests before the right is judicially recognized."); Guthridge v. Pen-Mod, Inc., 239 A.2d 709 (Del. Super. 1967) (stating that the right of privacy is not an absolute right, but rather is qualified by the circumstances and the rights of others); Elmore v. Atlantic Zayre, 341 S.E.2d 905 (Ga. App. 1986) ("[T]he law recognizes that the right of privacy is not absolute . . . . [I]t . . . must be kept within its proper limits, and in its exercise must be made to accord with the rights of those who have other liberties."); Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 19 (N.J. 1992) (finding that "the employee's individual right (here, privacy) must outweigh the competing public interest (here, public safety)").

The basic balancing test in Restatement Second of Torts § 652B provides the framework for this Section. There must be (1) an intrusion upon a protected privacy interest and (2) the intrusion must be unreasonable and offensive. Some jurisdictions have, at times, added additional factors to the test. In *Hill v. NCAA*, 865 P.2d 633, 654- (Cal. 1994), the court used a three-part test in discussing the California Constitution's right of privacy: (1) a legally protected privacy interest, (2) a reasonable expectation of privacy, and (3) a serious invasion of the privacy interest. Illinois has used a four-part test as to the elements of the intrusion upon seclusion tort: "(1) an unauthorized intrusion or prying into the plaintiff's seclusion, (2) the intrusion must be offensive or objectionable to a reasonable man, (3) the matter upon which the intrusion occurs must be private, and (4) the intrusion must cause anguish and suffering." Acuff v. IBP, 77 F.Supp.2d 914, 924 (C.D. Ill. 1999). Michigan also uses a three-part test: "(1) an intrusion by the defendant (2) into a matter in which the plaintiff has a right of privacy (3) by a means or method that is objectionable to a reasonable person." Saldana v. Kelsey-Hayes Co., 443 N.W.2d 382, 383 (Mich. Ct. App. 1989). The two-part Restatement test contains the concerns described in these other tests, with the advantages of a more historically grounded as well as simpler

approach. The key to the two part test is that the threshold of intrusion upon a privacy interest must first be met before inquiring into whether the invasion was justified based on a variety of factors. These justificatory factors are discussed more specifically in § 7.06.

The Supreme Court's approach to employee privacy interests has a federal constitutional, rather than common-law, basis. However, the Court's analysis of the constitutional protections accorded to government workers has employed a balancing test that would appear equally appropriate in the common law context. Two approaches are suggested in *O'Connor v. Ortega*, 480 U.S. 709 (1987). In that case, the four-Justice plurality suggested a two-step analysis: (1) whether search or seizure implicates the employee's Fourth Amendment rights because the employee has a reasonable expectation of privacy, and, if so, (2) whether the employer's intrusion on that privacy is reasonable under all of the circumstances. *Id.* at 717-18, 725-26 (plurality opinion). The plurality suggested that interests of the government as employer differ significantly from the government as law enforcement authority, and hence no warrant or probable cause is necessary so long as the searches involve a workplace-related purpose and are reasonable. Justice Scalia, concurring, would have assessed what the government may do in engaging in workplace-related searches in terms of what is reasonable in the private sector. His approach would hold that "government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment." *Id.* at 732 (Scalia, J., concurring in judgment).

In *Quon*, the Court avoided having to decide between these two approaches by assuming (without deciding) that the employee had a reasonable expectation of privacy and then finding that the search was reasonable. *Quon*, 130 S. Ct. at 2628-29. The Court took a similar approach in NASA v. Nelson, 562 U.S. ___, 131 S. Ct. 746 (2011). It assumed, without deciding, that the employee-plaintiffs had a constitutional right to informational privacy. *Id*. at 756-57. It then held that the employees' rights to privacy had not been violated by a required questionnaire that asked about each employees' drug use and potential treatment, as well as wide-ranging questions to references about the employees. In finding the questionnaires to be reasonable, the Court specifically cited to the experience of private employees. *Id.* at 761 ("The reasonableness of such open-ended questions is illustrated by their pervasiveness in the public and private sectors.").

There is also a significant overlap with the California constitutional protections of privacy and the common law tort of intrusion. In its analysis of NCAA drug testing procedures under the California Constitution Art. 1, § 1, the *Hill* court provided an extensive analysis of the common law doctrine of privacy. Citing it as one of the sources of the right to privacy, the Court explained its discussion as follows:

> By referring to the common law, we seek merely to draw upon the one hundred years of legal experience surrounding the term "privacy" in identifying legally protected privacy interests and in describing the process by which such interests are compared and weighed against other values. That experience suggests that the common law's insistence on objectively reasonable expectations of privacy based on widely shared social norms, serious violations of those expectations, and

> thorough consideration of competing interests, is an invaluable guide in constitutional privacy litigation.

Hill, 865 P.2d at 649. As noted earlier, California courts have settled upon a three-part test for violations of the California Constitution's right of privacy: (1) a legally protected privacy interest, (2) a reasonable expectation of privacy, and (3) a serious invasion of the privacy interest. Analyses of the first two factors are relevant to similar determinations made under the privacy tort's first part of its test: whether the employer has intruded upon an employee's privacy interest. The "serious invasion" fact is again akin to the "highly offensive," although with a seemingly lower threshold. Cases interpreting the California constitutional privacy provision thus are also useful in developing the common law approach. However, California also recognizes the intrusion tort. Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 286, 211 P.3d 1063, 1072 (2009) ("A privacy violation based on the common law tort of intrusion has two elements. First, the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person.").

Comment d. Protected privacy interests. This section summarizes analyses that are developed in other sections of the chapter.

Comment e. Unreasonable and offensive. Court have defined "highly offensive to a reasonable person" with a range of terms, from "offensive to persons of ordinary sensibilities," Remsburg v. Docusearch, Inc., 149 N.H. 148, 816 A.2d 1001, 1008 (N.H.2003), to "beyond the limits of decency." Gill v. Hearst Pub. Co., 253 P.2d 441, 443-44 (Cal.1953). See also McGovern v. Van Riper, 43 A.2d 514 (N.J. Ch.), aff'd 45 A.2d 842 (N.J. E & A. 1945) (defining the right to privacy as the "right of an individual to be . . . protected from any wrongful intrusion into his private life which would outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities"), quoted in Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 17 (N.J. 1992). The definitions of "unreasonable" and "offensive" are developed further in § 7.06.

Comment f. Constitutional and statutory protections. [Brief discussion of statutes and international protections to come.]

Comment g. Privacy and the tort of intentional or reckless infliction of emotional harm. The invocation of the intentional or reckless infliction of emotional distress tort is somewhat common in the privacy context. For example, see York v. General Electric Co., 759 N.E.2d 865 (Ohio App. 2001) (plaintiff alleged that surveillance was invasion of privacy and infliction of emotional distress); Norris v. Premier Integrity Solutions, Inc., --- F.3d ----, 2011 WL 1261188 (6th Cir. 2011) (claiming drug test was both intrusion and infliction of emotional distress); Bearder v. State, 788 N.W.2d 144 (Minn.App. 2010) (collection of blood test on infants was both); Webb v. CBS Broadcasting, Inc., 2011 WL 842743 (N.D.Ill.) (videotaping of home and yard was both intrusion and infliction of emotional distress). The tort is often paired up with the intrusion tort in the context of sexual harassment that pries into the employee's private personal behavior or sexual activity. See, e.g., Garus v. Rose Acre Farms, Inc., 839 F.Supp. 563 (N.D.Ind. 1993); Simon v. Morehouse School of Medicine, 908 F.Supp. 959 (N.D.Ga. 1995); Van

Jelgerhuis v. Mercury Finance Co., 940 F.Supp. 1344, 1368 (S.D.Ind.1996); Miller v. Speirs, 2010 Iowa App. Lexis 16 (Iowa App. 2010); Everett v. Goodloe, 602 S.E.2d 284, 291 (Ga. App. 2004); Vernon v. Medical Management Associates of Margate, Inc., 912 F.Supp. 1549, 1561-62 (S.D.Fla.1996) (persistent touching and fondling along with lewd sexual remarks "reflect a series of unwelcome and unreasonable intrusions into the most intimate areas of the Plaintiff's person," and were sufficient to state a claim for invasion of privacy); Stockett v. Tolin, 791 F.Supp. 1536, 1555-56 (S.D.Fla.1992) (defendant's repeated groping and kissing of the plaintiff "constituted both an offensive and unwelcome touching (i.e.battery) and an invasion of her physical solitude (invasion of privacy)"). But see Cornhill Ins. PLC v. Valsamis, Inc., 106 F.3d 80 (5th Cir.1997) (finding that sexual harassment claims do not constitute intrusions upon seclusion under Texas law). Of relevance in the employment context is this commentary:

> Whether an actor's conduct is extreme and outrageous depends on the facts of each case, including the relationship of the parties, whether or not the actor abused a position of authority over the plaintiff, any special vulnerability of the plaintiff and the actor's knowledge of it, the motivation of the actor, and whether the conduct was repeated or prolonged.

Restatement Third of Torts § 45 cmt.c.

For example, in Bodewig v. K-Mart, Inc., 635 P.2d 657 (Or. App. 1981), a manager at a retail store forced a cashier to disrobe in front of a customer after the customer accused the employee of theft. The court premised its finding of outrage on a finding of reckless intent on the part of the manager. *See id.* at 661 (holding that "the manager's conduct exceeded the bounds of social toleration and was in reckless disregard of its predictable effects on plaintiff"). As *Bodewig* illustrates, intentional infliction claims are generally reserved for instances of severely or outrageously offensive behavior. For example, see Schibursky v. IBM Corp., 820 F. Supp. 1169 (D. Minn. 1993) (requiring conduct that is "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community"). The extreme outrageousness requirement serves to limit the tort, given the permeability of its other factors. The privacy torts are limited by the categories of privacy interests; for this reason, perhaps, the level of offensiveness required is not extreme. In *Schibursky*, the court examined privacy concerns in terms of the intentional infliction of emotional distress cause of action. In that case, the plaintiff alleged that her employer has inflicted emotional distress, *inter alia*, "by subjecting her to unwarranted and oppressive surveillance [and] by tracking her coming and goings." at 1182-83. The court analyzed her surveillance claim solely under the infliction of emotional distress tort and found it to the employer's behavior to be primarily related to whether she was failing to record her overtime. *See id.* at 1183. Because employers "routinely engage in a variety of practices in order to confirm the accuracy of employee records," the court found the behavior was not "utterly intolerable." *Id.*

In some states, courts have prohibited or regulated certain methods of information collection through the "public policy" tort. See Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1366 (3d Cir. 1979) (holding that "a cause of action exists under Pennsylvania law for tortious discharge" if the discharge resulted from a refusal to submit to polygraph examination); Cordell v. General Hugh Mercer Corp., 325 S.E.2d 111, 117 (W.Va. 1984) (holding that

termination for refusal to submit to polygraph test was a wrongful termination in violation of public policy); Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11 (N.J. 1992) (public policy provides restrictions on employer drug testing); Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992) (holding that "dismissing an employee who refused to consent to urinalysis testing and to personal property searches would violate public policy if the testing tortiously invaded the employee's privacy"); Cramer v. Consolidated Freightways, Inc., 255 F.3d 683 (9th Cir. 2001) (finding public policy to support a common-law privacy action in California statute making the installation and maintenance of two-way mirrors permitting the observation of restrooms illegal); Baughman v. Wal-Mart Stores, Inc., 592 S.E.2d 824 (W. Va. 2003) (public policy prohibits drug testing of incumbent employees without good faith objective suspicion of drug use or safety considerations). In some of these cases, the "public policy" at issue is the common law protection against invasions of privacy. See, e.g., Borse, 963 F.2d at 625-26. We seek to incorporate the concerns and analysis of these cases into this section.

§ 7.02 Protected Employee Privacy Interests

Three major privacy interests are recognized in the employment context as protected employee privacy interests:

(a) the employee's private information of a personal nature (§ 7.03);

(b) the employee's person and physical or electronic locations, including work locations provided by the employer, in which the employee has a reasonable expectation of privacy (§ 7.04); and

(c) the employee's private information disclosed in confidence in the course of employment to the employer (§ 7.05).

Comment:

a. This Section recognizes three distinct areas where employees have cognizable privacy interests: keeping private employee information from the employer (§ 7.03); preserving privacy interests in the employee's person and in physical or electronic locations (§ 7.04); and keeping private information that has been provided to the employer out of the hands of third parties, including other employees for whom the information is not relevant to workplace duties (§ 7.05). An intrusion into one of these three interests is necessary, but not sufficient, to find the employer liable for a violation of the privacy right. In addition, the employer's intrusion must have been unreasonable and offensive, as discussed in § 7.06.

REPORTERS' NOTES

Comment a. The Restatement Second of Torts "intrusion upon seclusion" tort did not identify particular privacy interests; rather it simply subjected to liability for "invasion of privacy" one who "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of others . . . if the intrusion would be highly offensive to a reasonable person." Restatement

Second of Torts § 652B. As noted in the discussion of § 7.01, courts have rather naturally broken this test into two parts: (1) the intrusion upon seclusion or solitude plus (2) the highly offensive manner. Section 7.02 endeavors to break the first part of the test down into

In many jurisdictions, courts have generally used the "reasonable expectation of privacy" test in determining the threshold question of whether a privacy interest is implicated. This Chapter separates this reasonable-expectation requirement into three different categories of protected employee privacy interests: privacy expectations as to information disclosure to the employer; privacy expectations as to the employee's person and locations, including virtual electronic locations; and privacy expectations as to information disclosure to other employees or third parties.

The first two categories relate most directly to the tradition intrusion upon seclusion tort. In the first category, the employer is intruding by requesting information that is private to the employee. The employer will require personal information from employees in the course of legitimate business activities; however, the intrusion is only actionable if it is unreasonable and offensive (as developed in § 7.06). The second category covers those traditional intrusions into private physical spaces, like bathrooms or lockers, as well as electronic "places," such as email and text messages, and personal "places" such as one's body and personal effects. Again, the employer may need to intrude upon these places for legitimate business reasons, and thus it is only liable to the extent the intrusions are unreasonable and offensive.

The third category most closely relates to the tort of public disclosure of private facts, although it also contains elements of the intrusion on seclusion tort and the breach of confidentiality tort. It is not a traditional "intrusion" tort in that the employer has not gotten the information by intrusion; rather, it has collected the information from the employee voluntarily. The invasion of privacy is that the employer has then disclosed the information to fellow employees or a third party without the employee's consent. This subsequent disclosure is the wrong that the tort intends to sanction. The public disclosure of private fact tort requires that: "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." Restatement Second of Torts § 652D. It might be argued that the third privacy interest belongs as a separate cause of action, since it relates most specifically to the public disclosure of private fact tort, rather than the intrusion upon seclusion tort. However, such a separation would add more confusion that illumination. Both tests concern privacy interests. As the Restatement Second of Torts counsels, all four privacy torts share a core concern: "each involves interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others." Restatement Second of Torts § 652A cmt.b. More importantly, both the intrusion and publicity torts require that the disclosure or intrusion be "highly offensive to a reasonable person." Since this aspect of the test is common, both torts can be subsumed into § 7.01, which sets forth the basic test, and § 7.06, which discusses the meaning of "unreasonable and offensive." To the extent the torts diverge, they differ as to the privacy interest involved, which is why this section divides the interests into separate categories.

§ 7.03 Employee Privacy Interests in Information of a Personal Nature

(a) An employee has a protected privacy interest in information relating to the employee that is of a personal nature and that the employee has taken reasonable efforts to keep private.

(b) An employer intrudes upon this protected privacy interest by requiring that the employee provide such personal and private information in the course of employment.

(c) An employer does not intrude upon the protected privacy interest in Subsection (a) if the employer is required to obtain the employee's personal information pursuant to a legal requirement.

Comment:

a. Scope. The protection of information lies at the heart of many privacy claims. Employees may wish to keep the employer from obtaining details about their private life, their medical and financial history, or their personal activities. At the same time, these concerns must be balanced against the employer's legitimate business needs for employee information in making hiring decisions, managing relationships amongst employees, and complying with legal and employee benefits requirements. Subsection (a) sets forth the rule as to when employee information meets the standard for private information. Information relating to the employee is private information only if the information is personal in nature, the information is related to the employee, and the employee has taken reasonable steps to keep the information private. Subsection (b) sets forth for determining when the employer has intruded upon this privacy interest. The employer incurs no tort liability, however, unless that intrusion is unreasonable and

offensive as discussed in § 7.06. Moreover, Subsection (c) makes clear there is no intrusion if the employer requires information from the employee pursuant to a legal requirement.

b. Personal in nature. The information within this category of protected employee privacy interests must be personal, rather than business-related. Employees may want to keep certain business-related secrets, such as information about co-workers' misbehavior on the job or even trade secrets that they are privy to by reason of their work. This information is not personal to the employee and thus is not protected under § 7.03. In contrast, if the information relates only to the employee's off-the-job activities or behavior, as a general matter it is personal in nature. In addition, information relating to the employee as an individual, such as a social security number, medical history, or home address, remains employee information of a personal nature even if it is provided to the employer for business-related purposes.

Illustration:

1. Employee E was given a promotional baseball by a co-worker. A supervisor later questioned E as to who had given him the ball. E refused to answer. The information relating to the identity of the co-worker is not personal in nature; therefore, the employee has no privacy interest in the information.

c. Related to the employee. In order to have a protected employee privacy interest in information, the employee must have some connection to the information. The information need not be held by the employee in order to implicate a protected employee privacy interest. Information about an employee's family members is also related to the employee for purposes of this Section.

Illustration:

2. X sends a questionnaire to the employee's references as part of a background check. The questionnaire asks personal information about the employee. The employee has a privacy interest in this information, even though it is not held by the employee.

d. Reasonable efforts to keep the information private. For employee information to be protected under this Section, the employee must make reasonable efforts to keep the information private. However, disclosure to a small group need not eliminate the privacy interest, particularly if members of that group have a personal relationship with the employee. The inquiry is whether a reasonable person would have expected the information to remain private as to the employer, given the means taken by the employee to keep the information private. In addition, to the extent the information is related to the employee's work responsibilities and performance, the employee's expectations that the information will remain private is significantly reduced.

Illustrations:

3. Employee E posts his personal thoughts on a blog. Although the blog is not well-publicized and has a small number of visitors to the site, it is publicly available on the Internet. E does not have a protected privacy interest in the information posted to the blog.

4. Employee E posts personal information on his Facebook page. E does not have any of his co-workers as "friends," and thus they do not have access to his page. E has a protected privacy interest in the information on his Facebook page.

5. Employee E, a food service worker, learns that her leg has a staph infection. She tells two co-workers, who then convey this information to the office manager. E does not have a protected privacy interest in this information.

6. E1 and E2 worked as warehouse employees. They share personal details about family matters, romantic interests, and future employment plans with E3, a fellow employee. Unbeknownst to E1 and E2, however, E3 is a paid undercover private investigator for the employer X. E3 provided reports to X, which detailed all of the personal matters shared by E1 and E2. E1 and E2 have a protected privacy interest in the information they share with E3.

e. Requiring private information. An employer intrudes upon the protected privacy interest of an employee when it requires private information from the employee in the course of employment. The information must be required as a condition of obtaining or retaining employment. If the information is merely being requested in circumstances where an employee could not reasonably understand the request as a requirement of employment, there has no employer intrusion under this Section. These intrusions may come in the form of a demand from the employee's supervisor, or from an employment questionnaire answers to which are required of all applicants. Employer intrusions are actionable only if they are unreasonable and offensive (as discussed in § 7.06).

f. Information required by law. Both the employer and employee have legal obligations arising out of the employment relationship. An employer does not intrude upon the employee's protected privacy interests by requiring the employee to provide information of a personal nature if required by the government to provide that information. If the information request is

unreasonable an action might lie against the government for a Fourth Amendment violation. However, the employer would not be liable for the intrusion.

g. Interaction with autonomy protections. Autonomy protections are discussed in §§ 7.08 & 7.09 of this Chapter. These protections, which are distinct from privacy protections, are aimed at protecting the employee from employer interference (through adverse employment actions such as termination, discipline or loss of employment benefits) with personal, non-work-related choices made by the employee in her nonworking life.

REPORTERS' NOTES

Comment a. Privacy interest in employee information. Although employment itself will require the employee to share generally private information with the employer, some inquiries are so out of bounds as to constitute and invasion. As Prosser and Keeton have stated: "[H]ighly personal questions or demands by a person in authority may be regarded as an intrusion on psychological solitude or integrity and hence an invasion of privacy." Prosser and Keeton on Torts § 117 at p. 121. The Supreme Court's analysis in NASA v. Nelson, 562 U.S. ___, 131 S. Ct. 746 (2011), concerns the privacy interests at stake in employee personal information. In *NASA*, the Court assumed for the purpose of decision the existence of a constitutional right to information privacy without deciding whether such a right actually exists. The Court then applied the right to the facts at hand. In assuming the informational privacy right, the Court was dealing with the "interest in avoiding disclosure of personal matters." *Id.* at 751 (quoting Whalen v. Roe, 429 U.S. 589, 598-99 (1977)). The intrusion at issue in *NASA* was a background check for established employees at a NASA facility. The background check included a questionnaire for the employees as well as questionnaires sent to the employee's references. The employee questionnaire included questions about the employee's drug use, as well as whether they had received counseling or treatment. The questionnaires for references contained many open-ended inquiries, such as whether the reference had any "adverse information" concerning the employee's "violations of the law," "financial integrity," "general behavior and conduct," or "other matters." These inquiries were held to implicate the employees' interests in information privacy. Ultimately, the Court held that the inquiries were sufficiently reasonable to avoid violating any constitutional requirements. But the inquiries themselves are the exact kind of potential intrusion into information privacy that this section concerns.

Comment b. Personal in nature. Illustration 1 is based on Patton v. United Parcel Service, Inc., 910 F. Supp. 1250 (S.D. Tex. 1995). In *Patton*, the employee had received a souvenir baseball with the company logo embossed on it from another employee. The employees were not authorized to have the baseballs, and the employee was questioned about who had given him the ball. He refused to answer, and later sued for *inter alia* invasion of privacy. The court stated "the

questioning by the [company] was not unreasonable, unjustified, or unwarranted, as [the employee] was merely asked to disclose the identity of the person who had given him the baseball, a UPS promotional item." Indeed, the court specified: "This was not [his] private affair, but was instead UPS's affair. Indeed, it was [him], not the [company], who acted unreasonably by refusing to respond to a legitimate inquiry by management, especially after he was assured that no harm would befall the person in question."

The line between personal and employment-related information may be difficult to draw in some cases. Information about a person's temperament and character is relevant to understanding her likely success as an employee. As the Court stated in NASA v. Nelson, 562 U.S. ___, 131 S. Ct. 746, 758 (2011), "Reasonable investigations of applicants and employees aid the Government in ensuring the security of its facilities and in employing a competent, reliable workforce." Addressing the specific inquiries in the questionnaire at issue, the Court stated that the questions were relevant to legitimate employer concerns. As to the drug-related questions, the Court stated: "The Government has good reason to ask employees about their recent illegal-drug use. Like any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will efficiently and effectively discharge their duties. Questions about illegal-drug use are a useful way of figuring out which persons have these characteristics." Id. at 759-60 (citations and quotations omitted). As for the personal questions to references, the Court stated: "Asking an applicant's designated references broad, open-ended questions about job suitability is an appropriate tool for separating strong candidates from weak ones. It would be a truly daunting task to catalog all the reasons why a person might not be suitable for a particular job, and references do not have all day to answer a laundry list of specific questions." Id. at 761.

For an example of personal business information that would not be considered private under this section, see Hollander v. Lubow, 351 A.2d 421 (Md. 1976) (information about business partnership is public information).

Comment c. Related to the employee. Illustration 2 is based on NASA v. Nelson, 562 U.S. ___, 131 S. Ct. 746 (2011), discussed in the Reporters' Notes to the previous comment.

Comment d. Reasonable efforts to keep the information private. Illustrations 3 and 4 are drawn from a variety of cases which acknowledge the importance of password protection in finding electronically-stored information to be private. See, e.g., Steingart v. Loving Care Agency, Inc., ___ A.2d ___, 2010 WL 1189458, at *11 (N.J.) ("[Plaintiff] plainly took steps to protect the privacy of those emails and shield them from her employer. She used a personal, password-protected email account instead of her company e-mail address and did not save the account's password on her computer."); National Economic Research Associates, Inc. v. Evans, 21 Mass.L.Rptr. 337, 2006 WL 2440008 (Mass.Super.) ("[Employee] did not engage in these attorney-client communications through the NERA Intranet but through his private, password-protected Yahoo e-mail account that he accessed through the Internet."). Courts have also found that password protection creates reasonable expectations of privacy in the Fourth Amendment context. See U.S. v. Buckner, 407 F.Supp.2d 777 (W.D.Va. 2006) ("[Defendant] protected his files from disclosure to third persons, including his wife, through the use of a confidential password. He, thereby, exhibited an actual expectation of privacy."); U.S. v.

Ahrndt, 2010 WL 373994 (D.Or. Jan. 28, 2010) ("[S]ociety recognizes a lower expectation of privacy in information broadcast via an unsecured wireless network router than in information transmitted through a hardwired network or password-protected network."); Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2001) ("[Plaintiff's] password-protected files are analogous to the locked footlocker inside the bedroom. By using a password, [plaintiff] affirmatively intended to exclude . . . others from his personal files. . . . Thus, [plaintiff] had a reasonable expectation of privacy in the password-protected computer files . . . . ").

Illustration 7 is based upon Fletcher v. Price Chopper Foods of Trumann, Inc., 220 F.3d 871 (8th Cir. 2000). In *Fletcher*, the employee had objected to the employer contacting the employee's doctor after the employee had been terminated in order to confirm the existence of the staph infection. The Eighth Circuit held that the employee "lost her expectation of privacy when she shared knowledge of her staph infection with coworkers." Id. at 878. If an employee shares the private information with a source likely to disclose to others, that sharing defeats the employee's expectation of privacy. See Diss v. Gordon Food Service, 2003 Mich. App. Lexis 1922 (Mich. App. 2003) (employee shared news of sexual encounter with another employee, who then shared the news with many other employees). See also Adamski v. Johnson, 80 Pa. D. & C. 4th 69 (Pa. Cmn. Pleas 2006) (information about surgery that was shared with numerous other employees was not secret as to employer).

Illustration 8 is based on Johnson v. K-Mart Corp., 723 N.E.2d 1192 (Ill. App. 2000). In *Johnson*, employees provided personal information to undercover private investigators who were posing as warehouse employees in response to employer concerns about theft and drug use. The investigators reported this information back to the employer. *Id.* at 1194-95. The court held that "the act of placing private detectives, posing as employees, in the workplace to solicit highly personal information about defendant's employees was deceptive." *Id*. at 1196. Because of this deception, the disclosure "cannot be said to be a truly voluntary disclosure." As a result, "[p]laintiffs had a reasonable expectation that their conversations with 'coworkers' would remain private, at least to the extent that intimate life details would not be published to their employer." *Id*.

Comment e. Requiring private information. "[H]ighly personal questions or demands by a person ... may be regarded as an intrusion on psychological solitude or integrity and hence an invasion of privacy." Van Jelgerhuis v. Mercury Finance Co., 940 F.Sup. 1344, 1368 (S.D.Ind.1996), quoting Prosser and Keeton on Torts § 117 (Supp. 1988). An example of the private, personal employee information protected by this Section is the employee's sexual activity. *Van Jelgerhuis*, 940 F.Supp. at 1368 (series of questions and suggestions about employees' sex lives); Phillips v. Smalley Maintenance Services, 435 S.2d 705 (Ala. 1983) (employer questioning of employee about sexual activities with husband); Guccione v. Paley, 2006 Conn. Super Lexis 1815 (Conn. Super. June 14, 2006) (employer questions about employee's sexual relations with her boyfriend); Bonanno v. Dan Perkins Chevrolet, 2000 Conn. Super Lexis 287 (Feb. 4, 2000) (defendant's comments regarding plaintiffs' sex life, appearance, and values); Busby v. Truswas Sys. Corp., 551 So.2d 322 (Ala. 1989) (plant supervisor intruding into employees' sex lives); Aguinaga v. Sanmina Corp., Not Reported in F.Supp., 1998 WL 241260 (N.D.Tex. 1998) (supervisor asked employee intrusive and suggestive questions about her sexual activity); Cunningham v. Dabbs, 703 So.2d 979 (Ala. Civ. App. 1997) (improper

inquiries into personal sexual proclivities). However, the inquiry must also be "unreasonable and offensive," and the overall categorization gives way to a contextual approach. See, e.g., Morenz v. Progressive Cas. Ins. Co., 2002 WL 1041760 (Ohio Ct. App. May 23, 2002) (asking "Are you gay?" not intrusive in context); Haehn v. City of Hoisington, 702 F.Sup. 1526 (D.Kansas 1988) (holding that sexual comments, as well as touching are not so intrusive as to constitute an invasion of privacy). The offensiveness of the inquiry is taken up in § 7.06.

In Cort v. Bristol-Myers Co., 431 N.E.2d 908 (Mass. 1982), the Massachusetts Supreme Court established that "if [an employment] questionnaire sought to obtain information in circumstances that constituted an 'unreasonable, substantial or serious interference with his privacy' in violation of the principles expressed in [the Massachusetts privacy statute], the discharge of an employee for failure to provide such information could contravene public policy and warrant the imposition of liability on the employer for the discharge." *Id.* at 912; see also *id.* at 912 n.9 ("This opinion simply acknowledges that in the area of private employment there may be inquiries of a personal nature that are unreasonably intrusive and no business of the employer and that an employee may not be discharged with impunity for failure to answer such requests."). Regarding the facts at hand, the court found that the employer's questions were at best relevant to the job and at worst were "no more intrusive than those asked on an application for life insurance or for a bank loan." *Id.* at 914. As a result, there was no violation of the statute.

