EMPLOYEE PRIVACY OUTSIDE THE WORKPLACE

DARRELL G. FORD[*]
MARTY LUDLUM[**]

I. INTRODUCTION[1]

The right to privacy is recognized in this country as one of the fundamental rights of all people.[2] Nevertheless, in an age of satellite surveillance, video cameras, position tracking, communication monitoring, and electronic surveillance, the opportunities for someone to truly experience privacy are becoming rare. This surveillance is especially troublesome when someone is in a public place like a place of employment. Most employees now accept the notion that everything they say or do at the workplace could be seen, monitored or recorded. However, with advancements in technology, employers are now able to extend their monitoring of employees and their activities beyond the workplace. New technological ability raises the issue of whether employers should be permitted to monitor employees when not at work. At what point does an employer's need to know invade an employee's privacy?

This paper explores the privacy rights of employees when they are not at the workplace. We first examine privacy rights from a constitutional, statutory and common law perspective to identify which privacy rights exist and what actions constitute a violation of privacy rights. In the context of the employment relationship, we then address several different situations or circumstances involving employee activities and conduct outside the workplace to determine whether employer's intrusions amount to an invasion of employee privacy. Identifying the limits to which employers may intrude into the lives of their employees has value not only from an employee privacy perspective, but also from the perspective of an employer wanting to limit exposure to criminal and civil sanctions for violating the privacy rights of its employees.

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[*]J. D., Professor, University of Central Oklahoma.
[**]J. D., Associate Professor, University of Central Oklahoma.
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[2] Griswold v. Connecticut, 381 U.S. 479 (1965).

II. THE PRIVACY RIGHT

The right of privacy doctrine generally dates to 1890 when Louis B. Brandeis and Samuel D. Warren sparked the development of the privacy tort in the United States.[3] By 1960, the overwhelming majority of American courts had recognized the right in some form.[4] Today, the right to privacy is acknowledged at all levels of our legal system. In the employment context, the privacy right extends to both public and private employees.[5]

Although the United States Constitution does not have an express provision protecting a right to privacy, the Supreme Court has recognized "zones of privacy" in the various amendments to the Constitution.[6] These zones protect two types of privacy interests — the individual interest in avoiding disclosure of personal matters, and the interest in independence in making certain kinds of important decisions.[7]

The right not to have intimate facts concerning someone's life disclosed without their consent generally centers around the individual's reasonable expectations of privacy.[8] The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny.[9] People have high expectations of privacy with respect to medical information, financial information, and sexual orientation.[10]

However, the right to avoid disclosure of personal matters is not absolute. Disclosure of personal information may be necessary and in the public interest.[11] In each case, the court must weigh competing interests to determine whether the intrusion into an individual's privacy is justified.[12] Consideration should be given to the type of record requested, the information it does or might contain, the potential for harm in any subsequent

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[3] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV.L.REV. 193 (1890).
[4] *See* William L. Prosser, *Privacy*, 48 CAL.L.REV. 383, 384-88 (1960) (Only Rhode Island, Nebraska, Texas and Wisconsin had decisions rejecting the right of privacy.).
[5] Conner v. Ortega, 480 U. S. 709 (1987).
[6] Roe v. Wade, 410 U.S. 113, 152-153, (1973); C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 178 (3d Cir. 2005) (Tracing the development of the roots of the right of privacy in the First, Fourth, Fifth and Ninth Amendments, and the first section of the Fourteenth Amendment to the U. S. Constitution.).
[7] Hedges v. Musco, 204 F.3d 109, 121 (3d Cir.2000) (quoting Whalen v. Roe, 429 U.S. 589, 599-600, (1977) (footnote omitted)). *See also* Sterling v. Borough of Minersville, 232 F.3d 190, 193-196 (3d Cir.2000) (tracing the development and treatment of the right to privacy in the Supreme Court).
[8] *See* Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 112 (3d Cir.1987).
[9] *Id.*
[10] Sterling, 232 F.3d at 193-196 (Involving a police officer's threat to disclose a boy's homosexual activity.).
[11] United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir.1980) (Involving the search of employee medical records to determine exposure to harmful chemicals.).
[12] *Id.*

nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.[13]

The interest in independence in making certain kinds of important decisions extends to matters such as those relating to marriage, procreation, contraception, family relationships, and child rearing and education.[14]

At the state level, the constitutions of 10 states have explicit provisions relating to a right of privacy.[15] For example, the California Constitution states, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."[16] Other states recognize the right of privacy even though their constitutions do not contain explicit privacy protections.[17]

In addition to the constitutional recognitions of a privacy right, numerous statutes acknowledge a privacy right with respect to certain information and conduct. Among these statutes at the Federal level are the Health Insurance Portability and Accountability Act of 1996, known as HIPAA[18] which pertains to privacy rights for patients and medical record privacy, the Privacy Act of 1974[19] which pertains to personal information maintained by Federal agencies, the Americans with Disabilities Act of 1990[20] which prohibits employers from inquiring into the medical history or condition of applicants and prevents employers from discriminating against qualified individuals with a disability in regard to the terms, conditions, and privileges of employment, the