A physical mechanism that collects information from the employee in a nonverbal manner can also intrude upon the employee's information privacy interest. These mechanisms, such a drug testing, will also arise as a potential physical intrusion into the body or bodily products of the employee, and thus covered under § 7.04. However, the test may also be tortious in terms of the type of information it is seeking to collect. See Wilkinson v. Times Mirror Corp., 264 Cal. Rptr. 194, 203 (Cal. App. 1st 1989) ("[W]hen plaintiffs were asked to consent to drug and alcohol screening as a condition of an offer of employment, they were in effect asked to disclose voluntarily the personal information which might be revealed by that screening."); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989) (noting that "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable" because "chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee").

Polygraph testing is something of a hybrid: it monitors nonverbal information such as heart rate and sweat, but the test itself often involves inappropriate questions as well. Courts have found polygraph tests to be intrusions upon employee's information privacy. O'Hartigan v. State Dept. of Personnel, 821 P.2d 44, 47 (Wash. 1991) ("The polygraph examiner asks questions concerning the job applicant's medical history, psychological history, and whether the applicant has ever committed a sex crime. Such inquiries implicate privacy concerns, and [plaintiff] has a constitutionally protected privacy interest in the personal information requested for the polygraph test."); Long Beach City Employees Ass'n v. City of Long Beach, 719 P.2d 660, 666 (Cal. 1986) (discussing the "inherently intrusive nature of a polygraph examination—which involves the involuntary communication of thoughts"); Thorne v. City of El Segundo, 726 F.2d 459, 470-71 (9th Cir. 1983) (finding that questions from government employer about job applicant's sexual history violated her constitutional right to privacy); Woodland v. City of Houston, 918 F. Supp. 1047, (S.D. Tex. 1996) (applying Tex. Law) (finding that "personally

intrusive" polygraph questions violated Texas constitutional right to privacy), vacated 1996 WL 752803 (5th Cir. 1996) (pursuant to agreement to vacate). The Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347, 102 Stat. 646 (1988), codified at 29 U.S.C. §§ 2001-2009, prevents employers from requiring, requesting, or even suggesting the use of a polygraph test to an employee.

Comment f. Information required by law. In Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), the Federal Railroad Administration promulgated regulations requiring drug and alcohol testing for employees of privately-owned railroad companies. The employees' union brought a Fourth Amendment challenge to the regulations. Although the testing was carried on by private employers, the Court found that there were "clear indices of the Government's encouragement, endorsement, and participation [of the testing], and [those indices] suffice to implicate the Fourth Amendment." Id. at 615-16. Given the "encouragement, endorsement, and participation" behind the agency's regulations, it would not make sense to have held the employer liable for an intrusion based on the legal requirements imposed.

In Wells v. Premier Indus. Corp., 691 P.2d 765 (Colo.App. 1984), the IRS served the plaintiff's former employers with a summons that required the employer to provide forms and ledgers showing "all compensation paid to [plaintiff], deductions claimed by him, and expenses charged to him." Id. at 767. The employer notified the plaintiff of the summons and stated its intention to comply unless a court relieved them of this responsibility. The plaintiff wrote to the employer objecting that such a disclosure would violate his privacy. However, he took no other action to object to the summons. The employer then complied with the summons. The court found that there was no invasion of privacy.

Comment g. Interaction with autonomy protections. The case of Cunningham v. Dabbs, 703 So.2d 979 (Ala.Civ.App. 1997) provides an example of the interaction between the protection for personal information and protection for workplace autonomy In *Cunningham*, a supervisor subjected the plaintiff-employee to frequent episodes of sexual harassment. When the supervisor learned that plaintiff was getting married, he fired her. The court rejected her wrongful discharge claim, but it denied summary judgment as to her intrusion upon seclusion and outrage claims. It essentially treated the wrongful discharge claim as an outrage claims by basing the outrage claim on her discharge. *Cunningham*, 703 So.2d at 982-83 ("[In support of the outrage claim,] Cunningham alleges a pattern of harassment and a termination of employment in violation of her fundamental right to marry.").

§ 7.04 Employee Privacy Interests Against Employer Intrusion in Physical Person and Locations

(a) An employee has a protected privacy interest against employer intrusion in:

(1) the employee's physical person and private physical functions; and

(2) a physical or electronic location if the employee has a reasonable expectation that the location is private as to that intrusion.

(b) An employee has a reasonable expectation in the privacy of a physical or electronic work location provided by the employer if:

(1) the employer has provided express notice that the location is private for employees; or

(2) the employer has acted in a manner that treats the location as private for employees, the type of location is generally treated as private, and the employee has made reasonable efforts to keep the location private.

(c) An employer intrudes upon an employee's protected privacy interest under Subsection (a) by intruding into the employee's person, physical functions, or a physical or electronic location in which the employee has a reasonable expectation of privacy.

Comment:

a. Scope. The focus of this Section is on the employee's interest in keeping his physical person, certain physical function, and certain physical and electronic locations private from employer intrusion. It is generally acknowledged that the employee has a privacy interest in his physical person. The central question is whether the employee has a reasonable expectation in the privacy of the particular physical function or physical or electronic work location. If the employee has a reasonable expectation as to the privacy as to the employee's person, engaging in a particular physical function, or using a particular location, then it constitutes an intrusion for

the employer to search the employee's person, observe the employee while privately engaged in the physical function, or enter or otherwise access the location. The employer is not subject to liability, however, unless the intrusion is unreasonable and offensive as discussed in § 7.06.

b. Physical person and physical functions. Under Subsection (a), an employee has a protected privacy interest in the employee's physical person and private physical functions. This includes the employee's body, as well as bodily fluids and other byproducts. An employer's job requirement that an employee provide a urine sample as part of a test for unlawful drug use constitutes an intrusion into that protected privacy interest. Similarly, the employer's observing an employee engaged in private physical functions in a bathroom stall constitutes an intrusion into a protected privacy interest. There is no violation, however, unless the intrusion is unreasonable and offensive, as discussed in § 7.06.

c. Nonworkplace physical or electronic locations. Under Subsection (a), an employee has a protected personal privacy interest against employer intrusion in any non-workplace physical or electronic location in which the employee has a reasonable expectation of privacy. The employee's home, personal property, and personal electronic spaces are protected against employer intrusions, even though they are not part of the workplace. Indeed, an employee generally has a greater expectation of privacy against employer intrusions in non-workplace personal locations.

d. Employer-owned and employer-provided locations. Subsection (b) recognizes the employee's protected privacy interest in physical and electronic work locations in which the employee might have a reasonable expectation of privacy against employer intrusion. Such locations include the employer's physical workspace, including all areas where employees have access, as well as the electronic workspace, such as computer hard drives, email accounts, and

websites visited on Internet web browsers. The employer's ownership or control does not necessarily preclude an employee from having a reasonable expectation of privacy in particular work locations.

Illustrations:

1. E uses the bathroom at X's offices. E has a reasonable expectation of privacy while using the bathroom to attend to private physical functions, even though the bathroom is owned by X.
2. X provides lockers to its employees to store their clothing, bags and lunches during work hours. E uses the locker to store a bag with pornographic videos. E has a reasonable expectation of privacy in the contents of the locker even though the lockers are owned by X.
3. X provides email accounts to its employees for business use but permits use for personal communications. E uses the email account to discuss an upcoming party with his family. E has a reasonable expectation of privacy in the contents of his personal communications on X's email account despite X's ownership or control of the email system.

e. Reasonable expectation of privacy. The "reasonable expectation of privacy" test is influenced by the Fourth Amendment jurisprudence on the constitutionality of governmental searches, whether in the government's role as law enforcement authority or employer. In the common law context, courts assess whether the employee had a reasonable expectation of privacy in the particular location. It is important to recognize that whether the employee has a

reasonable expectation of privacy is a function not only of the location but also of the identity of the intruder and the manner of intrusion. An employee may have reasonable expectations that the government will not search her office, but she may not have such expectations as to her co-workers or the employer. Moreover, the space may be private as to some types of intrusions but not as to others.

Illustrations:

4. E and F are coworkers at X. They engage in a private conversation at a table in the company lunchroom; there is no other worker within twenty yards of the table. X has placed a secret microphone under the table and records their conversation. E and F have a reasonable expectation of privacy in the contents of their conversation at the lunchroom table.

5. E and F are coworkers at X They engage in a private conversation at a table in the lunchroom. After eating, they leave a set of papers behind that discuss their plans to leave the company. E and F do not have a reasonable expectation of privacy as to the papers left behind on the table.

f. Expectations as to employee-owned locations. When it comes to personal property or locations that the employee owns outside of the workplace, employees will generally enjoy the same expectations of privacy regarding employer intrusions as they do with respect to other third-party intrusions. The expectations will be a function of the nature of the location, its proximity to outside observance or interference, and the likelihood of outside intrusion. Even though the employee might not expect an employer to intrude into nonworking spaces, the

employee cannot expect a greater level of freedom from intrusion as to the employer than she does as to the general public. At the same time, the employer is not privileged to intrude upon an employee's protected privacy interests outside the workplace simply because the employer is pursuing a legitimate business interest. The employee's reasonable expectations of privacy against the employer remain the same as against the general public.

Illustrations:

6. E claims that he was injured in a workplace accident and files for workers' compensation benefits. X, his employer, hires a private investigator to monitor E in his everyday activities outside of work. X's investigator observes E from a public street as E mows his lawn, answers his door, and goes shopping in public. E has no expectation of privacy as to his observable activities.

7. Same facts as Illustration 6, except that X's investigator knocks on E's door and falsely claims to be a government agent. E lets the investigator into his home. While inside E's home, the investigator observes E's behavior and takes surreptitious photographs. E has a reasonable expectation of privacy in the contents of and activities in his home.

g. Expectations as to employee property brought into the workplace. When an employee brings personal items of property into the workplace, he is subject to the employer's reasonable regulations which will necessarily limit the employee's reasonable expectations of privacy in that regard. Subject to such regulations, the employee retains a reasonable expectation of privacy in his property brought into the workplace.

Illustrations:

8. E brings a backpack to work at X, and leaves it at his desk. E has a reasonable expectation of privacy in the contents of his backpack.

9. X operates a drug treatment center. In order to prevent illegal drugs from entering the center, X's policy is to search all backpacks, bags, or other containers that enter the workplace. E brings a backpack to work at X. E would reasonably expect that X's backpack would be subject to search upon entering the workplace.

10. E receives a letter marked "personal" at her workplace. Her supervisor opens the letter. E has a reasonable expectation of privacy in the contents of the letter.

11. X provides E with a computer in his office. E uses the computer to access an email account that he personally maintains through an outside service provider. In order to access the account, E must use X's browser. E has an expectation of privacy in the contents of his personal email account.

h. Expectations as to work locations. As noted above in Comment d, employees may have reasonable expectations of privacy in locations owned by the employer. These reasonable expectations are affected by the knowledge of employer ownership or control but are not necessarily precluded by such ownership or control. Under § 7.04(b), the employee has a reasonable expectation of privacy in a physical or electronic work location if the employer has provided express notice that the location is private for employees. In the absence of such express statements, the employee may still have a reasonable expectation of privacy in a physical or electronic work location where the employer has acted in a manner the treats the location as private for employees, the type of location is generally treated as private, and the employee has

made reasonable efforts to keep his activities in that location private. These factors are discussed further below.

i. Employer policies and notice as to intrusions. An employer's notice regarding the likelihood of employer intrusions in a work location is often an important factor in determining whether employees have a reasonable expectation of privacy in that location. Under § 7.04(b)(1), if employers tell employees that the location is private for employees, the employees have reasonable expectations of privacy in the area. Employers may do this through an express policy or posted notice, or through a well-established practice, of allowing employee personal use in or of that location. Conversely, a clear employer notice or policy that a particular location is not private for employees generally, but not necessarily, defeats an employee's expectation of privacy. The actual practices of the employer may more significantly inform reasonable expectations of privacy than the wording of an express notice or policy. Under § 7.04(b)(2), such expectations may arise if the employer actually treats the area as private, the location is generally regarded as a private one, and the employee took reasonable steps to maintain its privacy.

Illustrations:

12. X provides its employees with lockers for the storage of personal effects during working hours. Employees pick for their exclusive use whichever locker is available at the time. X permits employees to purchase and use their own locks on the lockers, and does not require the employee to provide the manager with either a combination or duplicate key. E, X's employee, uses one of these lockers and provides her own combination lock. E has a reasonable expectation of privacy in the contents of the locker.

13. E works as a manager for X. E uses the email service provided by X for business messages and has downloaded files containing nudity and sexually offensive material to the hard drive of his office computer (also provided by X). The employee handbook of X Corporation provides the following warnings about employee computer use: "Our personal computers, including e-mail, are intended for Company business only. X Corporation reserves the right to monitor any employee's e-mail and computer files for any legitimate business reason, including when there is a reasonable suspicion that employee use of these systems violates a company policy." E acknowledged in writing that he received a copy of this policy. E does not have a reasonable expectation of privacy in the files downloaded from his employer-provided email service and saved to his employer-provided computer.

j. Work location treated as private by employer. Under § 7.04(b)(2), if there is no express employer policy providing for privacy in a particular employer-provided locations, then employees must establish that the employer has acted in a manner that treats the location as private for employees, the type of location is generally treated as private, and the employee has made reasonable efforts his activities in that location private. The employer treats a location as private if it does not intrude into the location, creates no expectation of any future intrusion by its actions, and provides inadequate or no notice of any policies to the contrary.

Illustrations:

14. X provides its employees with express notice that no areas of its worksite are private as to employees, and employees should have no expectations of privacy anywhere in

the workplace. X maintains bathrooms for its employees that are separated by gender and have doors to the room and the individual stalls. X's maintenance employees knock on the door to the bathroom to provide notice they are about to enter to clean the locations. X's bathrooms are not otherwise inspected for business purposes. Despite X's written notice to the contrary, X's employees have an expectation of privacy while attending to their physical functions in the bathrooms because X has treated the bathrooms as a private area for employee, a bathroom is a type of location that is customarily private, and X's employees have made reasonable efforts to keep their activities in the location private.

15. E, employed by X, uses a laptop computer provided by X. X has a policy whereby it will sell the laptop to the employee if the employee obtains a new company laptop, or if the employee leaves the company. E maintains personal information on the laptop. E has a reasonable expectation of privacy in the contents of the laptop.

16. E, employed by X, has an employer-provided computer in a private office which E alone uses. E does not share his computer with other employees; the public and visitors do not have access to his computer. The employer's technical support staff provides assistance only at E's request and do not generally access the computer without E's consent. X has not provided notice limiting E's use of the computer. E has a reasonable expectation of privacy as to the contents of personal files on his employer-provided computer.

k. Type of location generally treated as private. Under § 7.04(b)(2), it is not sufficient for the employer to treat the work location as private and the employee to take reasonable measures

to keep his activity in that location private; in addition, the location must itself be one that is generally treated as private. In addition to specific facts about the particular workplace, courts also look commonly-held perceptions about the use of the space, the expected visitors to the space, and the likelihood that employees enjoy solitude there. The office bathroom is the quintessential example of a work location that generally treated as a private place, but other places include lockers, desks, and private offices.

Illustrations:

17. E1 and E2 share an office at X. The office has a door that can be shut, and its windows have shades that can be drawn. X secretly places a surveillance camera in the office. E1 and E2 have a reasonable expectation of privacy as to their activities in their office while the door is shut and the shades are drawn.

18. E works as a security guard in an office building in which X is located. E often works on the night shift. M, a manager at X, discovers that the locked file drawer on his desk has been tampered with. M and other X employees set up a video camera to videotape M's desk at night. The videotape shows E tampering with the desk. E has no reasonable expectation in the privacy of M's office.

l. Reasonable employee efforts to protect privacy. In addition to the other elements in § 7.04(b)(2), an employee must take reasonable efforts to keep his activity in the work location private. As with employee information, employee efforts to protect the privacy of a particular location serve as an indication that the employee expects the location to be kept private. In particular, methods of securing a location – such as locks and passwords – that are permitted by

the employer indicate that the employee has a desire to keep others out and has acted to keep others out.

Illustrations:

19. Same facts as Illustration 12. E uses her own personal combination lock on the locker. E has a reasonable expectation of privacy in the locker.

20. X provides employees with their own company email accounts which are password-protected. X does not have a policy against using the office's e-mail system for personal messages, and X provided no notice about any employer monitoring of the email system. Employees have a reasonable expectation of privacy in the contents of their personal message on Y's email accounts.

m. Nature of intrusion. The intrusion upon the employee's privacy need not be a physical intrusion. It may also occur through the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the employee's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may occur through some other form of investigation or examination into the employee's private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. See Restatement Second of Torts § 652B cmt. b. However, examination of public records will generally not be intrusion upon seclusion. Id. cmt. c.

Illustrations:

21. X hired two undercover investigators to work as employees. While pretending to be employees, the investigators had conversations with employees on such personal topics as family matters, intimate relationships, and future career plans. The investigators passed all of this information along to X. By hiring the undercover investigators and receiving the reports on personal employee matters, X intruded upon its employees' privacy interest.

22. X received a series of complaints from coworkers about E's job performance. After an investigation that included interviews with a number of employees and a review of personnel file, X terminated E. X did not intrude upon E's privacy interests.

23. X set ups a video surveillance camera in the workplace bathroom. The camera videotapes employees' normal use of the bathroom. X's videotaping constitutes an intrusion upon employees' privacy interests.

24. Same facts as Illustration 23, except that right after the camera was installed, employees discovered the presence of the camera and complained about it to the manager. The manager removed the camera before it had ever been hooked up to a video monitor. The placement of the camera in the bathroom did not intrude upon employees' privacy interests.

n. Intention to intrude. The employer need not have malicious or wrongful intent in order to intrude upon an employee's privacy. The employer and/or its agents need only have the intent to conduct the intrusion itself. In some circumstances, recklessness may be sufficient for an intrusion.

REPORTERS' NOTES

Comment a. Scope. Of the three types of privacy interests described in § 7.02, the intrusion into physical or electronic locations is the most prototypical privacy invasion. When we think of privacy, we tend to think of private areas such as one's home, a bathroom, or a closed office. The Restatement Second of Torts does not differentiate between privacy interests, but the examples used for the intrusion upon seclusion tort related most often to this privacy interest. See Restatement Second of Torts, § 652B, illus. 1 (intrusion into hospital room), 2-3 (intrusion into bedroom), & 5 (intrusion into home through phone calls).

There is considerable overlap between this type of invasion of privacy and the situations that have found to be searches under the Fourth Amendment. The Supreme Court cases regarding the Fourth Amendment protections for public employees have dealt with employer intrusions into private offices, O'Connor v. Ortega, 480 U.S. 709 (1987); the body and bodily products, National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); and text messages on cell phones, United States v. Quon, 560 U.S. ___, 130 S. Ct. 2619 (2010). The test for the constitutionality of these searches—reasonableness—differs from the conventional standard for the intrusion upon seclusion tort. However, the "reasonable expectation of privacy" test employed in this Chapter corresponds both the constitutional usage and the actual holdings of courts applying the intrusion upon seclusion tort. Of course, expectations as to intrusions by the government will differ from expectations as to intrusions by the employer, as discussed further in the Reporters Notes to comment e below. California courts have also interpreted that state's privacy protections – article 1, § 1 of the California Constitution – which are applicable to private conduct, to to include a "reasonable expectations of privacy" analysis. See Hill v. National Collegiate Athletic Association, 865 P.2d 633, 655 (Cal. 1994) (requiring a reasonable expectation of privacy as an element of the constitutional standard).

Comment b. Physical person and private physical functions. The employee's body is considered to be private against outside intrusion, including the employer . See, e.g., Catalano v. GWD Management Corp., 2005 WL 5519861 (S.D.Ga. 2005) (employee subjected to an invasive strip search at the hands of other employees); Simon v. Morehouse School of Medicine, 908 F.Supp. 959 (N.D.Ga. 1995) (alleged rape by co-employee was potential intrusion). Courts have held that intrusions into the body, such as blood tests, can count as invasions of privacy. See Schmerber v. California, 384 U.S. 757, 767 (1966) (holding that a blood alcohol test "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment"); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616 (1989) ("[I]t is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable."). Moreover, the collection and testing of bodily output, such as breath, urine, or hair follicles, can also constitute an invasion of privacy. *Skinner*, 489 U.S. at 616-17) ("Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber,* should also be deemed a search."); id. at 617 (noting that "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable" because "chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an

employee" and "the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests"); National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987), aff'd in part and rev'd in part, 489 U.S. 656 (1989) ("There are few activities in our society more personal or private than the passing of urine . . . . It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom."). For an example of the privacy expectations as to one's body outside the employment context, see Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) ("One's naked body is a very private part of one's person and generally known to others only by choice. This is a type of privacy interest worthy of protection.").

Comment c. Nonworkplace physical or electronic locations. Employer intrusions into nonworkplace locations usually arises in the context of surveillance of employees or former employees for litigation or benefits purposes. See, e.g., Saldana v. Kelsey-Hayes Co., 443 N.W.2d 382 (Mich. Ct. App. 1989) (finding intrusion (but no liability) when investigator took pictures inside employee's home using a telephoto lens); Sowards v. Norbar, Inc., 605 N.E.2d 468 (Ohio Ct. App. 1992) (finding intrusion and liability when employer searched employee's hotel room).

Comment d. Employer-owned and employer-provided locations. Although ownership of real or personal property has been a factor in finding an expectation of privacy in the common law context, it is by no means determinative. The quintessential example of this is the bathroom, as customers having no property interest in a store's bathroom will almost always have a strong expectation of privacy in that location. Illustration 1 is based on these cases. See, e.g., Elmore v. Atlantic Zayre, Inc., 341 S.E.2d 905, 906-07 (Ga. 1986); Harkey v. Abate, 346 N.W.2d 74, 76 (Mich. App. 1983); Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419, 422 (S.D.1994). See also Lewis v. Dayton Hudson Corp., 128 Mich.App. 165, 166, 339 N.W.2d 857, 858 (1983) (surveillance of plaintiff in department store fitting room); Snakenberg v. Hartford Casualty Insurance Co., 383 S.E.2d 2 (S.C. 1989) (surveillance in changing area); Annot., Retailer's surveillance of fitting or dressing rooms as invasion of privacy, 38 A.L.R.4th 954 (1985). Illustration 2 is based on K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. App. 1984).

As for illustration 3, many courts have found that employees do not have an expectation of privacy in email accounts within an employer's email system or employer-provided hardware such as laptops. However, almost all of these decisions base their conclusions on the employer's email policies, which generally specify that the email or laptop is open to employer searches at any time. See TBG Ins. Services Corp. v. Superior Court, 117 Cal.Rptr.2d 155 (Cal. App. 2002); Garrity v. John Hancock Mut. Life Ins. Co., 2002 U.S. Dist. Lexis 8343 (D. Mass 2002) (applying Mass. Law); Parkstone v. Coons, 2009 U.S. Dist. Lexis 33765 (D. Del. April 20, 2009) (applying Del. Law); Thygeson v. U.S. Bancorp, 2004 WL 2066746 (D.Or.). When an employer has failed to provide notice that company-provided electronic locations are subject to search, employees may acquire reasonable expectations that at least their personal communications will not be examined by the employer. See Restuccia v. Burk Tech., 1996 WL 1329386 (Mass. Super. Ct.) (genuine issue of material fact as to expectation of privacy); Hilderman v. Enea TekSci Inc., 551 F.Supp.2d 1183 (S.D. Cal. 2008) ("Whether [former employee] had a

reasonable expectation of privacy in the personal data saved on the computer depends on whether [the employer] still had a policy of allowing employees to purchase their laptops.").

In Smyth v. Pillsbury Co., 914 F.Supp. 97 (E.D. Pa. 1996) (applying Pa. law), the employer provided email accounts to the employees and repeatedly assured them that their emails would remain privileged and confidential. Id. at 98. The employer ultimately did intercept the emails and used information in the emails plaintiff sent to his supervisor to terminate the plaintiff. The court reasoned:

> Once plaintiff communicated the alleged unprofessional comments to a second person (his supervisor) over an e-mail system which was apparently utilized by the entire company, any reasonable expectation of privacy was lost. Significantly, the defendant did not require plaintiff, as in the case of an urinalysis or personal property search to disclose any personal information about himself. Rather, plaintiff voluntarily communicated the alleged unprofessional comments over the company e-mail system. We find no privacy interests in such communications.

Id. at 101. It is unclear whether the court was placing importance on the email recipient's position in the company, or whether the court found the use of the company email system in and of itself to be determinative. For another decision suggesting use of company-provided email can never be private for employees, see McLaren v. Microsoft Corp., 1999 Tex. App. Lexis 4103, 1999 WL 339015 (Tex. Ct. App. 5th May 28, 1999) (finding no reasonable expectation of privacy in employer-provided email without discussing employer's email privacy policies, if any).

Comment e. Reasonable expectation of privacy. The "reasonable expectations of privacy" test is the standard for determining whether an employee has a privacy interest in a particular location. The test has been informed by Fourth Amendment decisions on whether a particular governmental search is reasonable. However, the Fourth Amendment jurisprudence on reasonable expectation of privacy cannot be automatically transposed into the area of workplace intrusions. The Fourth Amendment cases concern whether an individual would reasonably expect the location to be private with respect to governmental searches. With respect to § 7.04, however, the question is whether the employee would reasonably expect the location to be private with respect to employer intrusions. Thus, an employee may have a reasonable expectation of privacy as against a governmental search but not as to a similar search by her or his employer. In Mancusi v. DeForte, 392 U.S. 364 (1968), the Supreme Court found that a union official had a reasonable expectation of privacy in his workplace as to a search by the police. The official shared the office space with other union employees and thus had no expectation of privacy as to his fellow employees, but collectively they had an expectation that government would not intrude into the office space. As the court noted, even though the space was shared, the official "still could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups." *Mancusi*, 392 U.S. at 369. See also O'Connor v. Ortega, 480 U.S. 709, 717 (1987) (plurality opinion) ("The operational realities of the workplace . . . may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official."); United States v. Ziegler, 474 F.3d 1184, 1190 (9th Cir.2007) (holding that employee had a reasonable expectation of

privacy in his office, and that therefore any search of that space and the items located therein must comply with the Fourth Amendment).

Some courts and individual jurists have applied a gradational approach to reasonable expectations of privacy. They find that the expectations of privacy are somehow "limited" or "diminished" by the particular context. See, e.g., City of Ontario v. Quon, 560 U.S. __, 130 S. Ct. 2619, 2634 (2010) (Stevens, J., concurring) (finding that officers had "a limited expectation of privacy in relation to this particular audit of his pager messages"); Hill v. National Collegiate Athletic Association, 865 P.2d 633, 658 (Cal. 1994) ("As a result of its unique set of demands, athletic participation carries with it social norms that effectively diminish the athlete's reasonable expectations of personal privacy in his or her bodily condition, both internal and external."). However, it is unclear what effect this "limited" or "diminished" set of expectations has on the relevant analysis. The expectations are always contextual as to both the location and the intrusion. The employee either has reasonable expectations of privacy, and the analysis proceeds forward (to § 7.06), or the employee does not and the inquiry ends there.

Illustrations 4 and 5 are taken from cases which find secret surveillance and eavesdropping to be intrusions into privacy. See, e.g., Saldana v. Kelsey-Hayes Co., 443 N.W.2d 382 (Mich. Ct. App. 1989) (finding intrusion (but no liability) when investigator took pictures inside employee's home using a telephoto lens); Sowards v. Norbar, Inc., 605 N.E.2d 468 (Ohio Ct. App. 1992) (finding intrusion and liability when employer searched employee's hotel room).

Comment f. Expectations as to employee-owned locations. Illustration 6 is based on York v. General Electric Co., 759 N.E.2d 865 (Ohio App. 12th 2001). In York, the employer hired an investigator to determine whether the employee's workers compensation claim was based on a legitimate injury. The investigator observed the employee arriving at work, going into his chiropractor's office, visiting a lawnmower repair shop, mowing his lawn, and riding a motorcycle. Id. at 866. The court held that there was no invasion of privacy because all of the observed scenes were "outside and in public view." Courts have generally not found employer surveillance of employees for purposes of investigating disability, workers compensation, or other injury claims to violate the employee's privacy rights. However, these investigations have generally observed employees in public places where the employee's expectations of privacy are diminished. See York v. General Electric Co., 759 N.E.2d 865 (Ohio Ct. App. 2001) (no intrusion because videotaped in public view); ICU Investigations, Inc. v. Jones, 70 So.2d 685 (Ala. 2000) (no intrusion when videotaped in front yard); Crego v. Home Insurance Co., 1985 Kan. App. Lexis 861 (Kan. App. July 11, 1985) (noting that "[a]ll of [the observed] activities occurred in public places"). Surveillance that includes trespass onto the employee's property has been held to constitute an intrusion. See Association Services, Inc. v. Smith, 549 S.E.2d 454, 461 (Ga. App. 2001).

A few decisions suggest that any investigation triggered by the filing of a workplace claim is not actionable because the filing of the claim waives the employee's right to privacy with respect to the investigation of the claim. As Ellenberg v. Pinkerton's Inc., 188 S.E.2d 911 (Ga. App. 1972) stated:

> In this case and others, both Georgia and other jurisdictions have recognized that one may waive this right to privacy. This occurs, for example, where one elects to sue another for injuries he receives. In such case, it has been recognized for a limited purpose that the plaintiff may waive his right to privacy and the defendant has the right to conduct a reasonable investigation of the plaintiff in order to ascertain the validity of the plaintiff's claim.

Id. at 914. See also McLain v. Boise Cascade Corp., 533 P.2d 343 (Or. 1975); Crego v. Home Insurance Co., 1985 Kan. App. Lexis 861 (Kan. App. July 11, 1985); Forster v. Manchester, 189 A.2d 147, 150 (Pa. 1963) (investigation of automobile accident). See also Annotation, Right of Privacy-Surveillance, 13 A.L.R.3d 1025, 1027 (1967) ("Where the surveillance, shadowing, and trailing is conducted in a reasonable manner, it has been held that owing to the social utility of exposing fraudulent claims and because of the fact that some sort of investigation is necessary to uncover fictitious injuries, an unobtrusive investigation, even though inadvertently made apparent to the person being investigated, does not constitute an actionable invasion of his privacy."). However, this "waiver" does not seem to actually change the privacy rights of employees; if anything, it only modifies the employee's expectations as to the potential for public surveillance. The test was described in one case as:

> If the surveillance is conducted in a reasonable and unobtrusive manner the defendant will incur no liability for invasion of privacy. On the other hand, if the surveillance is conducted in an unreasonable and obtrusive manner the defendant will be liable for invasion of privacy.

McLain, 533 P.2d at 346; see also Weimer v. Youngstown Steel Door Co., 1983 WL 6718 (Ohio Ct. App. Sept. 26, 1983) (permitting reasonable investigation into workers comp claim). Thus, the employee's reasonable expectations of privacy do not change, as employers must still act reasonably with respect to the surveillance. Moreover, there are policy reasons not to hold that filing a claim opens an employee up to an invasion of privacy: such a privilege would come close to encouraging retaliation. The filing of a workplace claim, however, may provide a legitimate business justification for any incursion due to an investigation of the claim, which is a factor in determining whether the incursion is or is not actionable (§ 7.06). Cf. Tucker v. American Employers' Ins. Co., 171 So.2d 437 (Fla.App.1965) (finding question of fact as to investigation of automobile accident claim).

Thus, illustration 7 is based on Saldana v. Kelsey-Hayes Co., 443 N.W.2d 382 (Mich. Ct. App. 1989), although it reaches a contrary result. In that case, an investigator posed as a process server in order to gain entrance to the employee's home. He also used a 1,200 millimeter camera lens to take photographs inside of the employee's home. The court recognized that these activities were intrusions, but found the employee had no right to keep such matters private since he had filed a claim for injuries sustained at work. Although the legitimate business reason for the search may mitigate and overcome the offensiveness of the intrusion, it still intrudes upon the employee's reasonable expectation of privacy. As the dissent pointed out, "Even if the purpose for conducting an invasion into private matters is legitimate, the defendant is not entitled to carte blanche investigate without regard to the degree and nature of the intrusion." Id. at 385 (Holbrook, Jr., J., dissenting). See also Souder v. Pendleton Detectives, Inc., 88 So.2d 716

(La.App.1956) (holding summary judgment to be inappropriate on claim that investigators violated employee's privacy by looking into the windows with binoculars and otherwise harassing employee and his wife during investigation of workers compensation claim); Wal-Mart Stores, Inc. v. Lee, 74 S.W.3d 634 (Ark. 2002) (finding that search of employee's home for stolen merchandise was intrusion); Burns v. Masterbrand Cabinets, Inc., 874 N.E.2d 72 (Ill. App. 4th 2007) (remanding intrusion claim for trial based on surveillance of employee's home for workers' compensation case, including entry to the home on false pretenses).

Comment g. Expectations as to employee property brought into the workplace. Courts have generally provided commensurate protection with personal items or locations in the workplace as such items or locations would receive in public places. A person suffers some loss of a privacy "zone" by nature of taking them into the public, but the location nevertheless enjoys some expectation of privacy due to its personal nature. As the Supreme Court stated in O'Connor v. Ortega, 480 U.S. 709, 716 (1987) (plurality):

> Not everything that passes through the confines of the business address can be considered part of the workplace context, however. An employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and the outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the *contents* of the luggage is not affected in the same way. The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag or a briefcase that happens to be within the employer's business address.

Illustration 10 is taken from Vernars v. Young, 539 F.2d 966 (3d Cir. 1976). In *Vernars*, the court found that the employee had a reasonable expectation that a letter marked "personal" and addressed to the plaintiff would not be opened by the employer, even though it was mailed to the workplace.

Illustration 11 is taken from Stengart v. Loving Care Agency, Inc. 990 A.2d 650 (N.J. 2010); National Economic Research Associates, Inc. v. Evans, 21 Mass.L.Rptr. 337, 2006 WL 2440008 (Mass.Super.); Thygeson v. U.S. Bancorp., 2004 U.S. Dist. Lexis 18863 (D. Or.); and Fischer v. Mt. Olive Lutheran Church, Inc., 207 F. Supp. 914 (W.D. Wisc.). These cases have distinguished between employer-provided email accounts and employee personal accounts that are accessed through an employer-provided computer in terms of privacy expectations.

Comment h. Expectations as to work locations. Concerning employer-owned property, courts have accorded weight to the employer's control in assessing reasonable expectations. Such an approach comes not in the form of a specific rule, but rather in greater attention to and solicitude for employer policies about the expectations of privacy inherent in a particular location. In some cases, the policy will be laid out plainly for all employees to see and understand. In other cases, it will be part of the background norms and everyday business affairs of the employer.

The express policies of the employer are not necessarily determinative. Often reasonable expectations will be the product of the employer's actual practices. In this respect, City of Ontario v. Quon, 560 U.S. __, 130 S. Ct. 2619 (2010) is instructive. The police officers in *Quon* were using their employer-provided cellular phones to send personal text messages during both work and personal time. The official employer policy, as communicated to the officers, was that employees were to have "no expectation of privacy or confidentiality" in their use of the cell phones. However, over time a practice developed in which employees would pay for any "overage" in their allotment of text message characters, and in return the employer would not audit their messages. Ultimately, the employer did audit the messages, and the officers were disciplined for their personal use of the system. In its analysis of the Fourth Amendment constitutionality of the audit, the Court assumed that the officers had a reasonable expectation of privacy in the content of their text messages. But it made clear that this assumption was, in part, based on the thorny issues raised by the employees' use of the employer's text messaging system. The Court first noted that, were it to conduct a "reasonable expectations" analysis, it would look to the official policy as well as the informal "overage" policy, particularly whether the overage policy was an authorized change. *Id.* at 2629. In addition, the Court said it would look to other reasons that officers might expect their text messages to be reviewed, such as "performance evaluations, litigation concerning the lawfulness of police actions, and perhaps compliance with state open records laws." *Id.* Looking to the bigger picture, however, the Court pointed to the overall societal expectations and their important but evolving role in privacy expectations:

> Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. . . . [T]he Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. Cell phone and text message communication are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.

Id. at 2629-30. As a result, the Court found it "preferable" to assume the existence of reasonable expectations of privacy and dispose of the case on "reasonableness" grounds.

Comment i. Employer policies and notice as to intrusions. Illustration 12 is based on K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. App. 1984). Illustration 13 is based on Thygeson v. U.S. Bancorp, 2004 WL 2066746 (D.Or.), 34 Employee Benefits Cas. 2097. See also TBG Ins. Servs. Corp. v. Superior Court, 117 Cal. Rptr. 2d 155, 163-64 (Cal. App. 2002) (employee's consent to employer equipment policy agreement, which stated that employee agreed that his computer use could be monitored and was not private, abrogated his expectations of privacy).

Comment j. Work location treated as private by employer. Illustration 14 is based on the generally accepted norms regarding the privacy of bathrooms, as discussed in Elmore v. Atlantic Zayre, Inc., 341 S.E.2d 905, 906-07 (Ga. 1986); Harkey v. Abate, 346 N.W.2d 74, 76 (Mich. App. 1983); and Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419, 422 (S.D.1994). See also Cramer v. Consolidated Freightways, Inc., 255 F.3d 683 (9th Cir. 2001) (finding public policy to support a common-law privacy action in California statute making the installation and maintenance of two-way mirrors permitting the observation of restrooms illegal).

Illustration 15 is based on Hilderman v. Enea TekSci Inc., 551 F.Supp.2d 1183 (S.D. Cal. 2008) ("Whether [former employee] had a reasonable expectation of privacy in the personal data saved on the computer depends on whether [the employer] still had a policy of allowing employees to purchase their laptops."). For an instructive discussion of the privacy interests in employee laptops, see TBG Ins. Services Corp. v. Superior Court, 117 Cal.Rptr.2d 155 (Cal. App. 2002).

Illustration 16 is based on Leventhal v. Knapek, 266 F.3d 64 (2d Cir. 2001). The *Leventhal* case involved a public employee who brought a § 1983 claim based on an alleged Fourth Amendment violation.

Comment k. Type of location generally treated as private. Illustration 17 is based on Hernandez v. Hillsides, Inc., 211 P.3d 1063 (Cal. 2009). The *Hernandez* court held that the employees had a reasonable expectation of privacy in their office as to the installation of a secret video camera. Illustration 18 is based on Marrs v. Marriott Corp., 830 F. Supp. 274 (D. Md. 1992). In *Marrs*, the plaintiff-employee picked a lock on the desk of a fellow employee and rifled through files within the desk. The desk was located in an open area of the office. The court found that plaintiff had no reasonable expectation of privacy in an open office used by all security employees. Concerning open access locations, see also Sheppard v. Beerman, 18 F.3d 147, 152 (2d Cir. 1994) ("Because of this distinctive open access to documents characteristic of judicial chambers, we agree with the district court's determination that Sheppard had 'no reasonable expectation of privacy in chambers' appurtenances, embracing desks, file cabinets or other work areas.'"). *Hernandez* emphasized the general expectations of privacy in one's office:

> As suggested by the evidence here, employees who share an office, and who have four walls that shield them from outside view (albeit, with a broken "doggie" flap on the door), may perform grooming or hygiene activities, or conduct personal conversations, during the workday. Privacy is not wholly lacking because the occupants of an office can see one another, or because colleagues, supervisors, visitors, and security and maintenance personnel have varying degrees of access.

Hernandez v. Hillsides, Inc., 211 P.3d 1063, 1075-76 (Cal. 2009).

For an example of an employer-provided off-worksite private space, see Sowards v. Norbar., Inc., 605 N.E.2d 468 (Ohio Ct. App. 1992) (finding intrusion when employer searched employee's hotel room even when employer paid for the room).

Comment l. Reasonable employee efforts to protect privacy. Illustrations 19 and 20 are drawn from a variety of cases which acknowledge the importance of password protection in finding electronically-stored information to be private. Courts have also found that password protection creates reasonable expectations of privacy in the Fourth Amendment context. See U.S. v. Buckner, 407 F.Supp.2d 777 (W.D.Va. 2006) ("[Defendant] protected his files from disclosure to third persons, including his wife, through the use of a confidential password. He, thereby, exhibited an actual expectation of privacy."); U.S. v. Ahrndt, 2010 WL 373994 (D.Or. Jan. 28, 2010) ("[S]ociety recognizes a lower expectation of privacy in information broadcast via an unsecured wireless network router than in information transmitted through a hardwired network or password-protected network."); Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2001) ("[Plaintiff's] password-protected files are analogous to the locked footlocker inside the bedroom. By using a password, [plaintiff] affirmatively intended to exclude . . . others from his personal files. . . . Thus, [plaintiff] had a reasonable expectation of privacy in the password-protected computer files . . . . ").

Comment m. Nature of intrusion. The intrusion need not be physical in nature. Fischer v. Mt. Olive Lutheran Church, Inc., 207 F. Supp. 2d 914 (W.D. Wisc. 2002) ("On its face, the language, 'intrusion upon the privacy of another ... in a place that a reasonable person would consider private,' does not limit the intrusion to a person's immediate physical environment but rather encompasses a person's private belongings as long as the place these private belongings are intruded upon is one that a reasonable person would consider private." (citations omitted)). Illustration 21 is based on Johnson v. K-Mart Corp., 723 N.E.2d 1192 (Ill. App. Ct. 2000) (hiring two undercover workers to observe employees was intrusion on seclusion, as employees had reasonable expectation that conversations would remain private). Illustration 22 is based on Rogers v. IBM Corp., 500 F. Supp. 867 (W.D. Pa. 1980) (investigation of employee limited to other employees and workplace documents). As the court stated in *Rogers*: "Here, there was no intrusion of Rogers' seclusion or private life. Defendant's investigation was limited to interviews of full time employees and an examination of company records. Written material was voluntarily produced by Rogers and since there could be no expectation of privacy for such material, the intrusion, if any, was reasonable as a matter of law." Id. at 870.

Illustration 23 is based on Koeppel v. Speirs, 779 N.W.2d 494 (Table), 2010 WL 200417 (Iowa App. 2010). In *Koeppel*, the question was whether the functionality and quality of the video recording was sufficient to create an intrusion. The employer had placed a surveillance camera in the office bathroom to monitor for drug use. However, the employer later claimed that he had never been able to get a signal from the camera. When police officers tried to use the camera, they found it was out of batteries and not hooked up; however, when they put in new batteries and plugged the monitor in they found that the camera transmitted a "fuzzy picture of the toilet seat and the bathroom wall." *Id*. at *1. The Iowa Court of Appeals held that in order to succeed on her claim, the employee "must show the surveillance camera was capable of functioning while in the bathroom." *Id*. at *6. However, the court held that the testimony from the officers regarding the "fuzzy" video was sufficient to survive summary judgment.

Illustration 24 is based on Meche v. Wal-Mart Stores, Inc., 692 So.2d 544, 547 (La.App. 1997) (no violation when evidence showed that video camera in bathroom was never hooked up to recording device and never turned on). See also Brazinski v. Amoco Petroleum Additives Co.,

6 F.3d 1176 (7th Cir. 1993) (plaintiff never established that she was in locker room where camera was placed or that camera, which was trained on the door, ever captured anyone in a state of undress). However, secret video surveillance may constitute an intrusion even if the employees are never captured on video. In Hernandez v. Hillsides, Inc., 211 P.3d 1063 (Cal. 2009), the court held that the maintenance of a secret camera with the ability to record office activities was sufficient to constitute an intrusion. As the court noted: "Defendants secretly installed a hidden video camera that was both operable and operating (electricity-wise), and that could be made to monitor and record activities inside plaintiffs' office, at will, by anyone who plugged in the receptors, and who had access to the remote location in which both the receptors and recording equipment were located." *Id*. at 1078. According to the court, "[p]laintiffs had no reasonable expectation that their employer would intrude so tangibly into their semi-private office." *Id*.

Comment n. Intention to intrude. As to intent, see Snakenberg v. Hartford Casualty Insurance Co., 383 S.E.2d 2 (S.C. 1989) (surveillance of changing room) ("[P]urpose relates to the result desired by the actor; motive is his subjective reason for desiring the result. Neither purpose nor motive must be proven to show intent. If the videotaping was an act of volition and the resulting exposure of the girls was the expected or natural consequence of that act, intent has been proved.").; Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 295, 211 P.3d 1063, 1079 (2009) ("Hence, no cause of action will lie for accidental, misguided, or excusable acts of overstepping upon legitimate privacy rights.").

In Bodewig v. K-Mart, Inc., 635 P.2d 657 (Or. App. 1981), the court premised its holding on a finding of reckless intent on the part of the manager. *See id.* at 661 (holding that "the manager's conduct exceeded the bounds of social toleration and was in reckless disregard of its predictable effects on plaintiff"). In its discussion of Oregon law, the court held that reckless intent was sufficient because of the special relationship between employer and employee. *Id.* Later courts have questioned this reading of Oregon law. *See* Snead v. Metropolitan Property and Cas. Ins. Co., 909 F.Supp. 775 (D.Or. Jan 04, 1996); Mathieson v. Yellow Book Sales and Distribution Co., Inc., 2008 WL 2889398 (D.Or. Jul 21, 2008). However, the Restatement Third of Torts does provide for reckless infliction of emotional distress. Restatement Third of Torts § 45, Council Draft No. 6 (October 26, 2006).

See also Sowards v. Norbar, Inc., 605 N.E.2d 468 (Ohio Ct. App. 1992) (finding intrusion and liability when employer searched employee's hotel room). In *Sowards*, the court stated: "Appellant next contends that the brief intrusion should be forgiven, since the search was conducted in good faith and without a belief appellee had stolen the permit book. However, this fact does not vindicate appellant, since an invasion of privacy need not be committed intentionally or maliciously in order to be actionable; simple negligence will suffice." Id. at 475 (citation omitted).

§ 7.05 Employer Disclosure of Private Employee Information

(a) An employee has a protected privacy interest in personal information provided in confidence to the employer in the course of the employment relationship.

(b) An employer intrudes upon the privacy interest in Subsection (a) by providing or allowing third parties access to such employee information. For purposes of this Subsection, third parties include employees or agents of the employer who have no legitimate reason to access the information.

(c) An employer does not intrude upon the privacy interest in Subsection (a) if the employer is compelled to provide a third party access to the information pursuant to a court order or other legal requirement.

a. Scope. Employees must of necessity share a wide range of private information with their employers. This sharing is often required in order to meet the employer's legal obligations, help the employer make compensation and benefits decisions, and t0 facilitate the employee's proper performance of the job. Whether or not the employee may be comfortable providing (or may have little practical choice but to provide) this information, the employee acts with the understanding that he is sharing this information with the employer on a confidential basis that precludes the employer from sharing it beyond a need-to-know basis. In concrete terms, that normally means that the employer will not release the information to third parties without justification, and that the employer is to share the information internally only with those agents who need it to facilitate the employer's legitimate purposes. Subsection (a) makes clear that employees can retain privacy interests in information they provide to their employer. Employees retain a privacy interest in social security numbers, for example, even though they provide them

to employers for payroll deductions. Subsections (b) and (c) discuss when an employer intrudes upon the employee's privacy interest by disclosing the private information to third parties. The employer is not liable unless the disclosure is unreasonable and offensive as discussed in § 7.06.

b. Employer intrusion. Under § 7.05(b), an employer intrudes upon an employee's protected privacy interest when it provides an employee's personal information to a third party, which included coworkers or other employer agents that have no need to know the information. Whether such an intrusion is an actionable invasion of the employee's right to privacy depends on whether the disclosure is unreasonable and offensive as defined in § 7.06.

Illustrations:

1. E provides medical information to employer X as part of her employment. After E is terminated, a manager at X discloses the medical information to a potential employer. X has intruded upon E's privacy interest.
2. E provides his social security number to employer X as part of his employment. X provides this number to the state in order to process E's state and local taxes. X has not intruded upon E's privacy interest under § 7.04(c).

c. Access to third parties. Under Subsection (b), an employer intrudes upon an employee's protected privacy interest by disclosing employee private information to a third party. The employee's consent to the disclosure is ordinarily a sufficient reason to render the intrusion reasonable, as long as the consent is not obtained by threat of employer discharge or other discipline for failure to consent. (See § 7.06 cmt. f.)

Illustration:

3. E and other employees were subject to an aptitude and personality test. X kept the test results in a locked filing cabinet. Access was only provided to those management employees who used the results in hiring and promotion decisions. X has not intruded upon E's privacy interests.

d. Legitimate reason for access. Under § 7.05(b), employers should limit access to employee-provided private information only to those of its employees or other agents with a legitimate need to know or use the information. Such limited access does not constitute an employer intrusion for purposes of this Section.

Illustrations:

4. E, an employee of X, suffers from a serious medical condition and requests medical leave to address it. As part of her request, E discloses her condition to her supervisor. While E is on leave, X's manager, M, discloses E's condition to a group of E's coworkers in order to satisfy their curiosity about her absence. If M is acting in the scope of his authority for X, X has intruded upon E's privacy interests.

5. E was accused by his coworkers at X for having an affair with an employee whom E supervised. X maintains an "Open Door Policy," which permits an employee to raise matters of concern with X's management. Utilizing this avenue, E's accusers stated to X that E favorably evaluated the employee with whom E was having the affair and that employee morale suffered as a result. X conducted an

investigation into the matter through interviews with employees and evaluations of E's job performance. Based on these interviews, X determined that E's relationship with the subordinate employee was inappropriate, and that his conduct negatively affected the duties of his employment. X terminated E's employment. X's disclosure of employee accusations to the members of its investigation team as part of the interview process did not intrude upon E's privacy interests.

e. Legal compulsion to provide information. An employer may be required to release employee information to a third party in situations in which the employee's consent is too difficult to obtain or unnecessary. Discovery requests and subpoenas may require an employer to disclose private information at the risk of sanction. Disclosure of employee personal information when compelled by statute, regulation, or judicial or administrative order does not constitute an employer intrusion of the employee's protected privacy interests under this Section.

Illustration:

6. The Internal Revenue Service serves employer X with a subpoena which requires X to report all compensation paid to E, deductions claimed by him, and expenses charged to him. X tells E of the subpoena and states its intention to comply unless a court relieves it of this responsibility. E writes to X in complaint about the potential release of information but takes no other action. X then complies with the subpoena. X does not intrude upon E's privacy interests by providing the information pursuant to administrative subpoena.

REPORTERS' NOTES

Comment a. Scope. A variety of causes of action have been sanctioned by courts for use against improper disclosure of employee information. These include: public disclosure of private facts, intrusion upon seclusion, breach of confidence, intentional infliction of emotional harm, negligence, negligent protection of confidential information, and breach of contract. This section endeavors to provide a more uniform and stable method of protection for employee privacy interests. It hews most closely to the public disclosure of private facts tort, as that tort is specifically designed to protect private information from disclosure. However, it recognizes the special relationship between employer and employee with respect to confidential information, and thereby does not require extensive "publicity" as part of the framework for liability.

Restatement Second of Torts § 652D sets forth the cause of action for public disclosure of private facts: **"**One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." The tort has been adopted in most jurisdictions. See Daniel J. Solove & Paul M. Schwartz, Information Privacy Law 106 (3d ed. 2009) (listing Nebraska, New York, North Carolina, North Dakota, Rhode Island, Utah, and Virginia as the non-adopting states). It follows a similar structure as the intrusion upon seclusion tort, as both require an invasion of one's privacy as well as that the invasion be highly offensive to a reasonable person. The intrusion upon seclusion tort protects against those invasions of privacy that penetrate into the victim's seclusion or privacy. The public disclosure tort, on the other hand, assumes that the privacy violation is the dispersal of private information out into the world. One invasion may violate both torts: for example, snooping into one's home with eavesdropping equipment violates the intrusion tort, while posting that material onto the Internet would violate the publicity tort. But the publicity tort does not require an intrusion; it merely requires improper disclosure.

The publicity tort is thus critical to protecting privacy within the employment relationship, as employees will often divulge private information to the employer as part of that relationship. The explicit guarantee, or more often the implicit expectation, is that the employer will keep that information private. There is one important limitation of the tort: the information disclosed cannot be of legitimate concern to the public. This limitation is likely required by the First Amendment, and the Restatement Second of Torts explicitly that "[i]t has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment to the Constitution, as applied to state law through the Fourteenth Amendment." Restatement Second of Torts § 652D, Special Note. However, this concern is much more likely to arise in situations involving the media, rather than the employment context.

In fact, the difficulty with the public disclosure tort in the employment context is the definition of "publicity." The comments to § 652D define publicity as follows:

> "Publicity," as it is used in this Section, differs from "publication," as that term is used in [Restatement Second of Torts] § 577 in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any

> communication by the defendant to a third person. "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.
>
> Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section. The distinction, in other words, is one between private and public communication.

Restatement Second of Torts § 652D cmt. a. Thus, in order to violate the "public" disclosure tort, the disclosure must be to the public.

In the employment context, however, employees are often injured by disclosure to a small but important subset of people, such as their coworkers. Courts have taken two approaches to such disclosures. One approach is to hold that the disclosure does not meet the requirements of the tort. See, e.g., Eddy v. Brown, 715 P.2d 74 (Okla. 1986) (disclosure to group of four employees is not publicity); Wells v. Thomas, 569 F. Supp. 426 (E.D. Penn. 1983) (disclosure of severance agreement to group of employees was not publicity) (applying Pa. law); Gonnering v. Blue Cross & Blue Shield, 420 F.Supp.2d 660 (W.D. Tex. 2006) (disclosure of employee's sexual orientation to two people is not publicity) (applying Tex. Law); Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550 (Minn. 2003) (no publicity when social security numbers were faxed out to sixteen different business locations); Johnson v. Mithun, 401 F. Supp. 2d 964 (D. Minn. 2005) (disclosure of multiple sclerosis to twelve to fifteen customers and employees was not publicity); Ex parte Birmingham News, Inc., 778 So. 2d 814 (Ala. 2001) (disclosure to one or at most a small group of people was not publicity); Pouncy v. Vulcan Materials Co., 920 F. Supp. 1566 (N.D. Ala. 1996) (disclosure to three other employees is not publicity) (applying Ala. law) ; Blackthorne v. Posner, 883 F. Supp. 1443 (D. Or. 1995) (employer's disclosure to a "handful" of people does not constitute publicity) (applying Or. Law); Fields v. Atchison, T. & S.F. Ry., 985 F. Supp. 1308 (D. Kan. 1997) (distribution to six other people did not constitute publicity) (applying Kan. law); C.L.D. v. Wal-Mart Stores Inc., 79 F. Supp. 2d 1080 (D. Minn. 1999) ("Moreover, the majority of state and federal courts to consider this issue have held that communication to a few people is not sufficient publicity to state a cause of action under this tort.") (applying Minn. law); Brown v. Mullarkey, 632 S.W.2d 507 (Mo. Ct. App. 1982) (employer's disclosure of entire personnel file to two of the employer's attorneys fell short of the requisite publication necessary to constitute disclosure to the public); Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371 (Colo. 1997) (requiring disclosure "to a large number of persons or the general public"); Seta v. Reading Rock, Inc., 654 N.E.2d 1061 (Ohio App. 1995) (holding that "disclosure to one single person . . . hardly fits the definition of publicity"). See also Restatement Second of Torts § 652D illus. 1 ("A, a creditor, writes a letter to the employer of B, his debtor,

informing him that B owes the debt and will not pay it. This is not an invasion of B's privacy under this Section."); Yoder v. Smith, 112 N.W.2d 862 (Iowa 1962) (disclosure of debts by creditor to employer not publicity).

The second approach to the "publicity" requirement is to determine whether the information was given to those with a "special relationship" to the employee. Courts have held that in the employment context disclosure to one's fellow employees may be sufficient to constitute the "public," particularly when employees are the relevant public with respect to the embarrassing nature of the information. As a result, some courts have noted that employees enjoy a "special relationship" in which disclosure can be particularly embarrassing and damaging. See Beaumont v. Brown, 257 N.W.2d 522, 531 (Mich. 1977) ("An invasion of a plaintiff's right to privacy is important if it exposes private facts to a public whose knowledge of those facts would be embarrassing to the plaintiff. Such a public might be the general public, if the person were a public figure, or a particular public such as fellow employees, club members, church members, family, or neighbors, if the person were not a public figure.") *overruled in part on other grounds by* Bradley v. Saranac Cmt. Sch. Bd. of Educ., 455 Mich. 285, 565 N.W.2d 650, 658 (1997); Miller v. Motorola, Inc., 560 N.E.2d 900, 903 (Ill. App. 1990) ("Where a special relationship exists between the plaintiff and the 'public' to whom the information has been disclosed, the disclosure may be just as devastating to the person even though the disclosure was made to a limited number of people. . . . Plaintiff's allegation that her medical condition was disclosed to her fellow employees sufficiently satisfies the requirement that publicity be given to the private fact."); Karraker v. Rent-A-Center, Inc., 411 F.3d 831 (7th Cir. 2005) ("The publicity requirement is satisfied by disclosure to a limited number of people if those people have a special relationship with the plaintiff that makes the disclosure as devastating as disclosure to the public at large.") (applying Ill. law); Karch v. BayBank FSB, 794 A.2d 763, 774 (N.H. 2002) ("[W]hether disclosure of a private matter has become one of public knowledge does not, as a matter of law, depend on the number of people told."); Johnson v. K-Mart Corp., 723 N.E.2d 1192, 1197 (Ill. App. 2000) ("We too hold that the public disclosure requirement may be satisfied by proof that the plaintiff has a special relationship with the 'public' to whom the information is disclosed. However, we also believe that rationale in *Miller* should be extended to include an employer as a member of a particular public with whom a plaintiff may share a special relationship."); Chisholm v. Foothill Capital Corp., 940 F. Supp. 1273 (N.D. Ill. 1996) ("Disclosure to . . . plaintiff's supervisor may meet the publication requirement for this tort because [supervisor] and plaintiff have the type of 'special relationship' that is described in *Miller,* 560 N.E.2d at 903.") (applying Ill. Law); Dietz v. Finlay Fine Jewelry Corp., 754 N.E.2d 958 (Ind. Ct. App. 2001) ("There is no evidence that Dietz had a special relationship with either so that a disclosure to them, under the circumstances, would render them a 'particular public.'"); McSurely v. McClellan, 753 F.2d 88, 112, 113 (D.C.Cir.1985) (holding that publication of private facts "may be satisfied by proof of disclosure to a very limited number of people when a special relationship exists between the plaintiff and the 'public' to whom the information has been disclosed"; and concluding that the publicity element was satisfied where the wife's private papers discussing her premarital behavior were disclosed to her spouse) (applying Kentucky law); cf. Doe v. Methodist Hosp., 690 N.E.2d 681 (Ind. 1997) (finding no publicity under either definition of publicity); Greenwood v. Taft, Stettinius & Hollister, 663 N.E.2d 1030 (Ohio Ct. App. 1995) (reinstating publicity to private facts claim based on presumably limited disclosure to other employees within the firm). In Miller v. Motorola, Inc., 560 N.E.2d 900 (Ill. App. 1990),

the plaintiff-employee consulted with the employer's resident nurse regarding her mastectomy and follow-up reconstructive surgeries. The nurse told her she would keep the information confidential. However, the information leaked out to a number of the employee's coworkers, and she was so distraught that she took early retirement. The court held that the employee met the "publicity" requirement:

> The Restatement indicates that the required communication must be more than that made to a small group; rather, the communication must be made to the public at large. In acknowledging this general requirement, however, some courts have recognized the need for flexibility in the application of the Restatement's theory to permit recovery for egregious conduct. . . These courts have realized that in circumstances where a special relationship exists between the plaintiff and the "public" to whom the information has been disclosed, the disclosure may be just as devastating to the person even though the disclosure was made to a limited number of people. . . . We adopt the position of the above authorities that the public disclosure requirement may be satisfied by proof that the plaintiff has a special relationship with the "public" to whom the information is disclosed. Plaintiff's allegation that her medical condition was disclosed to her fellow employees sufficiently satisfies the requirement that publicity be given to the private fact.

Id. at 903 (citations omitted). The Massachusetts privacy statute has been interpreted in the same way. Wagner v. City of Holyoke, 241 F.Supp.2d 78, 100 (D.Mass. 2003) ("Disclosure to the broad public is not necessarily required for a valid privacy claim. The disclosure of facts between coworkers is sufficient to violate privacy."); Bratt v. Int'l Bus. Machines Corp., 392 Mass. 508, 520, 467 N.E.2d 126, 135 (1984) ("We conclude that the disclosure of private facts about an employee among other employees in the same corporation can constitute sufficient publication under the Massachusetts right of privacy statute.").

In other contexts, defining "publicity" as the public at large may best capture the intent of § 652D. See Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550 (Minn. 2003) ("We conclude, therefore, that 'publicity' means that 'the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.' Restatement (Second) of Torts § 652D cmt. a."). However, the "special relationship" test captures important notions about the nature of privacy in the employment context, and the importance of confidentiality even with regard to a small subset of people. As one commentator has argued:

> The difference in the injury to a person's dignity between five persons' and fifty persons' access to a private fact is merely one of degree, not of nature. A person loses some sense of privacy the moment a second person divulges a private fact to a third person, particularly when the third person is a member of the same community as the first person. Thus, the degree of publicity, and the corresponding degree of injury to a person's dignity, is a factor better addressed in damage calculations than in summary judgments or motions to dismiss.

Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 Md. L. Rev. 425, 438 (1996). See also Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 Cal. L. Rev. 957, 992 (1989) ("We often care more about what those in our 'group' think of us than we do about our reputation among the strangers who comprise the general public."). As a result, defining "publicity" too expansively fails to capture important disclosure harms, especially within the employment relationship.

The notion of confidentiality perhaps better captures the core of protections necessary to prevent employee injury from improper employer disclosure. The breach of confidentiality tort is fairly straightforward: to establish liability, the plaintiff must prove that the defendant owed a duty of confidentiality to the plaintiff, and that the defendant breached that duty. The duty of confidentiality can arise from implicit or explicit promises, fiduciary relationships, laws and regulations, and ethical rules. See, e.g., Coralluzzo, By and Through Coralluzzo v. Fass, 435 So.2d 262 (Fla. App. 1983) ("The significance of this case is the unique fiduciary and confidential relationship between physician and patient, a relationship which imposes a duty on the physician not to disclose to third parties confidential information concerning his patient when not compelled to by law." (emphasis omitted)). See generally Restatement Second of Torts § 874 ("One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.")

Employers and employees must as of course exchange confidential information with each other. Employees incur a duty not to share this information with outside parties. . See § 8.01(a) ("Employees owe a duty of loyalty to their employer in matters related to the employment relationship."); § 8.01(b)(i) ("Employees breach the duty of loyalty by disclosing or using the employer's confidential information . . . for any purpose adverse to the employer's interest (including after termination of the employment relationship . . . ."); § 8.03 ("An employee or former employee breaches the duty of loyalty owed to the employer if, without the employer's consent, the employee discloses to a third party or uses for the employee's own benefit or a third party's benefit the employer's confidential information . . . ."). The employer must also obtain a wide range of confidential information from employees, both to meet its legal obligations and to ensure the efficient running of its operations. The employer is expected to keep this information confidential. Sometimes there will be an explicit agreement to that effect; more often the understanding is implicit. However, the breach of confidentiality tort has not been used in this context. Many states have recognized the confidentiality tort, but in the context of other relationships, such as doctor-patient and bank-customer. Horne v. Patton, 287 So. 2d 824, 829-30 (Ala. 1973) ("It is thus that it must be concluded that a medical doctor is under a general duty not to make extra-judicial disclosures of information acquired in the course of the doctor-patient relationship and that a breach of that duty will give rise to a cause of action."); Chizmar v. Mackie, 896 P.2d 196, 207 (Alaska 1995) ("We find MacDonald 's recognition of a cause of action for emotional distress arising from a physician's breach of the duty of confidentiality to be persuasive."); Rubenstein v. South Denver Nat'l Bank, 762 P.2d 755, 757 (Colo. Ct. App. 1988) ("In light of the considerable authority for the general rule that a bank is under a duty not to disclose the financial condition of its customers and depositors, we conclude that the trial court erred in entering summary judgment dismissing plaintiffs' claim for unauthorized disclosure of

confidential information."); Fanean v. Rite Aid Corp. of Del., Inc., 984 A.2d 812, 824 (Del. Super Ct. 2009) ("The tort of breach of confidentiality was first stated by this Court in *Martin.* This Court . . . later set out three elements required to state a cause of action: 1) defendant owed a duty of confidentiality; 2) a physician-patient relationship existed; and 3) that duty was breached."); Street v. Hedgepath, 607 A.2d 1238, 1246 (D.C. 1992) ("This court…has recognized a cause of action in tort for a breach of the confidential physician-patient relationship, based on the statutory privilege and on certain licensing statutes which generally prohibit physicians from disclosing patient treatment, except in cases of gunshot wounds and child neglect…The tort of breach of a confidential relationship consists of the 'unconsented, unprivileged disclosure to a third party of nonpublic information that the defendant has learned within a confidential relationship.'"); Barnett Bank of West Florida v. Hooper, 498 So.2d 923, 925 (Fla.1986) (noting that a bank has a qualified duty not to disclose confidential information of its customer unless "special circumstances" mandate the disclosure."); Peterson v. Idaho First Nat. Bank, 367 P.2d 284, 290 (Idaho 1961) ("It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account, and that, unless authorized by law or by the customer or depositor, the bank must be hald liable for breach of the implied contract."); Geisberger v. Willuhn, 390 N.E.2d 945, 948 (Ill. Ct. App. 1979) ("We find that, for all practical purposes, the breach of a confidential relationship and the breach of contract are probably co-extensive. In other words, those disclosures which violate the statutory privilege also define what is actionable under a contract theory."); Indiana Nat. Bank v. Chapman, 482 N.E.2d 474, 482 (Ind. Ct. App. 1985) ("We hold a bank impliedly contracts only that it will not reveal a customer's financial status unless a public duty arises. Communication to legitimate law enforcement inquiry meets the public duty test. We hold the trial court erred in denying the Bank's motion for directed verdict on the theory of breach of implied contract."); Leger v. Spurlock, 589 So.2d 40, 43 (La. Ct. App. 1991) ("Appellant contends that the cause of action for breach of patient-physician confidentiality is based in implied contract and tort. We agree and accordingly find that appellant's breach of confidentiality claim alleges a 'breach of contract based on ... professional services rendered ... by a health care provider, to a patient.'"); Burford v. First Nat. Bank in Mansfield, 557 So.2d 1147, 1151 (discussing statutes that require banks refrain from disclosing customer information and finding that "these statutes create a duty of confidentiality on the part of financial institutions in favor of their customers" that is "actionable"); Sargent v. Buckley, 697 A.2d 1272, 1275-76 (Me. 1997) (finding an actionable tort where a lawyer discloses the confidential information of a former client in the representation of a current client); Suburban Trust Co. v. Waller, 408 A.2d 758, 764 (Md. Spec. App. 1979) ("We think that a bank depositor in this State has a right to expect that the bank will, to the extent permitted by law, treat as confidential, all information regarding his account and any transaction relating thereto. Accordingly, we hold that, absent compulsion by law, a bank may not make any disclosures concerning a depositor's account without the express or implied consent of the depositor."); Alberts v. Devine, 479 N.E.2d 113, 118, 120 (Mass. 1985) ("We continue to recognize a patient's valid interest in preserving the confidentiality of medical facts communicated to a physician or discovered by the physician through examination…. We hold today that a duty of confidentiality arises from the physician-patient relationship and that a violation of that duty, resulting in damages, gives rise to a cause of action sounding in tort against the physician."); Kelley v. CVS Pharmacy, 23 Mass. L. Rptr. 87 (Mass. Super. Ct. 2007) (finding a duty of confidentiality from pharmacists to pharmacy customers to not disclose their

prescription information without authorization or legal obligation); Saur v. Probes, 476 N.W.2d 496, 498 (Mich. Ct. App. 1991) ("In light of a psychiatrist's ethical obligation to maintain patient confidences, as well as the state's interest in preserving its policy of protecting physician-patient confidences, we conclude that a legal duty does exist on the part of a psychiatrist not to disclose privileged communications."); Signergy Sign Group, Inc. v. Adam, No. A04-70, A04-147, 2004 WL 2711312, at *2 (Minn. Ct. App. Nov. 30, 2004) (analyzing trade secrets as a breach of a confidential relationship, rather than on whether a trade secret exists); Hopewell Enterprises, Inc. v. Trustmark Nat. Bank, 680 So.2d 812, 817-18 (Miss. 1996) (rejecting the claim that the debtor-creditor claim imposes a duty of confidentiality, but finding cases from other jurisdictions that find a duty of confidentiality in the bank-depositor relationship persuasive); Brandt v. Medical Defense Associates, 856 S.W.2d 667, 674 (Mo. 1993) ("We hold that a physician has a fiduciary duty of confidentiality not to disclose any medical information received in connection with the treatment of the patient. We further hold that if any such information is disclosed under circumstances where this duty of confidentiality has not been waived, the patient has a cause of action for damages in tort against the physician."); Pigg v. Robertson, 549 SW2d 597 (Mo. App. 1977) (bank owed duty of confidentiality to its borrower); Behringer Est. v. Princeton Med. Ctr., 592 A.2d 1251, 1268, 1274 (N.J. Super. Ct. 1991) ("The physician-patient privilege has a strong tradition in New Jersey. The privilege imposes an obligation on the physician to maintain the confidentiality of a patient's communications . . . . The medical center is liable for damages caused by this breach."); Runyon v. Smith, 749 A.2d 852, 854 (N.J. 2000) ("We also are in accord with the Appellate Division's conclusion that a psychologist who fails to assert her patient's privilege and discloses as a witness confidential information concerning that patient without a court determination that disclosure is required may be liable for damages to the patient."); MacDonald v. Clinger, 446 N.Y.S.2d 801, 805 (N.Y. App. Div. 1982) ("The relationship of the parties here was one of trust and confidence out of which sprang a duty not to disclose. Defendant's breach was not merely a broken contractual promise but a violation of a fiduciary responsibility to plaintiff implicit in and essential to the doctor-patient relation."); Daly v. Metropolitan Life Insurance Co, 782 N.Y.S.2d 530, 535 (N.Y. 2004) (recognizing that an insurer has a "duty to protect the confidential personal information provided by" the insured); Tehven v. Job Service North Dakota, 488 N.W.2d 48, 51 (N.D. 1992) ("Courts have generally recognized a patient's right to recover damages from a physician for unauthorized disclosure of medical information as an invasion of privacy, a breach of the physician-patient confidential relationship, a violation of statute, or breach of the fiduciary relationship between a physician and a patient."); Biddle v. Warren Gen Hospital, 715 N.E.2d 518, 523 (Ohio 1999) ("We hold that in Ohio, an independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship."); Alexander v. Culp, 705 N.E.2d 378, 382 (Ohio Ct. App. 1997) ("Public policy supports an action for breach of confidentiality by a minister. There is a public policy in favor of encouraging a person to seek religious counseling. People expect their disclosures to clergy members to be kept confidential."); Djowharzadeh v. City Nat. Bank & Trust Co., 646 P.2d 616, 619-20 (Okla.App.1982) ("Bank's relationship to a loan applicant implicitly imposes the duty to keep the contents of loan applications confidential. . . . The record clearly shows confidential information was given to Loan Officer whose specific duty was to collect and keep such information. Damages caused by his carelessness in its handling are directly chargeable to the bank."); Bryson v. Tilllinghast, 749 P.2d 110 (Okla. 1988) (finding that "an implied guarantee of confidentiality exists when a doctor and his patient enter into a

contract for medical services," but stating that since the doctor had not been professionally sanctioned, the court was reluctant to find a cause of action against him.); Humphers v. First Interstate Bank of Oregon, 696 P.2d 527, 535-36 (Or. 1985) ("A physician's duty to keep medical and related information about a patient in confidence is beyond question. . . . [P]laintiff may proceed under her claim of breach of confidentiality in a confidential relationship."); Burger v. Blair Medical Associates, Inc., 964 A.2d 374, 380 (Pa. 2009) ("[A]ll of the elements of a breach-of-confidentiality claim are present and are sufficiently distinguishable from an invasion-of-privacy cause. The duty on a health care facility's part to maintain the confidentiality of medical records arises out of the confidential nature of the relationship and the personal nature of the information which must be disclosed in the ordinary course of the medical treatment."); McGuire v. Shubert, 722 A.2d 1087, 1091 (Pa. Super. Ct. 1998) ("We find that the duty on a bank and its employees to keep a customer's bank account information confidential, which has long been recognized by the above-mentioned jurisdictions, is present as an implied contractual duty under Pennsylvania common law, as well."); McCormick v. England, 494 S.E. 2d 431, 437 (S.C. Ct. App. 1997) ("We find the reasoning of the cases from other jurisdictions persuasive on this issue and today we join the majority and hold that an actionable tort lies for a physician's breach of the duty to maintain the confidences of his or her patient in the absence of a compelling public interest or other justification for the disclosure."); Schaffer v. Spicer, 215 N.W.2d 134, 136 (S.D. 1974)("[S.D. Codified Laws § 19-2-3] imposes a duty upon a physician or other healing practitioner to keep confidential or privileged, information gained while in professional attendance of a patient. If a practitioner of the healing art breaches that duty by making any unauthorized disclosure of confidential information he may be liable to the patient for resulting damages."); Givens v. Mullikin ex rel. Estate of McElwaney, 75 S.W.3d 383, 407–08 (Tenn. 2002) ("[P]atients and physicians now clearly expect that the physician will keep the patient's information confidential, and this expectation arises at the time that the patient seeks treatment…[W]e now expressly hold that an implied covenant of confidentiality can arise from the original contract of treatment for payment, and we find that the plaintiff's complaint here has adequately alleged the existence of an implied covenant of confidentiality."); Sorensen v. Barbuto, 143 P.3d 295, 299 (Utah Ct. App. 2006) ("It is obvious then that [the doctor-patient] relationship gives rise to an implied covenant which, when breached, is actionable. . . . [H]owever, . . . the relationship contemplates an additional duty [of confidentiality] springing from but extraneous to the contract and that the breach of such duty is actionable as a tort." (citation omitted)); Shaw Resources Ltd., LLC v. Pruit, Gushee & Bachtell, P.C., 142 P.3d 560, (Utah Ct. App. 2006) (discussing a legal malpractice claim for breach of fiduciary duty by disclosure of confidential information); Fairfax Hospital By and Through INOVA Health System Hospitals, Inc. v. Curtis, 492 S.E.2d 642, 645 (Va. 1997) ("We hold that in the absence of a statutory command to the contrary, or absent a serious danger to the patient or others, a health care provider owes a duty to the patient not to disclose information gained from the patient during the course of treatment without the patient's authorization, and that violation of this duty gives rise to an action in tort."); State v. McCray, 551 P2d 1376, 1380 (Wash. Ct. App. 1976) ("[A] bank has an obligation to its customers and depositors to at least not unnecessarily, promiscuously or maliciously disclose their financial condition".); Morris v. Consolidated Coal Co., 446 S.E.2d 648, (W.Va. 1994) ("[W]e hold that a patient does have a cause of action for the breach of the duty of confidentiality against a treating physician who wrongfully divulges confidential information."); Krier v. Villone, 766 N.W.2d 517, 535 (Wis. 2009) ("[A]n

accountant who discloses information about another client could breach the accountant's duty of confidentiality.").

Only a handful of states have explicitly decided not to recognize the breach of confidence tort in any context. See D.H. v. ValueOptions Inc., No. 1 CA-CV 08-0643, 2009 WL 2195051, at *7 (Ariz. Ct. App. July 23, 2009) ("In this case, [plaintiff] does not allege and cites no authority that a claim for breach of duty of confidentiality existed at common law . . . ."); Meade v. Orthopedic Assocs. of Windham County, No. CV064005043, 2007 WL 4755001, at *5 (Conn. Super Ct. Dec. 27, 2007) ("There is no established cause of action in Connecticut for breach of confidence in the context of a patient-physician or patient-hospital relationship. Breach of confidence has typically arisen in the context of the attorney-client relationship, where it is considered a presumption."); Eickemeyer v. State, 666 N.W.2d 620, (Iowa Ct. App. 2003) ("Chapter 135C creates a comprehensive scheme for the licensure and regulation of health care facilities providing housing for the aged, infirm, convalescent, and the mentally or physically dependent….[N]o remedy, administrative or otherwise, is provided in the statute for a breach of confidentiality by the health care facilities….We…conclude that by not providing a remedy for a breach of confidentiality, the legislature has signaled its intention not to provide a private cause of action."); Horosko v. Jones, 101 P.3d 1270, 1270 (Kan. 2004) ("[W]e agree with those courts which hold that a minister's duty of confidentiality is a moral, not a legal, obligation."); Schoneweis v. Dando, 435 N.W.2d 666, 673 (Neb. 1989) (finding no duty of confidentiality in the debtor-creditor relationship of a bank and its customer).

Some states have specific confidentiality statutes. However, most involve medical information or specific professional relationships such as doctor-patient and minister-congregant. See ARIZ. REV. STAT. ANN. § 36-509 (confidentiality of medical records); CAL. CIV. CODE § 56.10 (confidentiality of medical records); CONN. GEN. STAT. ANN. § 31-128f (prohibiting an employer from disclosing any information included in an employee's personnel file); Gracey v. Eaker, 837 So.2d 348, 353 (Fla. 2002) ("The statutory scheme clearly mandated that the communications between the petitioners and Eaker [in a therapist-client relationship] 'shall be confidential.' § 491.0147, Fla. Stat. (1997). This created a clear statutory duty that, if violated, generated a viable cause of action in tort."); GA. STAT. § 37-3-166 (confidentiality of patient records); HAW. REV. STAT. § 325-101 (duty of confidentiality concerning medical records relating to a patient's HIV status); 210 ILL. COMP. STAT. § 85/6.14b (confidentiality of hospital patient records); IND. CODE § 16-39-5-3 (confidentiality of patient records); KY. REV. STAT. § 214.181 (requiring confidentiality of HIV test patients); 24 Me. RSA § 2510 (requiring confidentiality of medical records); ANNO. CODE OF MD. HEALTH GEN. § 4-302 (requiring that medical records are kept confidential); MASS. GEN. LAWS. 112 § 87E (requiring that accountants keep records and information communicated to them by their clients confidential); MICH. COMP. LAWS § 600.2156 (requiring priests and ministers to keep confessions confidential); MINN. STAT. § 144.293 (requiring confidentiality of health records); Mont. Code Ann. § 26-1-805 (creating a physician-patient privilege); NEV. REV. STAT. 629.061 (providing conditions under which health records may be disclosed and eliminating civil liability for anyone who discloses in accordance with the statute); GEN. LAWS. R.I. § 5-37.3-4 (prohibiting the release of transfer of confidential health care information without the consent of the patient, and allowing for actual and punitive damages if the statute is violated); TEX. HEALTH & SAFETY CODE ANN. § 773.091 (requires confidentiality of communications made in emergency medical services); Berger v. Sonneland,

26 P.3d 257, 269 (Wash. 2001) ("There is a cause of action under RCW chapter 7.70 for a physician's unauthorized disclosure of confidential information when the injury occurs as a result of "health care," when the breach occurs while the physician is utilizing the skills the physician had been taught in examining, diagnosing, treating or caring for the patient."); WIS. STAT. § 146.82 ("All patient health care records shall remain confidential. Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient.").

Taken together, the common law and state statutory protections have carved out important protections for confidential relationships. These relationships are generally relationships between professionals and clients, such as doctor-patient, accountant-client, or minister-congregant. Although confidentiality is likely expected in the employment relationship, courts thus far have been reluctant to establish a cause of action for its breach. See Scott L. Fast, Note, *Breach of Employee Confidentiality: Moving Toward a Common Law Tort Remedy*, Note, 142 U. Pa. L. Rev. 431 (1993) (discussing the potential for the confidentiality tort in the workplace); cf. Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L.J. 123 (2007) (comparing the broad confidentiality common law protection in the U.K. with the overall reluctance of U.S. courts to adopt breach of confidentiality outside of limited settings). However, the employer-employee relationship shares similarities with other relationships that have been recognized as confidential in nature:

> First, the relationship aspect of employee-employer interaction is clearly defined and recognized by the parties involved from the beginning. The tie between employee and employer is neither speculative nor prone to misinterpretation. The relationship is fundamental to the economic structure and a necessary part of most persons' everyday lives. Moreover, the employee-employer relationship has deep roots in common and statutory law. The law of agency recognizes employer liability in several contexts while state and federal statutes impose many restrictions and duties on individuals who enter this relationship either as an employee or an employer.
>
> Second, the employee-employer relationship clearly satisfies the nonpersonal requirement. It is a contractual relationship in which information is divulged for reasons of economic necessity, not because of emotional or familial ties.
>
> Third, and most importantly, the employee-employer relationship strongly suggests an expectation and custom of confidentiality. When an employee gives information to her employer, such as financial records, medical records, or criminal records, this information is given for one reason only: to aid the employer in her ability to run her business effectively. There is an implicit expectation that these records will be used for their intended purpose. Moreover, the nature of the information itself strongly suggests that it is to be kept confidential. In nearly every other context in one's life, when information about one's health or finances is exchanged between individuals in a non-social context, an expectation of confidentiality is assumed.

Fast, *Employee Confidentiality*, supra, at 457. For these reasons, a breach of confidentiality approach would recommend itself to the employer-employee relationship. It would mirror the protections of existing contractual protections but would also find a duty to protect when the parties have implicitly arranged for the employer to hold confidential information. Unlike the public disclosure tort, it would not require any publicity, nor would it require that the disclosure be highly offensive.

Some litigants have looked to the intrusion upon seclusion tort for relief in the employer disclosure context. See, e.g., French v. U.S. ex rel. Dept. of Human Health and Human Service, 55 F. Supp. 379 (W.D.N.C. 1999) (employer disclosed confidential medical information about former employee to potential employers); Toomer v. Garrett, 574 S.E.2d 76 (N.C. App. 2002) (applying the intrusion tort to a situation where the employer obtained information from his personnel files and gave the information to third parties); Kelleher v. City of Reading, 2002 U.S. Dist. Lexis 9408 (E.D. Pa. 2002) (applying both intrusion upon seclusion and publicity to private facts torts to claim for disclosure to information to third parties). One commentator has argued for subsuming the publicity tort into the intrusion tort in terms of the analysis to be undertaken. Lior Strahelivitz, *Reunifying Privacy Law*, 98 Cal. L. Rev. 2007, 2033 (2010) ("Returning privacy tort law to the 1890s-era status quo is attractive, and it does not require the replacement of Prosser's framework with element-less torts. We can embrace a reformed version of Warren and Brandeis's unified tort for invasion of privacy. Such an invasion occurs when the defendant infringes upon (1) the defendant's private facts or concerns, (2) in a manner that is highly offensive to a reasonable person, and (3) engages in conduct that engenders social harms that exceed the associated social benefits."). However, the difficulty with the intrusion tort in this context is that the employer has generally not intruded to get the information in the first place. As *Miller* explains:

> Illinois courts which have recognized such a cause of action have outlined the following elements necessary to be pled and proven by the plaintiff: (1) an unauthorized intrusion or prying into the plaintiff's seclusion; (2) the intrusion must be offensive or objectionable to a reasonable person; (3) the matter upon which the intrusion occurs must be private; and (4) the intrusion causes anguish and suffering. Plaintiff's factual allegations do not satisfy this action's unauthorized intrusion element. The alleged wrongful actions involve the dissemination or publication of information voluntarily provided to defendant by plaintiff, not defendant's unauthorized intrusion.

Id. at 904 (citations omitted). Although the disclosure itself could be characterized as the "intrusion," it is difficult to reconcile with the fact that the employee voluntarily provided the information to the employer.

The intentional infliction of emotional distress tort could be yet another potential avenue of relief. The tort requires: "An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional disturbance to another is subject to liability for that emotional disturbance and, if the emotional disturbance causes bodily harm, also for the bodily harm." Restatement Third of Torts § 45. The severity of the harm is what would set this tort apart from the others. But some disclosures of embarrassing information could certainly be considered

"extreme and outrageous conduct," and many victims of such disclosure have experienced severe emotional disturbance. See, e.g., French v. U.S. ex rel. Dept. of Human Health and Human Service, 55 F. Supp. 379 (W.D.N.C. 1999) (employer disclosed confidential medical information about former employee to potential employers). Of course, this tort encompasses a much broader range of activity, and thus fails to capture the unique harm that disclosure of private information can inflict.

Weighing the precedents in this area, along with a sense of the underlying harms at issue, this Section follows the "special relationship" approach to the public disclosure of private facts tort. The key elements are: the employer discloses private employee information to third parties (§ 7.05) and the disclosure is unreasonable and offensive (§ 7.06). The "publicity" element is taken into account in the "third parties" analysis as well as the "unreasonable and offensive" analysis. This approach follows the privacy torts as developed in Restatement Second of Torts, but recognizes the relationship between employer and employee in the exchange of highly personal information.

There are also statutory protections for improper disclosure of employee records. In Bratt v. Int'l Bus. Machines Corp., 392 Mass. 508, 520, 467 N.E.2d 126, 135 (1984), the Massachusetts Supreme Court held that disclosure of personal medical information to fellow employees could constitute an invasion of privacy under the Massachusetts statute (Mass. Gen Laws, c. 214 § 1B ("A person shall have a right against unreasonable, substantial or serious interference with his privacy.")). A physician who worked for the employer conducted a medical exam of an employee. "We conclude that the disclosure of private facts about an employee among other employees in the same corporation can constitute sufficient publication under the Massachusetts right of privacy statute." See, e.g., Privacy Act of 1974, 5 U.S.C. § 552a(g) [other statutes to be added].

Private information as described in § 7.03(a) does not lose its privacy as to third parties once it is disclosed to the employer. It is no longer private as to the employer, of course, but that does not render the information non-confidential to anyone else. The information must be private to be protected; information about workplace performance will generally not be considered private information. See, e.g., Dancy v. Fina Oil & Chem. Co., 3 F. Supp. 2d 737 (E.D. Tex. 1997) (distribution of list of employees with excessive absences to all employees was not a distribution of private facts because the absences were held open to the public eye.)

Comment b. Employer intrusion. Illustration 1 is based on French v. U.S. ex rel. Dept. of Human Health and Human Service, 55 F. Supp. 2d 379 (W.D.N.C. 1999). The employer in *French* disclosed confidential medical information about a terminated employee to potential employers; as a result, the employee was unable to find work. The court held that although the state (North Carolina) did not recognize the tort of publicity to private facts, plaintiff did state claims under the intrusion upon seclusion and intentional infliction of emotional distress torts.

Comment c. Access to third parties. As employers collect more and more employee-related information on electronic databases, these pools of information are vulnerable to attack. See Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S. Cal. L. Rev. 241 (2007) (discussing the problem of

insecure databases of personal information). One early case dealing with this issue is Allison v. Aetna, Inc., 2010 WL 3719243 (E.D. Pa. March 9, 2010). The complaint in *Allison* was dismissed for lack of standing due to the absence of any injury in fact. See id at *5 ("Plaintiff's alleged injury of an increased risk of identity theft is far too speculative."). In order to prove a claim, the employee would have to show actual injury caused by the disclosure of the information. Cf. O'Donnell v. U.S., 891 F.2d 1079 (3d Cir. 1989) (finding a private right of action under the Mental Health Procedures Act of 1976 for failure to protect the confidentiality of psychiatric records).

Illustration 3 is based on Karraker v. Rent-A-Center, Inc. 411 F.3d 831 (7th Cir. 2005). The disclosure claim in *Karraker* centered around the employer's handling of the personality and aptitude test results. The test results were kept in a filing cabinet in personnel files, and anyone wishing to view the records needed permission to do so from someone in the payroll department. The filing cabinet was locked at night, and the records were eventually moved into a locked room. According to the court, the employee-plaintiffs "provided only vague claims that their test results actually became public, instead noting general discussions about the test results, mostly of other employees." The court ruled: "Although someone could have seen the test results sitting in the fax machine or in the personnel file, that possibility is not sufficient to support a claim."

Comment d. Legitimate reason for access. Illustration 4 is based upon Blackwell v. Harris Chemical North America, Inc., 11 F.Supp.2d 1302 (D. Kan. 1998)**.** Illustration 5 is based on Rogers v. Int'l Bus. Machines, 500 F. Supp. 867 (W.D. Penn. 1980). In *Rogers*, the court found that the employer had not publicized the information regarding the employee's personal life, as "[a]ll information was conveyed only to employees of IBM with a duty, responsibility and a need for such information in order to properly address the concerns of subordinate employees." Id. at 870. Another example in which employees had reason to know is Shattuck Owen v. Snowbird Corp., 16 P.3d 555 (Utah 2000). In *Shattuck*, the plaintiff-employee suffered a sexual assault on the employer's premises. The assault was caught on the employer's videotape. As part of the investigation into the incident, the police as well as several of the employer's employees saw the video. The plaintiff sued for invasion of privacy from disclosure of the video. The court found that "the undisputed evidence shows that ten identified people, all legitimately involved with the investigation into the sexual assault, saw the video." Id at 559. See also Karraker v. Rent-A-Center, Inc. 411 F.3d 831 (7th Cir. 2005) ("Disclosure to persons with a 'natural and proper interest' in the information is not actionable."); Roehrborn v. Lambert, 660 N.E.2d 180 (Ill. App. Ct. 1995) (disclosure of overall test results to outside training institute did not constitute publicity because the director had a legitimate interest in knowing the performance of potential applicants on the required tests and because the disclosure was to a small audience with a legitimate interest in the facts); Beard v. Akzona, Inc., 517 F. Supp. 128 (E.D. Tenn. 1981) (disclosure to supervisor and other management personnel of taped conversation between employees about their affair was not publicity as the only people who heard the tapes were employees of the defendant that had some job-related connection to the employees).

The courts recognize that employers in some circumstances may have legitimate reasons in disclosing private employee information to coworkers and third parties on "a need to know" basis. In Ali v. Douglas Cable Communications, 929 F. Supp. 1362 (D. Kan. 1996), two former cable company employees sued their former employer for disclosure of private facts. They

complained that management had told other employees at the company that he was dangerous and threatening. The court found that the only groups were who told about the employees' potential dangerousness were employees and law enforcement and that both of these groups would have a legitimate interest in knowing that information. The court concluded there was no publication of the allegations and therefore no liability. In Davis v. Monsanto, Co., 627 F. Supp. 418 (S.D. W.Va. 1986), an employee sued his employer after they disclosed his mental health records to several management personnel and union representatives. The employee went to a psychologist after going through a divorce and experiencing some mental health issues. The psychologist deemed the employee to be suicidal and possibly homicidal. The psychologist then informed his employer who told several management personnel. Because the employer wanted to remove him from his job, they contacted several union representatives and discussed the issue with them. The union persuaded the employer to not fire the employee, who retired nine months later. The employee brought suit, claiming disclosure of private facts. The court held that the limited disclosure to only two people outside the management personnel within the company was insufficient to establish publicity. The court also held that the disclosures to the union were qualifiedly immune from the invasion of privacy tort because the employer was furthering a legitimate interest in protecting its plant employees from being exposed to harm and helping to further the union's interest by keeping its members from harm. Moreover, the court held that a West Virginia law, stating that all employers had to provide a safe workplace, required the disclosures because not doing so would put its employees in danger. But as to disclosures to union representatives, see Detroit Edison Co v. NLRB, 440 U.S. 301 (1979). In *Detroit Edison*, the Supreme Court found that the employer did not commit an unfair labor practice in failing to turn over the employees' results of a personality and aptitude test to the union. The Court emphasized that the company had promised in good faith to keep the scores confidential and that the privacy of the matter counseled in favor of keeping the information private.

Comment e. Legal compulsion to provide information. Illustration 6 is taken from Wells v. Premier Indus. Corp., 691 P.2d 765 (Colo.App. 1984). In *Wells*, the IRS served the plaintiff's former employers with a summons that required the employer to provide forms and ledgers showing "all compensation paid to [plaintiff], deductions claimed by him, and expenses charged to him." Id. at 767. The employer notified the plaintiff of the summons and stated its intention to comply unless a court relieved them of this responsibility. The plaintiff wrote to the employer objecting that such a disclosure would violate his privacy. However, he took no other action to object to the summons. The employer then complied with the summons. The court found that there was no invasion of privacy.

§ 7.06 Unreasonable and Offensive Employer Intrusions

(a) An employer is subject to liability under tort for an intrusion upon an employee's protected privacy interest if that intrusion is unreasonable and offensive to a reasonable person under the circumstances.

(b) An employer's intrusion upon an employee's protected privacy interest is unreasonable under Subsection (a) if the employer does not have a sufficient justification for the scope of the intrusion or the manner of the intrusion. The following considerations are relevant to determining the reasonableness of the employer intrusion:

(1) the nature, quality, and degree of invasiveness of the intrusion;

(2) the availability of less invasive alternatives;

(3) the provision of advance notice to the employee;

(4) the employee's consent to the intrusion;

(5) the nature of the employer's legitimate business interest for the intrusion; and

(6) an important public interest or interests for the intrusion.

(c) An employer's intrusion upon the employee's privacy interest is offensive to a reasonable person under the circumstances if the manner or scope of the employer's intrusion is a significant departure from the accepted norms for effectuating such an intrusion.

Comment:

a. Scope. The basic structure of the tort of invasion of employee privacy is established in § 7.01 (and restated in Subsection (a) here): the employer is liable for an invasion of privacy if

(a) the employer intrudes upon an employee's protected privacy interest, and (b) the intrusion is unreasonable and would be offensive to a reasonable person under the circumstances. Section 7.02 lists the employer intrusions upon protected employee privacy interests, and these intrusions are explored further in §§ 7.03—7.05. However, proof of an employer intrusion into an employee's protected privacy interest satisfies only the first element of the cause of action. In order for the employer intrusion to be actionable invasion of privacy, it must also be unreasonable and offensive under this Section.

Privacy intrusions are not in and of themselves actionable; liability depends on whether the intrusion is or is not justified by competing private and societal interests. The first step in the analysis (§ 7.06(b)) is whether the employer acted reasonably in effecting the intrusion. This step requires an evaluation of reasonableness of the manner and scope of the intrusion, as well as the employer's legitimate or public interest reasons for the intrusion. Section 7.06(b) lists factors that are relevant to this reasonableness inquiry.

Even if the employer's intrusion is considered an unreasonable interference with the employee's protected privacy interest under Subsection (b), it is still not actionable unless the intrusion would be offensive to a reasonable person under the circumstances. The latter remains an additional requirement under the common law of workplace privacy. Section 7.06(c) states that the intrusion must be a significant departure from the accepted norms for effectuating such an intrusion. The practices of other employers in like circumstances are relevant to the offensiveness inquiry.

b. Manner of intrusion. The employer can intrude upon employees' privacy interests by the intrusion itself, or its manner or scope, or both. "Manner" refers to the means that the employer uses in effecting the intrusion. "Scope" refers to the extensiveness or breadth of the

intrusion. The manner of the intrusion includes factors such as the type of information obtained during the intrusion; the degree of privacy generally accorded to the physical or electronic location in question; and the means used to effectuate the intrusion. The type of information is related to the degree of privacy the employee has in the information: how personal it is, how harmful or embarrassing it would be to disclose it to the employer or others, and how easy it would be to obtain the information otherwise.

Illustrations:

1. Employer X asks all its employees for personal information, such as home addresses, names of children, and phone numbers, in order to create an employee directory. Employees may decline to participate in the directory with no employment ramifications. Whether or not the query, alone, may constitute an intrusion under § 7.03, the manner of the intrusion is not unreasonable or offensive.
2. X requires job applicants who have received a conditional offer of employment to undergo a urinalysis to test for the use of illegal substances. The applicants are required to urinate in full view of an employee monitor. Whether or not requiring the urinalysis is itself reasonable, the manner of the intrusion is unreasonable unless justified by a strong business or public interest.
3. X maintains a video surveillance system of its working area for 100 employees. The working area is completely open without enclosed offices. To make sure that employees are working efficiently, X's supervisors monitor the working area by

observing the video. X's employees are informed of the video surveillance. The video surveillance system and the manner of its implementation are reasonable.

The employer's choice of means to effectuate the intrusion is also taken into account in assessing the reasonableness or offensiveness of the method of the intrusion. In particular, the use of deception or secrecy in effectuating the intrusion is particularly questionable unless justified by legitimate business reasons and in line with the practices of other employers in like circumstances.

Illustrations:

4. X hires an investigator to determine if employee E has filed a fraudulent workers' compensation claim. The investigator uses a powerful telephoto lens to take pictures inside of the employee's house. The manner of X's intrusion is unreasonable.

5. X hires private detectives to investigate fraud and drug use among its employees. The investigators use aliases to pose as employees, and they conduct frequent conversations with other employees on personal topics such as family matters, intimate affairs, and future employment plans. The investigators then provide the employer with reports on these matters. Unless X has taken steps to steer the detectives away from inquiring about the employees' personal matters, the manner of the X's investigation is unreasonable.

c. Scope of the intrusion. Intrusions into an employee's privacy can be limited or expansive in scope. Under § 7.06(b), both the scope and manner of the employer's intrusion must

be justified by the employer's legitimate business interests. Although the intrusion itself may be justified by the employer's legitimate business interests or the public interest, the scope of intrusion must also be justified by those interests.

Illustration:

6. Same facts as Illustration 4, except that the employer X also requires random urinalysis of existing employees. X must justify the expansion of the scope of the required urinalysis with a stronger legitimate business justification or public interest, even if it is reasonable to require the test of job applicants.

d. Availability of less invasive means. A relevant factor in assessing the reasonableness of the employer's intrusion if whether the employer could have achieved the same goals while employing less invasive means or a more limited scope to the intrusion. The employer is expected to limit the invasion based on its legitimate business purposes. However, an employer need not employ the most limited means, particularly if a more expansive scope may be justified based on the original business purposes.

Illustration:

7. The IT department for employer X monitors Internet use in order to prevent any viruses, malware, or other cyber-attacks on its network or individual computers. It employs software to monitor the sites visited by employees and to detect if any viruses or tracking software have been downloaded. In the course of monitoring computer use, agents for X print out and read E's personal emails after they were

able to identify the emails as irrelevant for monitoring and cyber-security purposes. The availability of less invasive means renders X's intrusion unreasonable.

e. Prior notice to employees. Another factor in evaluating the reasonableness of the employer intrusion is whether the employer has given prior notice of the particular intrusion or the likelihood of such intrusions to employees. Such notice is given considerable weight because it informs the reasonableness of the employee's expectations as well as the reasonableness of the employer's actions.

Illustrations:

8. M, an executive at X, surreptitiously listens in on employee E's conversations on X's office phones. Neither M nor X inform E that M is listening in on his conversations. By secretly listening in on E's phone conversations, M's intrusion is unreasonable. If M is acting in the scope of his employment with X, X is also responsible for M's conduct. .

9. X operates a call center for various national retailers. The work space is completely open and no employee has an enclosed office. X installs video cameras throughout the call center; and notifies its employees of the surveillance system once it is installed. X's supervisors maintain a 24-hour visual surveillance of X's employees at work. Access to the videotapes is limited to X's general manager. X's surveillance system is not unreasonable or offensive.

In certain circumstances, informing employees of secret monitoring would defeat the purpose of the monitoring. In those cases, the employer has a legitimate business interest not only in the intrusion itself, but also in the secrecy of the intrusion.

Illustrations:

10. E works as a security guard in an office building in which X is located. E often works on the night shift. M, a manager at X, discovers the locked file drawer on his desk has been tampered with. M arranges with X's employees to videotape his desk at night. The videotape shows E tampering with the desk. X had a reasonable business-related justification for videotaping the office without notification to E.

11. X receives reports from employees that supplies have been stolen from the nurse's office. X secretly installs a hidden camera in the office to record instances of theft. The camera is on and records throughout the day, even during a medical visit in which E receives an examination from the nurse. X does not have a reasonable business-related justification for videotaping the nurse's office during E's medical examination without notification to E.

f. Employee consent. Consent is generally an absolute defense to intentional tort claims. Restatement Second of Torts § 892A(1) ("One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it."). However, in the employment context, employee consent obtained as a condition of obtaining or retaining employment is usually not sufficient to provide a complete defense to privacy claims; it is not the type of voluntary acquiescence envisioned by § 892A.

Illustrations:

12. E worked as a checker at X, a retail grocery store. A customer accuses E of taking money that the customer believes was left on the check-out counter. After searching the area, E's manager tells E to go to the restroom and disrobe. E does so, accompanied by a female assistant manager and the customer. The customer watches as E disrobes down to her underwear. E quits the next day. E's compliance with the manager's directions does not constitute consent that would negate any privacy violation.

13. E worked at X, a discount retailer. X became suspicious that E and other employees were stealing merchandise from the store. X's manager asks E if X could search his home. E signs a paper agreeing to the search. X's agents remove hundreds of items from E's home, but ultimately he is not accused of theft as to any of the items. E reasonably feared that he would be fired if he refused to consent to the search. E's consent is not effective for the purpose of negating any privacy violation.

However, it is an oversimplification to say that consent can be disregarded in the employment context. Some types of employment require reduced expectations of privacy, whether for reasons of safety, efficiency, or societal norms. By taking a type of employment, the employee effectively consents to the reasonable requirements of the position, which may entail a reduced expectation of privacy.

Illustration:

14. E was hired as a health worker at X, a women's health clinic. As part of the initial paperwork, E acknowledged receipt of the job description, which indicated that E would have to "demonstrate self-cervical exam to pregnancy screening groups." X requires all health workers perform this self-examination in front of clients, as a means of educating clients to perform this examination on themselves. X has a legitimate business reason for requiring employees to conduct such an examination in front of colleagues; E's acknowledgement indicates notice of and effective consent to this requirement.

g. Legitimate business interest for intrusion. Under 7.06(b), the employer must have a legitimate business justification for any intrusion upon an employee's protected privacy interest. The employer will generally point to a business-related purpose in justifying any intrusion into an employee's protected privacy interest. The reason for the intrusion must justify the intrusion itself and its manner and scope to be reasonable under this Subsection.

Illustrations:

15. As part of its hiring process, X administers a written true-false test that includes many personal questions. Among the topics covered are the applicant's religious beliefs as well as the applicant's sexual history and practices. X requires that all applicants to take the test. X has no legitimate business interest in obtaining the personal information.

16. E is a salesperson at X. E's manager at X gave him a questionnaire and told E that he had to fill it out. The questionnaire asked about E's qualifications for his job, his principal strengths, his principal weaknesses, activities in which he preferred not to engage, the income he aspires to obtain, and his plans for the future. These questions concern legitimate areas of inquiry for employers and a reasonable in scope.

17. E has an employer-provided computer in a private office which E alone uses. E does not share his computer with other employees; the public and visitors do not have access to his computer. The employer's technical support staff provides assistance only at E's request and do not generally access the computer without E's consent. The employer provided no specific notice barring E from using the computer for personal matters. E has a reasonable expectation of privacy in the contents of personal files he places on his computer. However, the employer receives an anonymous but credible tip that E is using his computer to conduct other business for a competitor on company time. The employer searches E's computer and finds evidence of outside work. The employer acted reasonably in searching E's computer.

18. E has a computer provided by X. which she uses to access her own personal email account through the computer's web browser. X accesses E's computer and reviews her emails on the personal account, including email from her attorney. In general, the employer had a legitimate reason to observe employee computer activity to monitor employee productivity. However, the employer had no specific

reason to view the emails in E's personal account. The employer's search of E's personal emails was unreasonable.

19. Same facts as Illustration 18, except that X maintains an express policy, consistently enforced, of barring employees from maintaining a personal account or conducting personal business using the employer-provided computer or browser. X's search of E's emails to determine whether E is complying with X's policy is reasonable.

h. Public interest in the intrusion. The employer's legitimate business interests may, at times, coincide with interests that concern the public as a whole. In these cases, the reasonableness and nonoffensiveness of the employer's intrusion are bolstered by the public interest in the intrusion. For employees in safety-sensitive positions, for example, employers have claimed with success that their testing for illegal drug abuse furthers not only their managerial interests but also the public's interest in reliable, safe delivery of services.

Illustrations:

20. E, a firefighter employed by the City of X, is required to take a drug test in which he must urinate in the presence of an observer. X's observers stand in the back of or to the side of E when he is being tested, and they only look in E's general direction and not at his genitalia directly. In addition, the city offers alternative measures, such as nurse monitors, to individuals who were uncomfortable with direct employer surveillance. Because of the importance of safety and public

protection, X's drug testing protocol is neither unreasonable nor offensive to a reasonable person in this employment context.

21. E works at a desk designing computer programs for employee training. The training does not consist of dangerous or potentially harmful consequences if done improperly. The importance of safety and public protection in this situation is sharply reduced, leading to a less significant justification for the intrusion.

i. Offensive to a reasonable person under the circumstances. Under § 7.06(c), even an unreasonable interference with an employee's protected privacy interest is not actionable unless the manner or scope of the employer's intrusion would be offensive to a reasonable person under the circumstances. The test for offensiveness is whether the intrusion is a significant departure from accepted norms for effectuating such an intrusion. The practices of other employers in like circumstances provide a general baseline for determining departure from the norms. The purpose of this additional requirement is to incorporate a societal judgment in the determination of liability. The societal judgment is derived by assessing whether the employer's actions were unusually invasive under the circumstances. Whether the employer's actions depart significantly from generally accepted norms of proper conduct is a specially relevant factor in this determination.

Illustration:

22. Same facts as Illustration 13, while adding that employers in X's industry do not engage in searches of the employee's home to pursue employee theft inquiries. X's search of E's home is unreasonable and offensive.

REPORTERS' NOTES

Comment a. Scope. An intrusion upon a privacy interest only creates liability when that intrusion is unreasonable and offensive. The first set of inquiries (intrusion) calls for a specific inquiry into the nature of the intrusion, while the second (unreasonable and offensive) call for inquiries into the manner and purpose of the intrusion. The purpose of the "unreasonable and offensive" inquiry is to balance the degree of the intrusion against its private and social justification. See, e.g., Bratt v. Int'l Bus. Machines Corp., 392 Mass. 508, 520, 467 N.E.2d 126, 135 (1984) ("In evaluating whether the information sought from employees could amount to an unreasonable interference with their right of privacy, we stated that the employer's legitimate interest in determining the employees' effectiveness in their jobs should be balanced against the seriousness of the intrusion on the employees' privacy."); Vargo v. Nat'l Exch. Carriers Ass'n, Inc., 870 A.2d 679, 686 (N.J. Super. Ct. App. Div. 2005) ("[W]hether there is a common law violation requires a court to balance the employer's interest with the prospective employee's reasonable expectation of privacy.") Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 625 (3d Cir.1992) ("[D]etermining whether an alleged invasion of privacy is substantial and highly offensive to the reasonable person necessitates the use of a balancing test.") (applying Pa. law?????); Wilcher v. City of Wilmington, 60 F.Supp.2d 298, 302 (D.Del. 1999) ("Delaware courts have repeatedly recognized that the right of privacy is not an absolute right, but a right that is qualified by the circumstances and the rights of others.") (applying Del. Law).

The factors listed in this Subsection (b) section are generally recognized as relevant to the unreasonable and offensive inquiry, although the courts have not always on identical verbal formulations. In Hill v. National Collegiate Athletic Association, 865 P.2d 633, 648 (Cal. 1994), the California Supreme Court enumerated several factors which should be considered in determining the "offensiveness" of an invasion of privacy interest. These factors include: (1) the degree of the intrusion, (2) the context, conduct, and circumstances surrounding the intrusion, (3) the intruder's motives and objectives; (4) the setting into which the intruder invades; and (5) the expectations of those whose privacy is invaded. These factors are all taken into account in the factors set forth below. This Section also draws on decisions scrutinizing searches by public employers under the Fourth Amendment. The "reasonableness" test considers the same central factors as the "unreasonable and offensive" test does in this context. See, e.g., City of Ontario, Cal. v. Quon, 130 S. Ct. 2619, 2632 (2010) ("Because the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope, the search was reasonable under the approach of the *O'Connor* plurality. For these same reasons—that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of that justification—the Court also concludes that the search would be regarded as reasonable and normal in the private-employer context . . .'").

Comment b. Manner of intrusion. Illustration 1 is based on Slibeck v. Union Oil Co., 1986 Del. Super Lexis 1376 (Del. Super. 1986). In *Slibeck*, the court held that the disclosure of the employee's address and phone number in a directory was not an invasion of privacy, even though the employee had not consented. The court noted that the information disclosed was not normally considered private, and the employee received calls at home for work because he was generally on the road.

Secret observations of employees in certain private areas, such as bathrooms or locker rooms, are generally offensive unless counterbalanced by extremely significant business or private interests. See Johnson v. Allen, 613 S.E.2d 657, 660-61 (Ga. App. 2005) (finding that "continuous observation of private matters occurring in the women's restroom" through a video monitor "would surely be offensive to the reasonable person"); Koeppel v. Speirs, 779 N.W.2d 494 (Iowa 2010) ("There is no question viewing or recording [employee] while in the bathroom would be considered 'highly offensive' to any reasonable person."). See also Toomer v. Garrett, 574 S.E.2d 76 (N.C. App. 2002) ("The unauthorized examination of the contents of one's personnel file, especially where it includes sensitive information such as medical diagnoses and financial information, like the unauthorized opening and perusal of one's mail, would be highly offensive to a reasonable person.").

Illustration 2 is based on Kelley v. Schlumberger Tech. Corp., 849 F.2d 41, 42 (1st Cir. 1988) (direct observation of urinalysis test for barge engineer on a drilling rig was a violation of privacy causing emotional distress). However, the manner of the intrusion is only a factor in the entire analysis. In Wilcher v. City of Wilmington, 60 F.Supp.2d 298 (D.Del. 1999) (applying Del. law)), the employer required employees to provide urine samples under the supervision of a monitor. The court acknowledged that it was "beyond argument that individuals in this setting are generally afforded maximum privacy." *Id*. at 304. However, the court found that the test was justified by public safety concerns, and the supervision was justified by the potential for cheating on the test. *Id*. ("A reasonable person would recognize the importance of drug testing, particularly among firefighters who confront dangerous circumstances to save the lives and property of others. A reasonable person would also recognize that the SODAT monitor was only present to insure the accuracy of the drug test, a motive which is both legitimate and important."). However, it should also be noted that the employer in *Wilcher* did endeavor to minimize the manner of the intrusion within its overall parameters. *Id*. ("This is particularly evident where, as here, the [employer] monitors stood in the back of or to the side of the firefighters being tested, only looked in the firefighters general direction and not at their genitalia directly, and offered alternative measures, such as nurse monitors, to individuals who were uncomfortable."). In *Hill v. NCAA*, the California Supreme Court noted that "direct monitoring remains a significant privacy issue in athletic and nonathletic drug testing cases" and found that "[w]ith two exceptions, no decided case has upheld direct monitoring." Hill, 865 P.2d at 665. Of the two exceptions, one involved probationary police officers, and the other was later vacated. O'Connor v. Police Comm'r of Boston, 557 N.E.2d 1146, 1149 (Mass. 1990); O'Halloran v. University of Washington, 479 F. Supp. 1380, 1405 (W.D. Wash. 1987), reversed and remanded by 856 F.2d 1375 (9th Cir. 1988). For a later case upholding direct monitoring, see Folmsbee v. Tech Tool Grinding & Supply, 630 N.E.2d 586 (Mass. 1994). The court in *Folmsbee* found "brief visual inspections" to be justified "because vials of urine intended for the purpose of frustrating drug testing are commercially available." Id. at 590.

Illustration 3 is based on Vega-Rodriguez v. Puerto Rico Telephone Co., 110 F.3d 174 (1st Cir. 1997). The office area was described as "a large L-shaped area that contains the computers, the monitors, and assorted furniture (e.g., desks, chairs, consoles)." Id. at 176. It was "completely open and no individual employee has an assigned office, cubicle, work station, or desk." Id. In assessing the level of privacy for employees, the court stated: "It is simply implausible to suggest that society would recognize as reasonable an employee's expectation of

privacy against being viewed while toiling in the Center's open and undifferentiated work area." Id. at 180.

Illustration 4 is based on surveillance cases such as Saldana v. Kelsey-Hayes Co., 178 Mich. App. 230, 234, 443 N.W.2d 382, 384 (Mich. Ct. App. 1989) ("It may not be objectionable to peer through an open window where the curtains are not drawn, but the use of a powerful lens to observe the interior of a home or of a subterfuge to enter a home could be found objectionable to a reasonable person."); Pemberton v. Bethlehem Steel Corp., 502 A.2d 1101, 1117 (Md. Spec. App. 1986) (holding that the use of a listening device is generally actionable); and Dalley v. Dykema Gossett, 788 N.W.2d 679, 690 (Mich. Ct. App. 2010) (finding that "defendants' entry of plaintiff's apartment under false pretenses and their disregard of his instructions about the location of the [employer]-related information they desired could be found objectionable by a reasonable juror"). See also McLain v. Boise Cascade Corp., 533 P.2d 343 (Or. 1975) (holding that a trespass onto property does not *per se* render surveillance of an employee unreasonable). In addition, the *McLain* court noted that his activities "could have been observed by his neighbors or passersby on the road running in front of his property." *Id.* at 346.

Illustration 5 is based on Johnson v. K-Mart Corp., 723 N.E.2d 1192 (Ill. App. 2000). In *Johnson*, the employer hired a set of undercover investigators to act as employees in an effort to root out theft and drug use at a warehouse. The investigators sent the employer reports about their conversations with employees; the reports included details about the employees' family matters, romantic interests, future employment plans, and other personal matters. The court held that these reports could be considered an offensive intrusion into employees' personal lives, as there was "no business purpose" for the breadth of the inquiry. The employer's failure to instruct the investigators to keep away from such highly personal matters could be considered objectionable or offensive. *Id.* at 1196-97. For an example of a sustained campaign of offensive intrusion, see Busby v. Truswal Systems Corp., 551 So.2d 322 (Ala. 1989). The court catalogued a series of lewd comments, innuendo, sexual suggestions, physical groping, and staring at the plaintiff's bodies. *Id*. at 324. Based on these intrusions, the court held that "[a] jury could reasonably determine from this evidence that Deaton pried or intruded into the plaintiffs' sex lives in an offensive or objectionable manner and thereby invaded their right of privacy."

When looking at the manner of the invasion, the type of information required is also an important factor. The case of Doe v. High-Tech Institute, Inc., 972 P.2d 1060, 1068 (Colo. App. 1998) involved a student who gave blood willingly as part of a rubella testing procedure. However, the school also requested an additional test for HIV. The court noted the private nature of the information gleaned by the additional test. Id. at 1069-70 ("Thus, in determining if the unauthorized performance of an HIV test, such as alleged here, would be offensive or objectionable to a reasonable person, we note first that what may be unreasonably intrusive is not the physical test of a blood sample itself. Instead, it is because particular, highly personal medical information may be obtained from such test that this intrusion may be offensive to a reasonable person.").

Comment c. Scope of intrusion. The scope of the intrusion refers to its breadth or reach. In City of Ontario, Cal. v. Quon, 560 U.S. __, 130 S. Ct. 2619 (2010), the Supreme Court held that the legitimate business interests of the government employer justified the search of the

officers' text message, even assuming that the officers had a reasonable expectation of privacy in the texts. The Court also found that the search was not excessive in its scope. The Court found that "reviewing the transcripts [of the text messages] was reasonable because it was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use." *Id*. at 2631. In addition, the employer's initial reviewer "redacted all messages [the employee] sent while off duty, a measure which reduced the intrusiveness of any further review of the transcripts." *Id*.

Carefully tailoring the scope to the legitimate employer interests may make the difference between a reasonable and unreasonable intrusion. In Hilderman v. Enea TekSci Inc., 551 F.Supp.2d 1183 (S.D. Cal. 2008), the employer feared that the employee was using his company computer to transfer customer leads and other proprietary trade secrets outside of the company. It took away his computer from him and searched it for leads regarding these claims. The court held that the employee may have had a reasonable expectation of privacy in his employer-provided laptop, since the employer may have had a policy allowing employees to purchase the laptop upon termination. Nevertheless, the court held that the search of the computer was not offensive because the employer "was motivated by a desire to protect its confidential information and to ensure that [the employee] was not engaged in unauthorized activity that would harm [the company]." Id. at 1204. The court also noted, however, that the company restricted the scope of its search to business-related information. Id. at 1204-05.

Illustration 6 is based on Wilkinson v. Times Mirror Corp., 264 Cal. Rptr. 194 (Cal. App. 1st 1989). In *Wilkinson*, the court held that job applicants had lower expectations of privacy than current employees. See id. at 203 ("Perhaps the most important factor in our analysis is that plaintiffs are applicants for employment, not employees . . . . [W]hen plaintiffs were asked to consent to drug and alcohol screening as a condition of an offer of employment, they were in effect asked to disclose voluntarily the personal information which might be revealed by that screening.") See also Semore v. Pool, 266 Cal. Rptr. 280 (Cal. App. 4th 1990) (reinstating complaint for drug test of current employee); Webster v. Motorola, 637 N.E.2d 203 (Mass. 1994) (employer's drug testing policy for current employees infringed employee privacy rights).

The scope of surveillance is often an issue in judging its offensiveness. See Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1183-84 (7th Cir.1993)("[B]ut it can be argued that if the method of surveillance chosen is the least indiscriminate possible for achieving a lawful and important objective, the stranger whose privacy is incidentally and accidentally compromised . . . should not be heard to complain of the invasion of his privacy . . . .").

Comment d. Availability of less invasive means. The availability of less intrusive means is a factor in determining the offensiveness of the intrusion. Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 295, 211 P.3d 1063, 1079 (2009) ("Courts also may be asked to decide whether the plaintiff, in attempting to defeat a claim of competing interests, has shown that the defendant could have minimized the privacy intrusion through other reasonably available, less intrusive means."). However, the existence of less intrusive means, in and of itself, does not render an intrusion unreasonable and offensive. See id. at 1082 ("[D]efendants are not required to prove that there were no less intrusive means of accomplishing the legitimate objectives we have identified above in order to defeat the instant privacy claim."); Hill v. NCAA, 865 P.2d 633, 664

(Cal. 1994) ("We have been directed to no case imposing on a private organization, acting in a situation involving decreased expectations of privacy, the burden of justifying its conduct as the 'least offensive alternative' possible under the circumstances."). The Supreme Court has made clear that, at least when it comes to constitutional privacy analysis, the government need not choose the least restrictive means available, irrespective of costs or utility. As the court stated in NASA v. Nelson, 562 U.S. __, 131 S. Ct. 746 (2011), "We reject the argument that the Government, when it requests job-related personal information in an employment background check, has a constitutional burden to demonstrate that its questions are 'necessary' or the least restrictive means of furthering its interests." Id. at 760. See also City of Ontario, Cal. v. Quon, 560 U.S. __, 130 S. Ct. 2619, 2632 (2010) ("This Court has repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." (internal quotations omitted)). However, the existence of less intrusive means is a factor in determining whether the intrusion is unreasonable.

Illustration 7 is suggested by Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 660 (N.J. 2010). *Stengart* concerned an evidentiary motion seeking the return of email copied by the employer from the employee's own personal email. The Court noted that an employer may enforce email and/or Internet policies to protect their computers and networks, as well as prevent employees from wasting time or engaging in improper behavior. However, the Court noted that "employers have no need or basis to read the specific *contents* of personal, privileged, attorney-client communications in order to enforce corporate policy." *Id.* at 665.

Comment e. Prior notice to employees. Illustration 7 is based on Cady v. IMC Mortgage Co., 862 A.2d 202 (R.I. 2004), and Ali v. Douglas Cable Communications, 929 F. Supp. 1362 (D. Kan. 1996). See also Narducci v. Village of Bellwood, 444 F.Supp.2d 924, 2006 WL 2349213 (N.D.Ill.) (applying Ill. Law) ("Eavesdropping via wiretapping has been conspicuously singled out on several occasions as precisely the kind of conduct that gives rise to an intrusion-on-seclusion claim." (citing *inter alia* Restatement (Second) of Torts § 652B cmt. b)). Many states have anti-eavesdropping statutes, which may prohibit the behavior and provide a separate set of penalties and/or remedies. See, e.g., Ill. Crim. Code § 14-2, 720 ILCS 5/14-2. Federal law also prohibits wiretapping. See 18 U.S.C. §§ 2510-2520. However, notice may be sufficient to render phone monitoring reasonable under the context. See Jackson v. Nationwide Credit, Inc., 426 S.E.2d 630, 632 (Ga. App. 1992) (finding employer's notice that it would monitor its phones sufficient to justify the employer's monitoring of phones in a trade secrets case); Pemberton v. Bethlehem Steel Corp., 502 A.2d 1101, 1117 (Md. Spec. App. 1986) (holding that the use of a listening device within an employee's motel room was a potential intrusion upon seclusion).

Illustration 9 is based on Vega-Rodriguez v. Puerto Rico Telephone Co., 110 F.3d 174 (1st Cir. 1997) (applying P.R. law or 1983 case??). Because the employer in *Vega-Rodriguez* was a quasi-public corporation, employees' privacy interests were considered in the context of the Fourth Amendment. The court emphasized that the employees were informed of the surveillance in finding that the surveillance did not violate the employees' privacy interests. *See id.* at 180 n.5 ("We caution, however, that cases involving the covert use of clandestine cameras, or cases involving electronically-assisted eavesdropping, may be quite another story."). Notice has also been a factor in determining the reasonableness of a particular drug testing regime. See Gilmore v. Enogex, Inc., 878 P.2d 360, 364 (Okla. 1994) ("By announcing its program several

weeks before the actual testing, Enogex gave its employees an opportunity to cease current drug use so that they would not test positive when the program was administered.").

Illustration 10 is based on Marrs v. Marriott Corp., 830 F. Supp. 274 (D. Md. 1992) (applying Md. law). In that case, the court found no intrusion, as the guard did not have a reasonable expectation of privacy in someone else's office. However, the case is also a good example of when an employer would need stealth action to achieve its business objectives. And in Sacramento County Deputy Sheriffs' Assoc. v. County of Sacramento, 59 Cal.Rptr.2d 834 (Cal. Ct. App. 1997), the employer had conducted an investigation into the theft of inmates' property at a county jail. The investigation led the employer to conclude that the property was being stolen from a certain room. The court concluded that secret videotaping of this room was not a highly offensive intrusion because of the diminished privacy expectations in the room and because of the legitimate reasons for the videotaping. (While the County of Sacramento is a public employer subject to the Fourth Amendment, illustration 10 is based on the court's common law ground, a holding that rejected a claim of unlawful invasion of employee privacy.)

Illustration 11 is based on Acuff v. IBP, Inc., 77 F. Supp. 2d 914 (C.D. Ill. 1999) (applying Ill. Law). In *Acuff*, the court found that the videotaping of medical examinations could be highly offensive, even when there was a business-related reason behind the intrusion: namely, attempting to ferret out wrongdoing. The court held that the wide angle of the lens was beyond what the employer needed in order to monitor the traffic in and out of the room, and thus was potentially highly offensive.

Failure to notify or the use of deception is often considered problematic in the surveillance context. In Burns v. Masterbrand Cabinets, Inc., 874 N.E.2d 72 (Ill. App. 2007), the employer's investigator secretly videotaped an employee in his home after gaining entry on false pretenses. The court found the employer liable for an offensive intrusion. In Johnson v. K-Mart Corp., 723 N.E.2d 1192 (Ill. App. 2000), the employer sent undercover investigators into its warehouse workforce in response to concerns about thefts and drug use. However, the investigators reported back a much broader array of information, including details about the employees' family matters, romantic interests, future employment plans, and other personal matters. Employees had voluntary shared this information with the investigators; however, the employees believed the investigators were fellow employees. *Id.* at 1194-95. The court held that "the act of placing private detectives, posing as employees, in the workplace to solicit highly personal information about defendant's employees was deceptive." Id. at 1196. Because of this deception, the disclosure "cannot be said to be a truly voluntary disclosure." Moreover, as the employer had "no business purpose" for the personal information, the deception was not justifiable. *Id.* at 1197. Internal monitoring also requires notice when it is concerns personal information that is not normally monitored by employers. In Pulla v. Amoco Oil Co., 882 F.Supp. 836 (S.D. Iowa 1994) credit card information), affirmed in relevant part and reversed in part, 72 F.3d 648 (8th Cir. 1995), the employer provided its employees with credit cards for their personal use. When one employee went out on sick leave, the company accessed his credit card account to determine if he had used the card during his sick leave, and for what purposes. The court denied the employer's motion for summary judgment on the basis that such monitoring could be considered highly offensive.

Comment f. Employee consent. Restatement Second of Torts § 892A indicates that consent is a complete defense to intentional torts. Restatement Second of Torts § 892A ("One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it."). In its original form, the "consent" provision emphasized that consent needed to be given "freely." Restatement Second of Torts § 892 ("A person of full capacity who freely and without fraud or mistake manifests to another assent to the conduct of the other is not entitled to maintain an action of tort for harm resulting from such conduct."). Restatement Second of Torts provides that consent is not effective if there is duress. Restatement Second of Torts § 892B ("Consent is not effective if it is given under duress."). In explaining the nature of duress, the comments specifically refer to the threat of termination of employment as potential duress. *Id*. cmt. j ("Some forms of 'economic duress' such as the threat of infliction of pecuniary loss, as in the case in which the actor threatens to obtain the other's discharge from his employment, may be ground for relief of an equitable origin and character, such as rescission of the transaction into which the parties have entered and restitution of what has been paid.").

Some cases have treated consent in any form as an absolute defense. See Farrington v. Sysco Food Services, Inc., 865 S.W.2d 247, 254 (Tex. App. 1993) ("[Plaintiff's] consent negates any claim for invasion of privacy."); Lewis v. LeGrow, 670 N.W.2d 675, 688 (Mich. Ct. App. 2003) ("Like other torts, there can be no invasion of privacy under the theory of intrusion upon the seclusion of plaintiffs if plaintiffs consented to defendant's intrusion (videotaping)."); TBG Ins. Servs. Corp. v. Superior Court, 117 Cal. Rptr. 2d 155 (Cal. App. 2002) ("In the context of the case before us, we view [the employee's] consent as a complete defense to his invasion of privacy claim."). Cf. Hill v. NCAA, 865 P.2d 633, 648 (Cal. 1994) ("If voluntary consent is present, a defendant's conduct will rarely be deemed 'highly offensive to a reasonable person' so as to justify tort liability."). The decisiveness of consent to the defeat of a privacy claim was provided a theoretical justification in Jennings v. Minco Tech. Labs, Inc., 765 S.W.2d 497, 500 (Tex. App. 1989) (citations omitted):

> In the present case, the particular privacy interest at stake is Jennings's right to be free of any unwarranted intrusion into her private affairs. The heart of this privacy interest is the individual's exclusive prerogative to determine when, under what conditions, and to what extent he will consent to divulge his private affairs to others. When he elects to do so, his privacy interest is invaded, of course, but the invasion does not constitute a legal wrong because his prerogative was secured to him and he exercised it as he saw fit. For example, his consent amounts to an absolute defense in any tort action based upon the invasion, Restatement (Second) of Torts § 583 (1977); and in a criminal case his self-incriminating testimony would not be excluded, for the Fifth Amendment protects only against compulsory or non-consenting self-incrimination. Jennings's privacy interest, her common-law right, and the public policy they symbolize, necessarily include this essential element of consent. None of them are complete, or even intelligible, without it. We must view Jennings's privacy claim with that understanding.

The *Jennings* court went on to find that the plaintiff's consent to a drug test waived any claim she might have to the invasion of privacy. The court was dismissive as to the plaintiff's claims that she only consented to save her job:

> Jennings contends finally that she is poor and needs her salary to maintain herself and her family. Consequently, any "consent" she may give, in submitting to urinalysis, will be illusory and not real. For that practical reason, she argues, the company's plan *does* threaten a non-consensual, and therefore unlawful, invasion of her privacy. We disagree with the theory. A competent person's legal rights and obligations, under the common law governing the making, interpretation, and enforcement of contracts, cannot vary according to his economic circumstances. There cannot be one law of contracts for the rich and another for the poor. We cannot imagine a theory more at war with the basic assumptions held by society and its law. Nothing would introduce greater disorder into both. Because Jennings may not be denied the legal rights others have under the common law of contracts, she may not be given greater rights than they. The law views her economic circumstances as neutral and irrelevant facts insofar as her contracts are concerned.

Id. at 502.

However, the predominant view is that consent is not a complete defense if it is not freely given. See Wal-Mart Stores, Inc. v. Lee, 348 Ark. 707, 724, 74 S.W.3d 634, 647 (2002) ("[C]onsent must be given freely and voluntarily to be valid."); O'Brien v. Papa Gino's of America, Inc., 780 F.2d 1067, 1072 (1st Cir.1986) (applying N.H. law) (employee contracted away certain rights by accepting employment from employer who forbade drug use, but employer's demand that employee submit to polygraph exceeded scope of employee's consent to allow reasonable investigation into drug use). Thus, the general rule should be that an employee does not voluntarily consent if the alternative is termination. See Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 627 (3d Cir. 1992) (applying Pa. law) ("[A]n employee's consent to a violation of public policy is no defense to a wrongful discharge action when that consent is obtained by the threat of dismissal."); Leibowitz v. H.A. Winston Co., 493 A.2d 111, 115 (Pa. Super. 1985) (employee release authorizing polygraph test is invalid when employer requires employee to sign as a condition of continued employment); Polsky v. Radio Shack, 666 F.2d 824 (3d Cir. 1981) (applying Pa. law) ("[W]here an employee can show compulsion under threat of job termination to sign a release from liability . . . , the employee need not show duress to invalidate the release because it would contravene Pennsylvania's public policy."); cf. O'Connor v. Police Com'r of Boston, 408 Mass. 324, 329, 557 N.E.2d 1146, 1150 (1990) ("The Chief Justice, in his concurring opinion, states that the cadets' written agreement to submit to urinalysis testing constitutes consent, and that, given such consent, the court's 'resort to the manipulable balancing inquiry' is inappropriate. Obviously, we do not agree. Surely, the plaintiff would not be barred from relief if his consent to be the subject of a search and seizure were unreasonably required as a condition of employment. For example, if the plaintiff were seeking employment as a laborer, the State could not constitutionally require his consent to urinalysis testing as a precondition to such employment, and any consent given would be ineffective. "); Lewis v. LeGrow, 670 N.W.2d 675, 688 (Mich. Ct. App. 2003) ("The question of waiver or consent,

however, does not have a zero-sum answer but, rather, presents an issue of the degree or extent of waiver or consent granted, which depends on the facts and circumstances of the case.")

Illustration 12 is based on Bodewig v. K-Mart, Inc., 635 P.2d 657 (Or. App. 1981). In *Bodewig*, a manager at a retail store forced a cashier to disrobe in front of a customer after the customer accused the employee of theft. Although the employee did not complain or resist, the employer was still liable under tort law for plaintiff's emotional injuries. Illustration 13 is based on Wal-Mart Stores, Inc. v. Lee, 348 Ark. 707, 724, 74 S.W.3d 634, 647 (2002). In *Lee*, the employer was conducting an investigation for theft of store property. The store investigator asked the employee if he could search the employee's home for stolen equipment, especially fishing poles and life jackets. The employee verbally agreed and also signed a consent form presented to him by police that the employer had called to the scene. The employer's search, which lasted seven hours, ended up in the seizure of over 400 items; however, none of these items were ever shown to be the property of the employer. Even though the employee initially agreed to the search, the court held that the consent was not valid to waive the intrusion claim. The employee felt "threatened" when he signed the consent form; he felt like the employer was trying to "railroad" him; he feared he would be fired if he did not consent; and he thought the search would be much more limited in its scope. Id. at 647. For all these reasons, the court upheld the jury's verdict that the written consent "was not given freely and without coercion and, thus, was not valid consent." Id. at 648. See also Catalano v. GWD Management Corp., Not Reported in F.Supp.2d, 2005 WL 5519861 (S.D.Ga) (manager performed strip search on employee, who believed she had no choice but to comply), *aff'd*, Catalano v. McDonald's Corp., 199 Fed.Appx. 803 (11th Cir.(Ga.) Sep 28, 2006).

Consent obtained as condition of initial employment is more favorably received by the courts on the ground that the employee knew what she was getting into when she took the position. Illustration 14 is based on Feminist Women's Health Center v. Superior Cou.rt of Sacramento Co., 52 Cal. App. 4th 1234 (Cal. App. 3d 1997). In *Feminist Women's*, the employer was a women's health center who took a more open approach to its mission. One of the job requirements for health workers at the center was the willingness to demonstrate the use of a speculum to examine one's own cervix and vagina. Plaintiff employee, who claimed she did not understand this requirement upon taking the job, refused the assignment and was eventually terminated. The center pointed to the employee's written agreement to "demonstrat[ing] self cervical exam to pregnancy screening groups" as proof of her consent. The court largely discounted the employee's excuse, saying that her "professed ignorance of the particulars of cervical self-examination does not vitiate her agreement to perform it." Id. at 1247. However, the court also went on to determine "whether this type of cervical self-examination may reasonably be required of the Center's employees" because of the "seriousness of the privacy invasion." Id. at 1248. The court found that the self-examination was "important in advancing the Center's fundamental goal of educating women about the function and health of their reproductive systems." Id. Because the available alternatives would be "pale imitations" of the self exam, the exams were sufficiently important to justify the significant invasion of privacy that employees had to countenance.

However, even in the context of initial employment, consent as to a particular type of invasion does not mean consent to all varieties of that invasion, reasonable or unreasonable. In

Frye v. IBP, Inc., 15 F. Supp. 2d 1032, 1041 (D. Kan. 1998) (applying Kan. law), the court stated:

> IBP cites authority for the proposition that consent to a drug test obviates any claim for invasion of privacy. . . . As with any intentional tort, consent is an absolute defense, even if improperly induced. We agree with IBP that consent to a drug test may be inferred when an employee provides a urine sample upon request and, further, that the inference of consent is not negated by the mere fact that refusal to consent may result in termination or other adverse employment action. We also agree that by accepting employment in a workplace which required drug testing, plaintiff implicitly agreed to comply with IBP policy and protocol on drug testing. . . . We cannot agree, however, that by accepting employment with IBP, plaintiff implicitly agreed to submit to any and all demands that IBP might exact in the drug testing arena. At most, the record supports an inference that consistent with IBP policy, plaintiff consented to undergo an alcohol/controlled substance screen if IBP had a reasonable suspicion that his ability to function safely "may be affected by alcohol or drugs," and that if he failed to submit to a screen or altered a screen in any way, he would be disciplined (up to and including discharge). From this, plaintiff argues (1) that he never consented to drug testing when IBP did not have a reasonable suspicion that his ability to function safely was affected by alcohol or drugs, and (2) that he never consented to repeated testing to determine whether he had in any way altered or substituted a urine sample.
>
> IBP is not entitled to summary judgment on the consent defense, as it relates to the urine sample which plaintiff provided on September 5, because defendant has not demonstrated as a matter of law that plaintiff consented to drug testing in circumstances where IBP lacked a reasonable suspicion that his ability to function safely was affected by alcohol or drugs.

Frye v. IBP, Inc., 15 F. Supp. 2d 1032, 1041-42 (D. Kan. 1998) (citations omitted).

The consequences of a failure to consent are also important to the calculus. In TBG Ins. Servs. Corp. v. Superior Court, 117 Cal. Rptr. 2d 155 (Cal. App. 2002), the court noted the importance of this factor:

> When an employer requires drug testing as a condition of employment, the employee must either submit to the invasion of his 'autonomy privacy' or, typically, lose his job. When an employer requires consent to computer monitoring, the employee may have his cake and eat it too – he can avoid any invasion of his privacy by using his computer for business purposes only, and not for anything personal.

Id. at 160 n.5. The court's reasoning is a bit off here, as the employee must change her preferred behavior in order to protect her privacy. But the consequences of refusal here are still a propos. The employee in *TBG* had received a laptop to use from home. If the employee had refused to consent to the monitoring of the laptop, he theoretically could have purchased his own. Thus, the consequences would not be job loss but rather an additional expense. If the employer had

required that the employee use an employer-provided laptop or face termination, the laptop example would be similar to the drug testing one. Moreover, some waivers may not be enforceable regardless of genuine consent. See Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 660 (N.J. 2010) ("Because of the important public policy concerns underlying the attorney-client privilege, even a more clearly written company manual-that is, a policy that banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee's attorney-client communications, if accessed on a personal, password-protected e-mail account using the company's computer system-would not be enforceable.").

Of course, lack of consent is not itself sufficient to finding a violation of privacy. For example, in Slibeck v. Union Oil Co., 1986 Del. Super Lexis 1376 (Del. Super. 1986), the court held that the disclosure of the employee's address and phone number in a directory was not an invasion of privacy, even though the employee had not consented. The court noted that the information disclosed was not normally considered private, and the employee received calls at home for work because he was generally on the road.

In Mayer v. Huesner, 107 P.3d 152 (Wash. Ct. App. 2005), the employee's consent of the release of medical information was sufficient to release the employer from liability.

Comment g. Legitimate business interest for intrusion. Courts have recognized in a variety of contexts that the motives of the potential tortfeasor matter when it comes to the offensiveness of a privacy invasion. See, e.g., Shulman v. Group W Prods., Inc., 955 P.2d 469 (Cal. 1998) (finding the motives "pertinent" in a case involving the recording of an accident scene). Because of the special relationship between the employer and employee, the employer's interests in support on an intrusion will generally be significantly stronger than those of a stranger. For these reasons, many intrusions which would be offensive in other contexts can be justified when conducted by an employer. However, the presence of a legitimate business interest does not suffice to render any search reasonable and inoffensive. The few cases that may have claimed otherwise have erred, to the extent that they can be read to draw this conclusion. See, e.g., Baggs v. Eagle-Picher Industries, Inc., 957 F.2d 268 (6th Cir. 1992) (applying Mich. law) (claiming that "an employer can use intrusive and even objectionable means to obtain employment-related information about an employee"). A legitimate business interest may be a decisive factor in rendering a search inoffensive, but it is by no means always so.

Illustrations 15 is based on Soroka v. Dayton Hudson Corp., 1 Cal.Rptr.2d 77 (Cal.App. 1991), review granted and opinion withdrawn, Soroka v. Dayton Hudson Corp., 822 P.2d 1327 (Cal. 1992). Even though the opinion was withdrawn, it has been cited as a proper description of California privacy law. See Murray v. Oceanside Unified School Dist., 95 Cal.Rptr.2d 28, 35 n.3 (Cal.App. 2000) (noting that *Soroka*'s protection against sexual orientation discrimination had been incorporated into California statutory protections). Illustration 16 is based on Cort v. Bristol-Myers Co., 431 N.E.2d 908 (Mass. 1982). In NASA v. Nelson, 562 U.S. __, 131 S. Ct. 746 (2011), the employer conducted background checks on employees which included personal questions to both the employees and their references. Even assuming that the questions "implicate[d] a privacy interest of constitutional significance," the Supreme Court justified them in part on the purpose behind the questions. As the Court stated: "Reasonable investigations of applicants and employees aid the Government in ensuring the security of its facilities and in

employing a competent, reliable workforce. Courts must keep those interests in mind when asked to go line-by-line through the Government's employment forms and to scrutinize the choice and wording of the questions they contain." Id. at 759-60. In fact, the Court specifically compared the open-ended questions to references with similar questions used by private employers:

> The reasonableness of such open-ended questions is illustrated by their pervasiveness in the public and private sectors. Form 42 alone is sent out by the Government over 1.8 million times annually. *Ibid.* In addition, the use of open-ended questions in employment background checks appears to be equally commonplace in the private sector. See, *e.g.,* S. Bock et al., Mandated Benefits 2008 Compliance Guide, Exh. 20.1, A Sample Policy on Reference Checks on Job Applicants ("Following are the guidelines for conducting a telephone reference check: ... Ask open-ended questions, then wait for the respondent to answer"); M. Zweig, Human Resources Management 87 (1991) ("Also ask, 'Is there anything else I need to know about [candidate's name]?' This kind of open-ended question may turn up all kinds of information you wouldn't have gotten any other way"). The use of similar open-ended questions by the Government is reasonable and furthers its interests in managing its operations.

Id. at 761. As to questions particularly about illegal drug use, the Court stated: "The Government has good reason to ask employees about their recent illegal-drug use. Like any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will 'efficiently and effectively' discharge their duties." *Id*. at 759-60.

Illustration 17 is based on Leventhal v. Knapek, 266 F.3d 64 (2d Cir. 2001) (intrusion into computer). The *Leventhal* case involved a public employee who brought a § 1983 claim based on an alleged Fourth Amendment violation. Illustration 18 is based on Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 660 (N.J. 2010). Illustration 19 is based on TBG Ins. Services Corp. v. Superior Court, 117 Cal.Rptr.2d 155 (Cal. App. 2002); Garrity v. John Hancock Mut. Life Ins. Co., 2002 U.S. Dist. Lexis 8343 (D. Mass 2002) (applying Mass. Law); Parkstone v. Coons, 2009 U.S. Dist. Lexis 33765 (D. Del. April 20, 2009) (applying Del. Law); Thygeson v. U.S. Bancorp, 2004 WL 2066746 (D.Or.). These cases illustrate that employers are given leeway in conducting intrusions when grounded in legitimate business concerns and practices; however, they must not stray too far beyond those purposes in constructing the method and scope of the intrusion. In City of Ontario, Cal. v. Quon, 560 U.S. __, 130 S. Ct. 2619 (2010), the Supreme Court also found that the legitimate business interests of the government (as employer) justified the search of the officers' text message, even assuming that the officers had a reasonable expectation of privacy in the texts. As the Court found:

> The search was justified at its inception because there were reasonable grounds for suspecting that the search was necessary for a noninvestigatory work-related purpose. As a jury found, Chief Scharf ordered the search in order to determine whether the character limit on the City's contract with Arch Wireless was sufficient to meet the City's needs. This was, as the Ninth Circuit noted, a "legitimate work-related rationale." The City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for

> work-related expenses, or on the other hand that the City was not paying for extensive personal communications.

Id. at 2631 (internal quotations and citations omitted). Similarly, a search of an employee's laptop was justified by legitimate business considerations in Hilderman v. Enea TekSci Inc., 551 F.Supp.2d 1183 (S.D. Cal. 2008) (applying Cal. law). . In that case, the employer feared that the employee was using his company computer to transfer customer leads and other proprietary trade secrets outside of the company. It took away his computer from him and searched it for leads regarding these claims. The court held that the employee may have had a reasonable expectation of privacy in his employer-provided laptop, since the employer may have had a policy allowing employees to purchase the laptop upon termination. Nevertheless, the court held that the search of the computer was not highly offensive because the employer "was motivated by a desire to protect its confidential information and to ensure that [the employee] was not engaged in unauthorized activity that would harm [the company]." Id. at 1204. The court also noted, however, that the company restricted the scope of its search to business-related information. Id. at 1204-05.

One important legitimate interest that employers have in the monitoring of their computers and email systems is the detection and prevention of harassment or other illegal activity. In Garrity v. John Hancock Mut. Life Ins. Co., 2002 U.S. Dist. Lexis 8343 (D. Mass 2002) (applying Mass. Law), the employer had received a complaint about sexually explicit emails sent by two employees to their coworkers. The company investigated the email accounts of these employees and terminated the employees upon finding such emails. The court noted that antidiscrimination laws require employers to take affirmative steps upon discovering potentially harassing conduct. Thus, the court found that the employer's investigation was "required" once it had received the complaint. Id. at *7. Cf. Doe v. XYC Corp., 887 A.2d 1156, 1167-68 (N.J. App. 2005) (finding that employer had a duty to report employee's use of work computer to view and possess child pornography).

For other examples of legitimate business reasons that were not sufficiently strong to justify the level of the intrusion, see Acuff v. IBP, Inc., 77 F. Supp. 2d 914 (C.D. Ill. 1999) (applying Ill. Law) (videotaping of nurse's office during medical exams not justified by concerns about theft); Baughman v. Wal-Mart Stores, Inc., 592 S.E.2d 824 (W. Va. 2003) (public policy prohibits drug testing of incumbent employees without good faith objective suspicion of drug use or safety considerations);

Courts have held that employers have a legitimate interest in surveillance of employees outside of the workplace in order to investigate workers' compensation and disability claims. See, e.g., Saldana v. Kelsey-Hayes Co., 443 N.W.2d 382, 384 (Mich. Ct. App. 1989) ("Defendant's surveillance of plaintiff at his home involved matters which defendants had a legitimate right to investigate. . . . Plaintiff's privacy was subject to the legitimate interest of his employer in investigating suspicions that plaintiff's work-related disability was a pretext."); Crego v. Home Ins. Co., 1985 Kan. App. Lexis 861, *8 (Kan. App. July 11, 1985) ("The investigation of [employee] was warranted because he had submitted a workers' compensation claim. . . . [A] claimant who files an action waives the right to privacy, to the extent that one is subject to a reasonable investigation of one's activities."); I.C.U. Investigations v. Jones, 780 So. 2d 685, 689 (Ala. 2000) (holding that an employee in a workers' compensation case must expect

"a reasonable investigation regarding his physical capacity"); Johnson v. Corporate Special Services, Inc., 602 So. 2d 385, 388 (Ala. 1992) (holding that employee should have "expected a reasonable amount of investigation into his physical incapability"). However, the legitimate goal of ascertaining the extent of injury or disability must be balanced against the nature and extent of the intrusion. Jones, 780 So. 2d at 689 (looking at the purpose and the means of the surveillance); Johnson, 602 So. 2d at 387 (same).

Private employers have also been held to have a legitimate business interest in preventing their employees from using illegal drugs. See Gilmore v. Enogex, Inc., 878 P.2d 360, 366-67 (Okla. 1994) ("Employers have a legitimate interest in maintaining a work force free from the adverse effects of illegal drug and alcohol abuse. Safety issues and other concerns for efficiency prompted Enogex to take steps to ensure that its employees are neither intoxicated on the job nor performing under par because of off-duty drug and alcohol abuse."). See also Frye v. IBP, Inc., 15 F. Supp. 2d 1032, 1043 (D. Kan. 1998) (applying Kan. Law) ("Because IBP had a legitimate interest in determining whether plaintiff had tampered with the first sample, it had sufficient reason to request that plaintiff provide a second. Nothing in the timing, manner or purpose of its request can be remotely construed as 'highly offensive' to an ordinary reasonable person.").

In Young v. Jackson, 572 So.2d 378 (Miss. 1990), the court held that legitimate business interests were sufficient to justify the disclosure of an employee's hysterectomy. The employee, a nuclear decontamination laborer, collapsed at work, and her coworkers became concerned that it was related to radiation exposure. The employer disclosed to the rest of her coworkers that she had not collapsed from exposure to radiation but from the after effects of a recent hysterectomy. The employer stated that it had done so in order to allay fears of radiation exposure. The court recognized that the fact would be offensive to the average woman because it involved her sexual organs and would be something that a reasonable woman would have an interest in keeping private. The court then found that the employer had a qualified privilege to disclose the private fact to its employees in order to allay their fears of radiation exposure. The court noted that in certain situations public policy allows that a fact can be disclosed, even if it is private or sensitive, if the party making the disclosure and those who she is making the disclosure to have a common, legitimate interest in that fact. The court found that because the information was only disseminated to coworkers who had a legitimate interest in knowing that where they were working was safe and did not contain high levels of radiation, they had stayed within the bounds of the privilege. Had the employer only told them that her collapse was not radiation related without disclosing the hysterectomy, the employees would have wondered about the actual cause and likely not been satisfied by the explanation. The court entered summary judgment for the employer.

Comment h. Public interest in the intrusion. Illustration 20 is based on Wilcher v. City of Wilmington, 60 F.Supp.2d 298 (D. Del. 1999), on remand from 139 F.3d 366 (3d Cir. 1998). Illustration 21 is based on Luck v. Southern Pacific Transportation Co., 267 Cal. Rptr. 618 (Cal. App. 1st 1990). In *Luck*, the employee was a computer programmer for a railroad; she wrote computer programs concerning what employees did each day, where company equipment was located, and how much material was being used by employees. *Id*. at 621. The court held, as a matter of law, that she was not a "safety employee" and therefore there was no compelling interest in administering a drug test based on safety concerns. *Id*. at 631-32. See also Kelley v.

Schlumberger Tech. Corp., 849 F.2d 41, 42 (1st Cir. 1988) (direct observation of urinalysis test for barge engineer on a drilling rig was a violation of privacy causing emotional distress).

For a differentiation between these two ends of the spectrum, see Webster v. Motorola, 637 N.E.2d 203 (Mass. 1994). In *Webster*, employees were subject to random drug testing; they would average at least one test every three years. Two employees challenged the testing; one was an account executive who had a company car, while the other was a technical editor who worked with primarily user manuals. Interpreting the state's privacy statute, the Massachusetts Supreme Court held that the employer did have legitimate interests in testing the account executive, as they had an interest in "ensuring that [he] not operate their motor vehicle while intoxicated by drugs." Id. at 208. The editor, on the other hand, had only an "attenuated" connection to any risk to human health or safety through his potential drug use. Therefore, the drug policy did not pass statutory muster as to him.

With respect to common law liability for drug testing, courts have generally permitted such testing, as long as it is done for legitimate business purposes. As one source described it: "The courts appear to be supportive of employers' attempts to create a safe working environment by holding that drug-testing does not constitute an invasion of the employees' common law right to privacy." 62A American Jurisprudence 2d (1990) 683, Privacy, Section 61, cited in Groves v. Goodyear Tire & Rubber Co., 70 Ohio App.3d 656, 662, 591 N.E.2d 875, 878 (Ohio App. 1991) and Seta v. Reading Rock, Inc., 100 Ohio App. 3d 731, 739, 654 N.E.2d 1061, 1067 (Ohio Ct. App. 1995). However, a few jurisdictions have required a narrow tailoring of the manner and scope of the testing with regard to employees whose positions involve no safety risk. The West Virginia Supreme Court provides a good example of this perspective:

> . . . [I]t is unquestionable that since we do recognize a "legally protected interest in privacy" and have previously found that requiring employees to submit to polygraph examinations violates public policy based upon this privacy right, we likewise recognize that it is contrary to public policy in West Virginia for an employer to require an employee to submit to drug testing, since such testing portends an invasion of an individual's right to privacy. We do, however, temper our holding with two exceptions to this rule. Drug testing will not be found to be violative of public policy grounded in the potential intrusion of a person's right to privacy where it is conducted by an employer based upon reasonable good faith objective suspicion of an employee's drug usage or where an employee's job responsibility involves public safety or the safety of others.

Twigg v. Hercules Corp., 185 W. Va. 155, 158, 406 S.E.2d 52, 55 (1990).

Thus, even in states with greater restrictions, safety concerns will provide sufficient justification for the employer to conduct at least some kinds of tests. See Thomson v. Marsh, 884 F.2d 113 (4th Cir.1989) (upholding random drug testing at a chemical weapons plant because of governmental interest in safety); Jones v. McKenzie, 833 F.2d 335 (D.C.Cir.1987) (upholding drug testing where employee's duties involved direct contact with young school children and their physical safety); Ensor v. Rust Eng'g Co., 704 F.Supp. 808 (E.D.Tenn.1989) (applying Tenn. Law) (upholding drug testing program of pipefitters working at a facility engaged in research of nuclear energy and coming into contact with fissionable materials); Casse v.

Louisiana Gen. Serv., Inc., 531 So.2d 554 (La.Ct.App.1988) (court upheld drug testing program where company had a legitimate safety concern since it was in the business of distributing volatile natural gas). In Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11 (N.J. 1992), the court held that "safety outweighs a right to privacy in off-duty activities." The plaintiff in *Hennessey* was a lead pumper at an oil refinery, a "dangerous" job in which the consequences of error included explosions and fires. Id. at 37-38. The court stated: "If the employee's duties are so fraught with hazard that his or her attempts to perform them while in a state of drug impairment would pose a threat to co-workers, to the workplace, or to the public at large, then the employer must prevail." Id. at 36-37.

Courts have reached largely analogous results when evaluating the reasonableness of drug tests as a search under the Fourth Amendment. The standard was set in two 1989 Supreme Court cases: Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989), and Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). In both cases, the Court found that government-required drug and alcohol testing implicated the Fourth Amendment's search and seizure requirements. The testing procedures therefore had to meet the amendment's reasonableness requirement. In both cases, the Court found the testing to be reasonable, based primarily on safety concerns. Citing to "governmental interest in ensuring the safety of the traveling public and of the employees themselves," the *Skinner* Court found that the employees worked in an industry that was "regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." Skinner, 489 U.S. at 621, 627. The Court found that the "Government interest in testing without a showing of individualized suspicion is compelling," because railroad employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." Id. at 628. Only two years earlier, sixteen people had been killed in an Amtrak accident with a Conrail locomotive in Maryland; the two Conrail crew members had been under the influence of marijuana at the time. Because drug testing was "a highly effective means of ascertaining on-the-job impairment and of deterring the use of drugs by railroad employees," the Court found the tests to be reasonable. Id. at 632.

The drug and alcohol testing procedures in *Skinner* were triggered by specific events, such as serious accidents. By contrast, the testing procedures in *Von Raab* were routine pre-employment screenings for those U.S. Customs employees in positions involving drug interdiction, firearm use, or transporting classified documents. Von Raab, 489 U.S. at 660-61. Conducting a reasonableness balancing test, the Court held that "the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms." Id. at 668. The national interest in self-protection could be "irreparably damaged," said the Court, if Customs employees were, "because of their own drug use, unsympathetic to their mission of interdicting narcotics." Id. at 670. Ultimately, the testing program for those who handle firearms and participate in drug interdiction was justified by "the Government's compelling interests in safety and in the integrity of our borders." Id. at 672. The Court did not rule upon the reasonableness of the testing program for those who handled classified documents, as the Court was not clear on the boundaries of that category. As the Court noted, "it is not evident that those occupying these positions are likely to gain access to sensitive information, and this apparent discrepancy raises in our minds the question whether the Service has defined this category of employees more broadly than is necessary to meet the purposes of

the Commissioner's directive." Id. at 678. The Court remanded to the lower courts to "examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric." Id.

For cases upholding searches in the context of public employment, see Middlebrooks v. Wayne County, 446 Mich. 151, 163, 521 N.W.2d 774, 779-80 (1994) ("Operation of a riding lawn mower, especially on highway medians and embankments, and driving front-end loaders, trucks, and other equipment between a work site and repair facility, might result in serious injury from momentary lapses of attention characteristic of illegal drug use. . . . A riding lawn mower, front-end loader, or truck might become lethal when operated negligently. Thus, we conclude that the balance mandated by the Fourth Amendment tips in favor of permitting the state to require urinalysis testing . . . ." (quotations omitted)). The court distinguished American Federation of Government Employees v. Sullivan, 787 F. Supp. 255 (D.D.C. 1992), and Nat'l Treasury Employees v. Watkins, 722 F. Supp. 766 (D.D.C. 1989) by pointing out that the employees in those cases drove cars and vans similar to the way ordinary citizens would use the roads, while the plaintiff in *Middlebrooks* would have been required to operate a riding lawn mower on highway medians and embankments, as well as front-end loaders, trucks, and other heavy equipment. *Id*. at 780.

Employees will have difficulty arguing for the offensiveness of the drug-testing procedures if such procedures are explicitly permissible under state statutory law. See, e.g., Ritchie v. Walker Mfg. Co., 963 F.2d 1119 (8th Cir. 1992) ("Walker's drug-testing policy and its actions to discharge employees who are using or under the influence of drugs on company property or on company time reflect Nebraska law, which expressly permits the dismissal of an employee who fails a drug test and of '[a]ny employee who refuses the lawful directive of an employer to provide a body fluid.'" (quoting Neb.Rev.Stat. §§ 48-1903 and 48-1910 (1988)); Slaughter v. John Elway Dodge Southwest/AutoNation, 107 P.3d 1165 (Colo. App. 2005) (holding that an employee may not refuse to consent to a drug test that complies with Colorado statutory requirements as set forth in Colo. Rev. Stat. § 8-73-108(5)(e)(IX.5)); Frye v. IBP, Inc., 15 F. Supp. 2d 1032, 1041 (D. Kan. 1998) ("Despite plaintiff's argument that drug tests automatically impinge upon an employee's right to privacy, the State of Kansas clearly recognizes employer policies which require drug testing as a condition of employment. *See, e.g.,* K.S.A. § 44-706(b).").

Concerns about public safety also apply outside the drug testing context. In Fletcher v. Price Chopper Foods of Trumann, Inc., 220 F.3d 871 (8th Cir. 2000), for example, a food-service employee had developed a staph infection, which rendered her legally unable to continue in her job. The employer later contacted the employee's doctor to confirm that she had an infection. The court held that "[w]hen such a concern for the public health exists, an employer's need to know trumps an employee's right to privacy." See also Childrey v. Capital Area Community Services, Inc., 1999 Mich. App. Lexis 460 (Mich. App. 1999) (employer's investigation into employee's attempt "to hire someone to kill her supervisor" as well as "an illegal scheme to import and sell babies from Mexico" was justified by the illegality of the alleged conduct); Hernandez v. Hillsides, Inc., 211 P.3d 1063, 1081 (Cal. 2009) (stating that the employer had an important "goal to provide a wholesome environment for the abused children in its care, and to avoid any exposure [to pornography] that might aggravate their vulnerable state").

Comment i. Offensive to a reasonable person under the circumstances. Illustration 22 is based on Wal-Mart Stores, Inc. v. Lee, 348 Ark. 707, 724, 74 S.W.3d 634, 647 (2002). [Additional commentary to come.]

§ 7.07 Liability for Adverse Actions in Retaliation

An employer who takes a material adverse employment action against an employee for refusing to consent to an unreasonable and offensive employer intrusion upon a protected employee privacy interest under § 7.01 is subject to a tort action for wrongful discharge or discipline in violation of public policy.

Comment:

a. Scope. This Section outlines the protections accorded employees who refuse to give consent to employer intrusions that would otherwise violate their privacy interests under this Chapter. It applies the protections of § 4.01 to an employer's demand that the employer consent to a tortious intrusion.

b. Wrongful discipline or discharge. Courts have generally found no invasion of privacy when an employee refuses to submit to an employer's requested invasion of privacy since (as an analytic matter) the employee's refusal has staved off the invasion. But if the employee suffers a termination of employment or loss of employee benefits because of the employee's refusal to submit to invasion of his privacy, a tort action will lie for wrongful discharge or discipline in violation of public policy under Chapter 4 of this Restatement. The identified public policy is the right of employees to refuse to submit to unreasonable and offensive invasions of their protected privacy interests in the workplace. The common law is the source for these privacy protections. Courts have also pointed to federal and state constitutional privacy provisions, as well as federal and state legislation, as further sources of the protected employee rights of privacy in the workplace.

c. Threatened privacy violation required. This Section applies only to employer demands that, if realized, would constitute an actionable invasion of privacy under this Chapter. Privacy protections are generally the result of a balancing between employee privacy interests, employer business interests, and (at times) public interests in safety or business productivity. As a result, if employees were entitled to refuse employer-mandated intrusions based simply on a good-faith or even reasonable belief that the employer's proposed intrusion would violate their rights, an employer could be liable for legitimate and socially useful practices. Employees are entitled to refuse only those employer demands that would, if realized, be tortious invasions of privacy under this Chapter. Simply because the employee believes reasonably or in good faith that an employer is violating his rights does not create a basis in tort for holding the employer liable for insisting on its reasonable job requirements.

Illustrations:

1. X requires all of its employees to be randomly tested for use of illegal drugs through a urinalysis requiring the employee to produce the urine sample under the direct observation of X's supervisors. X's implementation of such a testing program would be a tortious invasion of the employees' privacy rights under this Chapter. E refuses to take the test, and X fires E. X has committed a wrongful discharge in violation of public policy under Chapter 4.
2. X requires its employees to be randomly tested for use of illegal drugs. The employees in question drive large trucks on major highways. X's implementation of the testing program would not be a tortious invasion of the employee's privacy. However, E believes in good faith that the test is a wrongful invasion of his

privacy rights. E refuses to take the test, and X fires E. X has committed no violation.

d. Adverse employment action. As in Chapter 4, the protections of § 7.07 are triggered only if the employer has taken a material adverse employment action. For this purpose, such an employment action is defined as "an action that significantly affects compensation or working conditions or other action, short of discharge, that is reasonably likely to deter a similarly situated employee from engaging in protected activity." Section 4.01(b).

REPORTERS' NOTES

Comment a. Scope. The logic behind this Section is straightforward. If an employer would commit a tort by invading an employee's privacy in a certain way, it should also be a tort for the employer to discipline the employee for refusing to consent to the invasion. Otherwise, in order to obtain relief, employees would have to consent to the invasion of privacy and then sue for damages after the fact. Employees should not have to consent to an invasion of their rights in order to have the protections of the common law of privacy. .

The protection described here could be classified as one type of the protections recognized in § 4.01(a) of this Restatement ("An employer that discharges or takes other material adverse action against an employee because the employee has engaged or will engage in protected activity under § 4.02 is subject to liability in tort for wrongful discipline in violation of public policy . . . ."). This Subsection is included in Chapter 7 because it is a complement to the protections offered earlier in the Chapter, but should be read consistent with the protections recognized in Chapter 4. Employer discipline for refusal to consent to privacy violations could as readily be classified as wrongful discipline in violation of public policy.

Section 7.07 is critical to the proper enforcement of common law privacy protections. It is akin to the anti-retaliation provision common to most employment law statutory schemes. Anti-retaliation provisions protect employees in the exercise of their rights under the statutory scheme. If employers were not liable for retaliating, employees would be vulnerable to attack for simply seeking to exercise the law's provisions. The U.S. Supreme Court has been particularly solicitous of employee claims against retaliation. See Kasten v. Saint-Gobain Performance Plastic Corp.,131 S.Ct. 1325_ (2011) (expanding FLSA anti-retaliation protection to oral as well as written complaints); Thompson v. North American Stainless, LP, 131 S.Ct. 863 (2011) (expanding Title VII's anti-retaliation provision to prohibit retaliation against the fiancé of an employee who engaged in protected conduct); Burlington Northern & Santa Fe Railway Co. v.

White, 548 U.S. 53, 70-73 (2006) (finding that change of job duties without reduction in pay as well as a rescinded suspension can constitute retaliation); Crawford v. Metropolitan Government of Nashville and Davidson County Tennessee, 129 S.Ct. 846, (2009) (finding participation in an internal investigation to constitute participation for Title VII retaliation purposes); Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008) (finding an implied right of action for retaliation in the ADEA); CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008) (finding an implied claim for retaliation in 42 U.S.C. § 1981); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (finding an implied claim for retaliation in Title IX of the 1964 Civil Rights Act). As Professor Moberly observes, the Court has developed an "anti-retaliation" principle based on "society's interest in effective enforcement of the laws." Richard Moberly, *The Supreme Court's Anti-Retaliation Principle*, 61 Case W. Res. L. Rev. (forthcoming 2011). For an influential discussion of the need for protection against termination based on a refusal to consent to invasions of privacy, see Pauline T. Kim, *Privacy Rights, Public Policy, and the Employment Relationship*, 57 Ohio St. L.J. 671 (1996).

Comment b. Wrongful discipline or discharge. Although employees who are discharged or discipline for refusal to consent to an invasion of their privacy have a claim of wrongful termination or discipline under this Section, they have not in fact suffered an invasion of privacy. See, e.g., Kelly v. Mercoid Corp., 776 F.Supp. 1246, 1257 (N.D.Ill. 1991) (finding no intrusion claim for mandatory drug test because plaintiff "never submitted to such a test") (applying Ill. Law); Hart v. Seven Resorts, 947 P.2d 846, 853-54 (Ariz. Ct. App. 1997) (employees who were terminated for failure to take a drug test did not suffer an invasion of privacy merely from the demand to take a drug test); Hellanbrand v. National Waste Assoc., LLC, 2008 Conn. Super. Lexis 249, at *15 (employee's refusal to turn over cellular phone records meant that "no intrusion took place"); Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1138 (Alaska 1989) ("As to the urinanalyses [plaintiffs] refused to take, we hold that no cause of action for invasion of privacy arises where the intrusion is prevented from taking place."); Rushing v. Hershey Chocolate-Memphis, 2000 U.S. App. Lexis 27392 (6th Cir. 2000) (failing to find an intrusion when employee refused to take drug test); Baggs v. Eagle-Picher Industries, Inc. 750 F. Supp. 264, 272 (W.D. Mich. 1990), *aff'd* 957 F.2d 268 (6th Cir. 1992) (same). However, the absence of an employer intrusion is only due to the employee's well-founded refusal. If the employer takes no action against the employee for refusing to consent, there is no violation. If the employer does take a material adverse employment action against the employee, then the employee has retaliated against the employee's exercise of her privacy rights and would be liable under this Section.

The following courts have found that public policy supports a claim against discipline or discharge based on the employee's exercise of privacy rights: Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989) (finding that "there is a public policy supporting the protection of employee privacy" and that "[v]iolation of that policy by an employer may rise to the level of a breach of the implied covenant of good faith and fair dealing"); Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1366 (3d Cir. 1979) (holding that "a cause of action exists under Pennsylvania law for tortious discharge" if the discharge resulted from a refusal to submit to polygraph examination); Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111, 117 (W.Va. 1984) (holding that termination for refusal to submit to polygraph test was a wrongful termination in violation of public policy); Cort v. Bristol-Myers Co., 431 N.E.2d 908, 912 n.9

(Mass. 1982) ("[I] in the area of private employment there may be inquiries of a personal nature that are unreasonably intrusive and no business of the employer and that an employee may not be discharged with impunity for failure to answer such requests."); *id.* at 915 (Abrams, J., concurring) (endeavoring to "explicitly state the opinion's underlying premise: that an employee at will has an action for bad faith discharge if an employer discharges the employee for failure to provide private information"); Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11 (N.J. 1992) (finding that "existing constitutional privacy protections may form the basis for a clear mandate of public policy supporting a wrongful discharge claim"); Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992) (holding that "dismissing an employee who refused to consent to urinalysis testing and to personal property searches would violate public policy if the testing tortiously invaded the employee's privacy"); Feminist Women's Health Center v. Superior Court of Sacramento Co., 52 Cal. App. 4th 1234, 1244 (Cal. App. 3d 1997) ("An action for wrongful termination of employment in violation of public policy may lie if the employer conditions employment upon required participation in unlawful conduct by the employee."); *id.* at 1245 (holding that "the constitutional right to privacy [in California] forms a sufficient touchstone of public policy to support [a] wrongful discharge claim"); Twigg v. Hercules Corp., 406 S.E.2d 52 (W.Va. 1990) ("[I]t is contrary to public policy in West Virginia for an employer to require an employee to submit to drug testing, since such testing portends an invasion of an individual's right to privacy.").

The cause of action described in the section is best elucidated by the Judge Edward Becker's opinion for the Third Circuit in Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992).(applying Pa. law). In finding the existence of a public policy interest based on common law privacy protection, the court hearkened back to Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974), which created the original Pennsylvania common protections for wrongful discharge. The *Geary* court had stated:

> It may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly when some recognized fact of public policy is threatened.

Id. at 180. The *Borse* court found that the federal and state constitutions did not provide the public policies necessary to support a wrongful discharge claim. However, Pennsylvania common law did. The court created the follow scheme for determining liability for wrongful discipline based on common law privacy interests:

> [W]hen an employee alleges that his or her discharge was related to an employer's invasion of his or her privacy, the Pennsylvania Supreme Court would examine the facts and circumstances surrounding the alleged invasion of privacy. If the court determined that the discharge was related to a substantial and highly offensive invasion of the employee's privacy, we believe it would conclude that the discharge violated public policy.

Borse, 963 F.2d at 623. See also Twigg v. Hercules Corp., 406 S.E.2d 52 (W.Va. 1990) ("[I]t is contrary to public policy in West Virginia for an employer to require an

employee to submit to drug testing, since such testing portends an invasion of an individual's right to privacy.").

Other courts have based their determination of a public policy in privacy on state constitutional provisions that protect privacy in the private sector, or on state statutes prohibiting certain types of privacy invasions. See Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1366 (3d Cir. 1979) (basing the public policy on a Pennsylvania statute making the use of a polygraph in the employment context a misdemeanor); Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989) (discussing state statutory and constitutional provisions that protect privacy rights, as well as the common law right of privacy). In Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11 (N.J. 1992), the New Jersey Supreme Court found that the wrongful discharge tort protected privacy rights based on public policy. The Court stated:

> Thus, persuasive precedent supports finding a clear mandate of public policy in privacy rights from several sources [including the common law]. Although one of those sources is the State Constitution, we emphasize that we are *not* finding in this opinion a constitutional right to privacy that governs the conduct of private actors. Rather, we find only that existing constitutional privacy protections may form the basis for a clear mandate of public policy supporting a wrongful-discharge claim.

Id. at 19. Ultimately, the court held against the employee because the drug test was properly administered based on safety concerns.

There is a minority of courts that view that an employer's demand to violate a person's privacy rights as an instance of the intrusion tort, rather than a separate tort for wrongful discipline. See, e.g., Gilmore v. Enogex, Inc., 878 P.2d 360, 366-67 (Okla. 1994) (holding that an employer's demand that the employee "undergo a drug test to continue his at-will employment status may be viewed as so intrusive by itself as to meet the *nonconsensual* element of this test"). However, it is more internally consistent to view the punishment for failing to consent to the intrusion as a separate wrong. Another minority approach is to find a contractual claim. In Luck v. Southern Pacific Transportation Co., 267 Cal. Rptr. 618 (Cal. App. 1st 1990), the court rejected the wrongful discharge claim but upheld plaintiff's claim that termination for refusal to take the drug test constituted a violation of an implied covenant of good faith and fair dealing. The appellate court held that the right of privacy is a private right, not a public one, and therefore violation of the right does not trigger a public interest. *Id.* at 635. The court also said that even if public policy interests were involved, they were not sufficiently established to serve as the basis for a wrongful discharge. *Id.* (noting that "the public policy must be one about which reasonable persons can have little disagreement"). However, this approach fails to recognize the important public policies inherent in enforcing employee privacy protections.

The court in Jennings v. Minco Technology Labs, 765 S.W.2d 497 (Tex. App. 1989) rejected any public policy protection for terminated or disciplined employees. In *Jennings*, the employer had announced a plan to test its employees for drugs. The plaintiff sued for declaratory and injunctive relief against the testing program. The court found the plaintiff's fear of losing

her job unpersuasive. Rejecting the employee's claim that she needed her job because of her relative poverty otherwise, the court stated:

> We disagree with this theory. A competent person's legal rights and obligations [under contract] cannot vary according to his economic circumstances. There cannot be one law of contracts for the rich and another for the poor.

Id. at 502. The *Jennings* court misses the point. It is not that only poor people should have protection against wrongful discharge – everyone should have these protections. They are necessary if employee's common law rights are to be meaningful against a concerted employer attack.

Another public policy interest in protecting against wrongful discipline or discharge is to prevent employers from using coercive means to not only invade the person's privacy, but also risk some negative finding against them, such as an incorrectly positive drug test. If employees are entitled to the protection of their privacy interest, they should be encouraged to resist such invasions in order to prevent the degradation of privacy rights. Moreover, employees may suffer social stigma for refusing the invasion. In Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W.Va. 1984), the dissenting justice remarked: "I suspect that the reason the employees in this case failed to take the polygraph examination was that they had stolen things from either the hotel or its guests." *Id.* at 119 (Neely, J., dissenting). Given the concerns about the validity of polygraph tests, Justice Neely's suspicion seems ill-advised. Protection against retaliation is needed to overcome any lingering effects of stigma from the refusal.

Comment c. Threatened privacy violation required. The decisions which recognize protection against wrongful discipline or discharge for privacy violations all require a balancing between the employee's privacy interests and the interests of the employer and society. See Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992) (noting that other courts have "balance[d] the employer's privacy interest against the employer's interests" in determining whether there was a proposed invasion of privacy); Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1135 (Alaska 1989) (holding that the right to privacy "must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare"); Gilmore v. Enogex, Inc., 878 P.2d 360, 366-67 (Okla. 1994) (balancing the employee's concerns against the employer's legitimate interests in a drug-free workplace); Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 20 (N.J. 1992) ("[A]lthough employees have a right to be protected from intrusions of privacy, we must also consider the competing public interests in safety. To constitute a 'clear mandate of public policy' supporting a wrongful-discharge cause of action, the employee's individual right (here, privacy) must outweigh the competing public interest (here, public safety)."); Twigg v. Hercules Corp., 406 S.E.2d 52, 55 (W.Va. 1990) (permitting an employer to compel testing as a condition of employment where it is "based upon reasonable good faith objective suspicion of an employee's drug usage or where an employee's job responsibility involves public safety or the safety of others"). This balancing determines whether the threatened invasion of privacy was justified based on the confluence of interests. In order to discourage tortious invasion while permitting socially-beneficial invasions to take place, courts must enforce this provision by protecting employees only for refusing tortious invasions of their privacy.

Illustration 1 is based on Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992). In *Borse*, the Third Circuit held that under Pennsylvania common law, a termination of an employee for failure to consent to an invasion of privacy would be contrary to public policy. *Id.* at 626 ("In sum, based on our prediction of Pennsylvania law, we hold that dismissing an employee who refused to consent to urinalysis testing and to personal property searches would violate public policy if the testing tortiously invaded the employee's privacy."). In the case at hand, the court remanded the case to determine whether the employer's drug testing program violated its employees' privacy interests in a substantial and highly offensive way, and thus whether her termination was a violation of public policy.

Illustration 2 is based on Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989). In *Luedtke*, employees were suing for refusing submit to drug tests. The court recognized a right against wrongful discharge because the employee refused to consent to an invasion of privacy. However, the court balanced the privacy rights against the employer's and society's interests in a drug-free workplace. Ultimately, the court held that the employer was justified in requiring a drug test because "the health and safety concerns [associated with the drug test] are paramount." *Id.* at 1136.

Comment d. Adverse employment action. The standard for material adverse employment action is taken from § 4.01(b). For a discussion of the "adverse action" standard, see Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 70-73 (2006). In *Burlington*, the Court held that a change of job duties without reduction in pay, as well as a rescinded suspension, are sufficiently material adverse actions to constitute retaliation. The Court described its holding as: "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (quotations and citations omitted).

TOPIC 2
PROTECTION OF EMPLOYEE PERSONAL AUTONOMY

§ 7.08 Employee Autonomy Interests

Employees have rights of autonomy while in the employment relationship. Protected employee autonomy interests while in that relationship include the interests in:

(a) engaging in conduct, activities, or behavior outside of the workplace that do not interfere with the employee's responsibilities as an employee;

(b) adhering to moral, ethical, or other personal beliefs that do not interfere with the employee's responsibilities as an employee; and

(c) engaging in conduct or behavior outside the workplace which the employer has agreed or promised to treat as separate from and irrelevant to the obtaining or maintenance of the employment relationship with the employer.

Comment:

a. Scope. Sections 7.08 and 7.09 address the common-law protections against unreasonable employer infringement on employee autonomy interests. Section 7.08 describes the nature of these interests, and section 7.09 explains the cause of action provided for employees who are injured by such unreasonable employer infringements.

Employee autonomy has sometimes been characterized as a species of privacy protection. Like privacy interests, autonomy interests are intended to cover those aspects of an employee's life that take place outside the scope of the workplace and the employer's control of the workplace. Both autonomy and privacy protections are intended to carve out a protected zone for the employee against unwarranted employer intrusion. Privacy interests tend to be discrete. An employee has a privacy interest in her personal email account, her locker, her clothes, and her social security number. Moreover, an employee must often compromise her privacy in the

context of carrying out her employment responsibilities. Autonomy, if construed in a manner consistent with the nature of the employment relationship, concerns one's personal conduct, activities, and beliefs that are separate from and have no impact on the workplace. Employees must cede a great deal of their overall autonomy during their working time because they relinquish control over their work time and entrepreneurial discretion to the employer (§ 1.01). That being so, it is the employee interests that lie outside the boundaries of the workplace – that are separable from the demands made on employees from the nature of their employment – that constitute the protected "autonomy interests" described in this and the succeeding sections.

b. Autonomy protections in contract and in tort. Protections for autonomy interests flow from both contract and tort. In some cases, employers have made express contractual promises to employees that their private lives will be kept out of the workplace. These promises bind employers while they are in effect. However, even in the absence of direct agreement, employees do not expect—and have not authorized simply by entering into an employment relationship—employers to take adverse employment actions based on conduct, behavior, or beliefs that have nothing to do with the employment relationship. The unwritten expectations are that employees will perform their job as prescribed by the employer, and that the employee generally will not suffer an adverse employment action because of off-duty activities unrelated to employee concerns.

Tort also plays a role in these protections, as there are societal interests in protecting employee autonomy outside of the workplace. Courts have recognized the public policy importance in carving out space for employees to engage in protected activities. Free political speech and the freedom to practice one's religion are important constitutional values. Even though the First Amendment of the United States Constitution protects persons only against

government interference, common law courts have recognized similar interests in the course of expounding contract and tort law. Thus, the tort of wrongful discipline in violation of public policy (see Chapter 4) has been applied to bar employers from preventing employees from participating in jury pools or other forms of participation in governance responsibilities. In some cases, courts have defined autonomy as a type of privacy interest and have protected autonomy through the torts relating to privacy, particularly intrusion upon seclusion.

Of course, these protections have to be interpreted consistent with the overall contractual presumption of at-will employment (see Chapter 2), as well as the limitations on autonomy inherent in the employment relationship. Thus, protections of employee autonomy are relatively narrow and circumscribed. Nevertheless, these protections are available to employees when the employer has greatly overstepped its contractual discretion and trampled on employee autonomy interests that have no workplace ramifications.

c. Constitutional and statutory protections. This section deals with common law protections for employee autonomy interests. It does not cover federal or state constitutional provisions or statutory provisions except to the extent they may inform common law principles.

d. Conduct, activities, or behavior outside the workplace. When an employee is engaged in the employment relationship, she is an agent of the employer and her actions reflect on the employer and its business. Any conduct, activities, or behavior that takes place during working time is not "outside of the workplace." Nor can conduct that takes place on employer property or during working hours be considered "outside the workplace," even if it primarily concerns activities that occur outside of the physical workplace.

Illustration:

1. E drives his car to work and parks in the employer's parking lot. He has a rifle in his car locked securely away in the trunk, as he plans to visit a gun range after work. Even though E has no plans to use the gun at the workplace and does not open the trunk while in the parking lot, having a gun in his car at the employer's parking lot is conduct occurring at the workplace and hence outside the scope of this Section.

e. Dating between coworkers. Although they may take place largely or exclusively after working hours and outside the employer's premises, dating or romantic relationships between coworkers is not entirely conduct occurring outside the workplace.

Illustration:

2. E has a romantic relationship with F, a fellow employee at X's food production plant. The relationship between E and F has caused dissension among other employees at work, particularly when E tried to join the same shift as F. X's decision not to accede E's request to join F's shift, to avoid such dissension, did not violate E's autonomy rights under this Section because X has a legitimate basis for concern that E's working with F on the same shift would cause operational problems.

f. Autonomy protected by agreement or promise. An employer can also extend an employee's autonomy interests to widen the spectrum of protected activity. Such protections

may extend beyond conduct, behavior, or beliefs that do not occur at the workplace or have no workplace impact. For example, an employer may, through promise or agreement, permit an employee to engage in conduct that might be uncongenial to a segment of customers, or it may permit the employee to refuse certain workplace requests based on the employee's moral or religious beliefs. An employer's agreement to such limitation can overcome the employer's general discretion to discipline employees for private activities outside of the workplace that have an effect on the employer's workplace or reputation.

Illustration:

3. X's chief executive officer adopted the following policy with regard to employee discipline for conduct outside of work:

> We have concern with an employee's off-the-job behavior only when it reduces his ability to perform regular job assignments, interferes with the job performance of other employees, or if his outside behavior affects the reputation of the company in a major way. When on-the-job performance is acceptable there are few situations in which outside activities could result in disciplinary action or dismissal.

E is in a romantic relationship with B, a former employee of X who now works for X's competitor. X. terminated E's employment after E failed to break off the relationship. However, there was no evidence that E had access to any information that would be useful to a competitor. Under the expanded protection for employee autonomy promised by X policy, X's termination of E was in breach of contract because E's relationship with B had no adverse effect on E's job responsibilities or X's reputation.

g. Nonapplicability to workplace conduct. Protected autonomy rights under this Chapter refer only to conduct or behavior occurring outside of the workplace; they do not extend to conduct or behavior at the workplace. Thus, an employee's on-the-job speech does not implicate an autonomy interest under this Section. Similarly, employee refusal to participate in political activities related to their jobs based on personally-held moral or political beliefs are not protected under this Section. Autonomy protections extend only to conduct, behavior and beliefs that are separate from the workplace.

Illustrations:

4. Employer X fired E after he complained about a variety of workplace practices that, in E's view, raised safety concerns. E's conduct may be protected under particular occupational safety laws but does not implicate an autonomy interest protected under this Section.

5. E worked as a manager for X, an insurance company. The employer requested all employees to sign and circulate a petition supporting certain reforms to the state's insurance laws. E refused to participate and told his superiors that he disagreed with the legislation. E's conduct does not implicate a protected autonomy interest.

h. Noninterference with employee responsibilities. Courts have generally accorded employers substantial discretion to determine whether an employee's off-premises activity interferes with workplace responsibilities or the company's reputation. Because employees in a managerial position often act as a representative of the employer, their off-hours behavior can

affect the reputation of the employer; this can provide a legitimate basis for employer's taking cognizance of such behavior in making employment decisions.

Illustration:

6. E worked as head of trading for X, a major investment bank. Outside of working hours, E also operated a mail-distribution business which sold white supremacist and Nazi music and paraphernalia. An article in a local paper discussed E's mail-distribution business, which it described as "racist." After learning of E's business through the article, X terminated E's employment. X properly determined that E's business interfered with his responsibilities as an employee.

In addition, protections of employee autonomy do not extend to expressions of political or ideological belief that run counter to the employer's interests. Autonomy protections are intended for those activities in which the employer has no legitimate interest. An employer has an interest in having its employees support proposals or policies that would directly benefit the employer as well as oppose those policies or proposals that would directly harm the employer. Chapter 4, which discusses the tort of wrongful discipline, covers those instances in which an employee may speak out against the employer in order to promote the public interest. This Section concerns the protection of employee interests in autonomy without regard to any broader public interest.

Illustration:

7. E attends the meeting of a citizens' advisory group working to develop proposals to regulate the use of nearby public lands. X, E's employer and a lumber company, submits a proposal that would allow further development rights for the lumber industry on public lands. E speaks up at the meeting against X's plan. E's actions interfered with his responsibilities as X's employee and are not protected autonomy interests under this Section.

REPORTERS' NOTES

Comment a. Scope. Many have bemoaned the common law's apparent lack of protection for worker autonomy. And unlike privacy, there is not a direct common law cause of action that directly protects the interests in question. However, courts have addressed autonomy concerns in cases involving contract protections, the tort against wrongful discipline in violation of public policy, and privacy protections. Moreover, cases rejecting autonomy protections have either concerned conduct that takes place in the workplace or conduct that has an impact on the employer's workplace, business, or reputation. The protections for autonomy described herein fit within common law outcomes and traditions.

Comment b. Autonomy protections in contract and in tort. The themes discussed in comment b are developed further in this section.

Comment d. Conduct, activities, or behavior outside the workplace. Illustration 1 is based on Hansen v. American Online, Inc., 96 P.3d 950 (Utah 2004). In *Hansen*, the plaintiffs had taken their guns out of their car trunks while on the parking lot simply to transfer them to another car. Security cameras recorded the transfer. Although keeping a gun in a locked trunk on the employer's premises is not considered outside the workplace, an employee might still have privacy protections if the gun is kept in the trunk and only found after an improperly intrusive search.

Comment e. Dating between coworkers. Almost all courts have held that relationships between coworkers – particularly those between supervisors and subordinates – are matters of workplace concern and do not constitute private behavior. *See, e.g.*, Barbee v. Household Automotive Finance Corp., 113 Cal.App.4th 525, 6 Cal.Rptr.3d 406 (2003) (recognizing employer interests in avoiding conflicts of interest between work-related and family-related obligations, reducing favoritism or even the appearance of favoritism, and preventing sexual harassment); Crosier v. United Parcel Service, Inc., 150 Cal.App.3d 1132, 198 Cal.Rptr. 361 (1983), (disapproved of on other grounds by Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765

P.2d 373 (1988) (finding that the employer was "legitimately concerned with appearances of favoritism, possible claims of sexual harassment and employee dissension created by romantic relationships between management and nonmanagement employees"); Rogers v. International Business Machines, 500 F. Supp. 867 (W.D. Pa. 1980) (finding that employee's termination because of a relationship with a subordinate was based on employer's "legitimate interest in preserving harmony among its employees and in preserving its normal operational procedures from disruption") (applying Pa. law); Patton v. J.C. Penney Co., 301 Or. 117, 719 P.2d 854 (1986), abrogated on other grounds by McGanty v. Staudenraus, 321 Or. 532, 901 P.2d 841 (1995) (finding no tortious conduct for termination based on relationship with coworker); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (same); Ward v. Frito-Lay, Inc., 95 Wis.2d 372, 290 N.W.2d 536 (Ct.App.1980) (same); Patton v. J.C. Penney, 719 P.2d 854 (Oregon 1986) (same). However, at least one court has held open the possibility in dicta that an employer's actions concerning a consensual relationship between employees could be tortious. Mercer v. City of Cedar Rapids, 104 F. Supp. 2d 1130, 1180 (N.D. Iowa 2000) (stating that "intrusion upon the privacy of an employee's off-duty, consensual relationship with another coworker might be highly offensive in private sector employment") (applying Ia. Law).

As a corollary, off-duty contact between coworkers also falls outside the protections for autonomy. See, e.g., Manning v. Department of Employment Sec., 850 N.E.2d 244, 18 A.L.R.6th 839 (Ill. App. Ct. 1st Dist. 2006) (employee's conduct in leaving a vulgar message on a coworker's personal voice mail after work was misconduct harmful to the employer).

Comment f. Autonomy protected by agreement or promise. Illustration 3 is based on Rulon-Miller v. International Business Machines Corp., 208 Cal. Rptr. 524 (1st Dist. 1984), *overruled on other grounds,* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (disallowing tort actions for breach of good faith and fair dealing). In *Rulon-Miller*, the employer's chairman had distributed a policy to all company managers stating that: "We have concern with an employee's off-the-job behavior only when it reduces his ability to perform regular job assignments, interferes with the job performance of other employees, or if his outside behavior affects the reputation of the company in a major way. When on-the-job performance is acceptable, I can think of few situations in which outside activities could result in disciplinary action or dismissal." *Id.* at 530. The court held that "this company policy insures to the employee both the right of privacy and the right to hold a job even though 'off-the-job behavior' might not be approved of by the employee's manager." *Id*.

Comment g. Nonapplicability to workplace conduct. Courts have consistently held that employees do not have free speech rights that extend to the workplace itself. See, e.g., Barr v. Kelso-Burnett Co., 478 N.E.2d 1354, 1356 (1985) (refusing to extent protection to plaintiffs who were allegedly fired for peaceably informing fellow employees of layoff procedures being utilized). Speech may be protected if it includes a public policy component, such as speaking out against dangerous or illegal employer practices. See Chapter 4. However, mere self-expression at the workplace, unprotected by public policy protections, is outside of the scope of workplace autonomy.

Illustration 4 is based on Bushko v. Miller Brewing Co., 134 Wis.2d 136, 396 N.W.2d 167 (Wis. 1986).

Illustration 5 is based on Novosel v. Nationwide Insurance Co., 721 F.2d 894 (3d Cir. 1983) (applying Pa. law). Because it focused its public policy analysis on the protection of employees' freedom of expression, it is perhaps the highest-profile case to provide protection for worker autonomy. However, the court in *Novosel* actually reached a contrary conclusion to the example, as it held that the employee stated a claim for termination based on to tort of wrongful discharge in violation of public policy. Illustration f reaches a contrary result because the decision in *Novosel* is not compatible with common-law protections for worker autonomy. The employer in *Novosel* was clearly asking the employee to participate in a work-related lobbying effort that would directly benefit the employer's business interests. As such, it falls under the rubric of political action that an employer may demand of its employees during the course of the employee's job performance. Under the logic of *Novosel*, "[a]n explicit contractual provision authorizing an employer to dismiss a lobbyist for failure to undertake lobbying might be unenforceable or subject to a balancing test." *Novosel*, 721 F.2d 894, 903 (statement of Becker, J., dissenting from the denial of the petition for rehearing). Worker autonomy interests focus on those aspects of employee autonomy that are clearly separate from the workplace.

Moreover, *Novosel*'s use of the balancing test from public-employee speech cases, such as Connick v. Myers, 461 U.S. 138 (1983) and Pickering v. Board of Education, 391 U.S. 563 (1968), was problematic in its direct incorporation of federal constitutional law into state common law. Most courts have rejected a direct application of public-sector speech protections to the private sector. See, e.g., Dixon v. Coburg Dairy, Inc., 330 F.3d 250, 262 (4th Cir. 2003) (applying S.C. law) (declining to reach "the absurd result of making every private workplace a constitutionally protected forum for political discourse"), reversed on other grounds, 369 F.3d 811 (4th Cir. 2004) (en banc); Grinzi v. San Diego Hospice Corp., 14 Cal. Rptr. 3d 893, 900 (Cal. App. 4th 2004) ("We do not find [*Novosel*] persuasive and also decline to adopt it."); Edmondson v. Shearer Lumber Products, 75 P.3d 733, 738-739 (Idaho 2003) (*Novosel* policy not "endorsed by any other court"); Shovelin v. Central New Mexico Elec. Co-op., Inc., 850 P.2d 996, 1010 (N.M. 1993) ("We did not, however, adopt the approach taken by the Third Circuit in *Novosel* and are not inclined to adopt that approach now."); Tiernan v. Charleston Area Medical Center, Inc., 506 S.E.2d 578, 588-591 (W.Va. 1998) (rejecting the *Novosel* approach in a lengthy discussion); Barr v. Kelso-Burnett Co., 478 N.E.2d 1354, 1356 (1985) (constitutional guarantee of free speech provided by Illinois and U.S. Constitutions does not provide protection or redress against private individuals or corporations which seek to abridge free expression of others); Graebel v. American Dynatec Corp., 604 N.W.2d 35 (Table), 1999 WL 693460 (Wis. App. 1999) ("Although we recognize a wrongful discharge claim when an employer's actions violate a clearly mandated public policy, the public policy exception may not be used to extend constitutional free speech protection to private employment." (quoting Bushko v. Miller Brewing Co., 396 N.W.2d 167, 172 (Wis. 1986))).

However, it is important to recognize that none of these cases, in terms of their holdings, reject the more limited approach taken in this Section. The cases all involved either workplace conduct or conduct that had a significant impact on the employer's business or reputation. See *Dixon,* 330 F.3d at 254-55 (no public policy protection for Confederate flag on tool box that would be visible to coworkers); *Grinzi*, 14 Cal. Rptr. 3d at 896 (no protection for employee's membership in Women's Garden Circle, an investment group the employer believed to be an illegal pyramid scheme); *Edmondson*, 75 P.3d at 736 (no protection for employee's involvement

in local government task force that concerned issues vital to the employer's interest, particularly when employee opposed employer's interests); *Shovelin*, 850 P.2d at 1010 (no protection for employee serving as local mayor; employer warned employee prior to election that mayoral duties would interfere with employee's ability to perform the job); *Tiernan,* 506 S.E.2d at 588-591 (no protection for employee's letter, published by newspaper, that was critical of and sarcastic towards the employer); *Barr*, 478 N.E.2d at 1355 (plaintiffs had, prior to said discharge by the defendants without threats or intimidation and peaceably, informed fellow employees of layoff procedures being utilized); *Graebel,* 604 N.W.2d 35, 1999 WL 693460 at *1 (employee fired because of letter to local newspaper using racially inflammatory expressions).

Comment h. Noninterference with employee responsibilities. Illustration 6 is based on Wiegand v. Motiva Enterprises, LLC, 295 F. Supp. 2d. 465 (D.N.J. 2003). However, the employee in that case was a clerk at a retail establishment. See also Graebel v. American Dynatec Corp., 230 Wis. 2d 748, 604 N.W.2d 35 (Table) (Ct. App. 1999) (employee fired because of letter to local newspaper using racially inflammatory expressions).

Off-duty expressions of racial, sexual, age-oriented, or religious bigotry may also impact the employer by providing support for another employee's discrimination claim. See Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325 (6th Cir. 1994) (finding no error in allowing off-duty verbal statements critical of the elderly into evidence for age discrimination case).

Illustration 7 is based on Edmondson v. Shearer Lumber Products, 73 P.2d 733 (Idaho 2003).

§ 7.09 Liability for Intrusions on Employee Autonomy

An employer is subject to liability for intruding upon an employee's autonomy interest if:

(a) the employer discharges or takes other material adverse employment action against the employee based solely on the employee's exercise of a protected autonomy interest; and

(b) the employer does not have a good faith basis for believing that the employee's exercise of that autonomy interest interferes with the employee's responsibilities as an employee.

Comment:

a. The relationship between the at-will rule and protection for employee autonomy. As discussed in Chapter 2, the at-will rule is the default contractual rule for terminating the employment relationship. However, Chapters 2 and 4 recognize important limitations on the at-will rule based on both public policy and the nature of the employment relationship. Section 2.06 provides that the employer owes a duty of good faith and fair dealing to the employee – a duty which includes an obligation not to deprive the employee of the benefits of the contract. Section 4.01 recognizes a tort based on an employer's wrongful discipline in violation of public policy. The sources of public policy are set out in § 4.03; they include legislative, judicial, and regulatory sources, as well as well-established rules of professional or occupational conduct.

Both the covenant of good faith and the tort of wrongful discharge or discipline contribute to the legal protections of the employee right of autonomy. An employee cedes a great deal of her autonomy to the employer as part of the employment contract. During work hours, the employer can dictate the employee's activities; indeed, the common law control test for employment was based primarily on this power. Implicit in this employer control is a mutual

recognition of employer and employee that such control does not extend outside of the employment relationship. The employer can be said by fair implication to promise that it will not overstep the bounds of the relationship and seek to deprive the employee of her off-hours autonomy on grounds that provide no benefit to the employer.

As also discussed in connection with § 7.08, employee autonomy is additionally grounded in societal concerns. Autonomy can include matters of public and personal importance, such as the freedom to hold religious, moral, ethical, and political beliefs, which society has an interest in protecting against both government and private intrusions. If an employer's adverse employment decisions reflect efforts to violate public policy, the employee can seek relief in the tort of wrongful discipline discussed in Chapter 4. This Section also provides protection for employee expression or other exercise of religious, moral, ethical and political beliefs that do not implicate legitimate business concerns of the employer.

b. Good faith. The employer is subject to liability under this Section for violating an employee's autonomy interests only if it does so without good-faith justification. The implied duty of good faith and fair dealing, contained in every employment agreement, recognizes "a duty of cooperation such that he or she will not hinder the other's ability to accomplish that party's performance under the agreement or deprive that party of the benefit of the contract." (§ 2.06 cmt. a.) If the employer disciplines an employee solely because of conduct, behavior, or beliefs that have no impact on the workplace, such discipline undermines, without countervailing justification, the employee's right of autonomy. The good-faith requirement limits liability to employers who knowingly and intentionally act to punish an employee for activity that does not interfere in any way with the employee's responsibilities as an employee.

Illustrations:

1. E works as a cashier for X, a car body shop. In her free time, she volunteers at a foundation for those who have a crippling virus. The virus is contagious but only through blood-to-blood contact. M, the manager at X, learns of E's volunteer work and fears that E will spread the virus to E's coworkers and customers. M tells E she must stop volunteering or be terminated. She refuses and M terminates her employment. Even though it is extremely unlikely that E's volunteer work would lead her to contract the virus, X would not be liable for E's discharge under this Section based on its good-faith concern for its workers and customers.
2. M, a supervisor for employer X, engaged in a pattern of harassment of E. M also told E he would fire her if she ever got married. When M learned of E's plan to marry, he fired her. If M was acting within the scope of his authority for X, X would be liable for E's termination.

c. Adverse employment action. Employers are liable for any adverse employment actions they take against an employee in violation of this Section. Although termination represents the most severe such action, any action that negatively affects the employee's terms and conditions of employment potentially injures that employee. As set forth in Chapter 4, the disciplinary decision is actionable when it negatively affects an employee sufficiently to dissuade a reasonable worker from engaging in the protected activity (in this case, exercising their autonomy interests).

Illustration:

3. M, a manager at X, learns that E is a member of a religion which M finds offensive. X reassigns E from her position as forklift operator to a less-skilled laborer position. Her pay remains the same, as do her benefits. However, the changes in her job duties could well dissuade E from engaging in protected autonomous activities and therefore constitute an adverse employment action.

REPORTERS' NOTES

Comment a. The relationship between the at-will rule and protection for employee autonomy. As discussed in the Reporters' Notes on § 7.08, protections for autonomy are based on the principles of the tort of wrongful discipline in violation of public policy, the common law protections for privacy, and the contractual covenant of good faith and fair dealing. The mechanics of the cause of action most resemble the tort of wrongful discipline or § 7.08 of this chapter, as the employee is suffering retaliation based on protected conduct. Unlike the privacy torts, the harm is not a direct employer intrusion; it is rather the employer's retaliation for the employee's expression of autonomy. Thus, autonomy protections do not concern the autonomy interests directly, but rather the employer's improper actions that are based solely on those autonomy interests.

Although autonomy interests inure overall to the good of the public, autonomy itself is less directly aimed at the public weal than those actions which are protected by the tort of wrongful discharge in Chapter 4. In fact, the protection of autonomy ultimately seeks to free the individual to act in her own individualized way apart from the workplace. Thus, the autonomy protections in § 7.09 do not amount to an effort to include First Amendment values within the tort of wrongful discharge. This was most directly attempted in Novosel v. Nationwide Insurance Co., 721 F.2d 894 (3d Cir. 1983), and most courts have rejected the *Novosel* approach, as discussed in the Reporters' Note to 7.08 cmt. g.

The crux of the contractual compromise between employee and employer is aptly summarized by the following passage from Pettis v. Cole, 49 Cal. App. 4th 402, 444-45 (Cal. App. 1 Dist. 1996):

> Anyone who has ever been an "employee" can relate to . . . the importance of protecting an individual's right to informational privacy, especially as against employers and others with whom the individual maintains only a business relationship. The "employee" mask is one that helps workers maintain an aura of competence, efficiency, professionalism, social propriety, seriousness of purpose, etc., allowing them to perform their duties to the satisfaction of their employers

> but simultaneously to protect their job security and, thus, their economic well-being. Many employees choose to conceal from their employers matters of disability, sexual orientation and conduct, political affiliation or activities, family or marital strife, unconventional life styles or avocations, etc., out of fear that, no matter how well they might perform in the workplace, revelations about these or other aspects of their private lives may cost them their jobs. In general, this approach is one that benefits both employees and employers, who often stress that employees should not bring their personal problems to work with them or pursue personal interests while they are "on the clock," and who would not always wish to be identified as somehow connected with their employees' private conduct. In return, it is only fair that employees be allowed to maintain a wall of privacy around highly personal information about their other "roles" in life, to be free to tell their employers, in effect, "It's none of your business what I do-and think-on my own time."

Comment b. Good faith. Illustration 1 is based on Brunner v. Al Attar, 786 S.W.2d 784 (Tex. App. 1990). In *Brunner*, the employee was allegedly fired after she refused to stop her off-duty volunteering with a local AIDS foundation. Such work would seemingly have no effect on the employee's work at the employer's body shop. However, the employee alleged that the employer "feared that [the employee] would catch and spread the Acquired Immune Deficiency Syndrome (AIDS) to [her fellow] employees." Although such fears seem unwarranted, particularly in retrospect, they show that the employer's decision to terminate was based on the owner's good-faith fears of workplace effects.

Illustration 2 is based on Cunningham v. Dabbs, 703 So.2d 979 (Ala.Civ.App. 1997). In *Cunningham*, a supervisor subjected the plaintiff-employee to frequent episodes of sexual harassment. When the supervisor learned that plaintiff was getting married, he fired her. The court rejected her wrongful discharge claim, but it denied summary judgment as to her intrusion upon seclusion and outrage claims. It essentially treated the wrongful discharge claim as an outrage claims by basing the outrage claim on her discharge. *Cunningham*, 703 So.2d at 983 ("[In support of the outrage claim,] Cunningham alleges a pattern of harassment and a termination of employment in violation of her fundamental right to marry."). Under this Chapter, the plaintiff would have an action under § 7.09 for her discharge based on her marriage.

Comment c. Adverse employment action. Like § 4.01(b), this provision protects not only against discharge but also against all other discipline that could be considered material. Illustration 3 is taken in part from Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006). *Burlington* concerned the antiretaliation provisions in Title VII. The court held that an action taken by the employer could be considered materially adverse if such action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68. Here, the standard can be adapted to cover those disciplinary actions that could well dissuade a reasonable worker from engaging in the protected autonomy interests. As the court noted, "normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence." *Id.*

APPENDIX

Black Letter of Preliminary Draft No. 8

§ 3.01 Right to Earned Compensation

(a) Whether the employment relationship is terminable at will or terminable only for cause, employees have a right to be paid the compensation they have earned.

(b) Whether compensation has been earned is determined by the agreement between the employer and employee or any binding promises or policy statements of the employer.

(c) Employers are under an obligation to pay in a timely fashion the compensation employees have earned. If there is a bona fide dispute as to whether the compensation claimed has been earned, employers are under an obligation to pay in a timely fashion the compensation that is not in dispute.

§ 3.02 Bonuses and Other Incentive Compensation

(a) If so provided in an agreement between the employer and the employee or any binding promises or policy statements of the employer, bonuses and other incentive compensation are a form of compensation which employees have a right to be paid if they have earned such compensation. Absent such an agreement or any binding promises or policy statements, bonuses and incentive compensation are awards made in the employer's discretion.

(b) Whether bonuses or other incentive compensation have been earned is determined by the agreement between the employer and employee or any binding promises or policy statements of the employer.

(c) Employers are under an obligation to pay in a timely fashion the bonus and other incentive compensation employees have earned. If there is a bona fide dispute as to whether the compensation claimed has been earned, employers are under an obligation to pay in a timely fashion the compensation that is not in dispute.

§ 3.03 Benefits

(a) If so provided in an agreement between the employer and the employee or any binding promises or policy statements of the employer, benefits are a form of compensation which employees have a right to receive, in accordance with any applicable plan documents.

(b) Employers are under an obligation to provide employees, in accordance with any applicable plan documents, the benefits the employers have agreed or promised, as a matter of agreement, practice, or policy statement, to provide. If there is a bona fide dispute as to whether the requirements of the applicable plan documents have been satisfied employers are under an obligation to provide the benefits for which eligibility is not in dispute.

§ 3.04 Modification of Compensation or Benefits

(a) Except as provided in (c) below, an employer may prospectively modify or revoke any compensation or benefits based on its past practices or policy statement by providing reasonable notice of the modification or revocation to the affected employees.

(b) Such modifications and revocations apply to all employees hired, and all employees who continue working, after the effective date of the notice of modification or revocation.

(c) Such modifications and revocations cannot, absent the consent of affected employees (backed by consideration), adversely affect rights under any agreement between the employer and the employee or employees (§ 2.03) or adversely affect any vested or accrued employee rights that may have been created by an agreement (§ 2.03), employer statement (§ 2.04), or reasonable detrimental reliance on an employer promise (§ 2.02, comment c).

§ 3.05 Implied Duty of Good Faith and Fair Dealing

(a) Both the employer and employee, whether or not the relationship is terminable for cause or at will, owe a nonwaivable duty of good faith and fair dealing to each other, which includes an agreement by each not to hinder the other's performance under, or to deprive the other of the benefit of, the employment relationship (§ 2.06).

(b) The employer's duty of good faith and fair dealing includes the duty not to terminate or seek to terminate the employment relationship or implement other adverse employment action, for the purpose of

(1) preventing the vesting or accrual of an employee right or benefit, or

(2) retaliating against the employee for refusing to consent to a change in earned compensation or benefits.

§ 7.01 Employee Right of Privacy

An employer violates an employee's right of privacy by an intrusion upon a protected privacy interest that is unreasonable and would be offensive to a reasonable person under the circumstances.

§ 7.02 Protected Employee Privacy Interests

Three major privacy interests are recognized in the employment context as protected employee privacy interests:

(a) the employee's private information of a personal nature (§ 7.03);

(b) the employee's person and physical or electronic locations, including work locations provided by the employer, in which the employee has a reasonable expectation of privacy (§ 7.04); and

(c) the employee's private information disclosed in confidence in the course of employment to the employer (§ 7.05).

§ 7.03 Employee Privacy Interests in Information of a Personal Nature

(a) An employee has a protected privacy interest in information relating to the employee that is of a personal nature and that the employee has taken reasonable efforts to keep private.

(b) An employer intrudes upon this protected privacy interest by requiring that the employee provide such personal and private information in the course of employment.

(c) An employer does not intrude upon the protected privacy interest in Subsection (a) if the employer is required to obtain the employee's personal information pursuant to a legal requirement.

§ 7.04 Employee Privacy Interests Against Employer Intrusion in Physical Person and Locations

(a) An employee has a protected privacy interest against employer intrusion in:

(1) the employee's physical person and private physical functions; and

(2) a physical or electronic location if the employee has a reasonable expectation that the location is private as to that intrusion.

(b) An employee has a reasonable expectation in the privacy of a physical or electronic work location provided by the employer if:

(1) the employer has provided express notice that the location is private for employees; or

(2) the employer has acted in a manner that treats the location as private for employees, the type of location is generally treated as private, and the employee has made reasonable efforts to keep the location private.

(c) An employer intrudes upon an employee's protected privacy interest under Subsection (a) by intruding into the employee's person, physical functions, or a physical or electronic location in which the employee has a reasonable expectation of privacy.

§ 7.05 Employer Disclosure of Private Employee Information

(a) An employee has a protected privacy interest in personal information provided in confidence to the employer in the course of the employment relationship.

(b) An employer intrudes upon the privacy interest in Subsection (a) by providing or allowing third parties access to such employee information. For purposes of this Subsection, third parties include employees or agents of the employer who have no legitimate reason to access the information.

(c) An employer does not intrude upon the privacy interest in Subsection (a) if the employer is compelled to provide a third party access to the information pursuant to a court order or other legal requirement.

§ 7.06 Unreasonable and Offensive Employer Intrusions

(a) An employer is subject to liability under tort for an intrusion upon an employee's protected privacy interest if that intrusion is unreasonable and offensive to a reasonable person under the circumstances.

(b) An employer's intrusion upon an employee's protected privacy interest is unreasonable under Subsection (a) if the employer does not have a sufficient justification for the scope of the intrusion or the manner of the intrusion. The following considerations are relevant to determining the reasonableness of the employer intrusion:

(1) the nature, quality, and degree of invasiveness of the intrusion;

(2) the availability of less invasive alternatives;

(3) the provision of advance notice to the employee;

(4) the employee's consent to the intrusion;

(5) the nature of the employer's legitimate business interest for the intrusion; and

(6) an important public interest or interests for the intrusion.

(c) An employer's intrusion upon the employee's privacy interest is offensive to a reasonable person under the circumstances if the manner or scope of the employer's intrusion is a significant departure from the accepted norms for effectuating such an intrusion.

§ 7.07 Liability for Adverse Actions in Retaliation

An employer who takes a material adverse employment action against an employee for refusing to consent to an unreasonable and offensive employer intrusion upon a protected employee privacy interest under § 7.01 is subject to a tort action for wrongful discharge or discipline in violation of public policy.

§ 7.08 Employee Autonomy Interests

Employees have rights of autonomy while in the employment relationship. Protected employee autonomy interests while in that relationship include the interests in:

(a) engaging in conduct, activities, or behavior outside of the workplace that do not interfere with the employee's responsibilities as an employee;

(b) adhering to moral, ethical, or other personal beliefs that do not interfere with the employee's responsibilities as an employee; and

(c) engaging in conduct or behavior outside the workplace which the employer has agreed or promised to treat as separate from and irrelevant to the obtaining or maintenance of the employment relationship with the employer.

§ 7.09 Liability for Intrusions on Employee Autonomy

An employer is subject to liability for intruding upon an employee's autonomy interest if:

(a) the employer discharges or takes other material adverse employment action against the employee based solely on the employee's exercise of a protected autonomy interest; and

(b) the employer does not have a good faith basis for believing that the employee's exercise of that autonomy interest interferes with the employee's responsibilities as an employee.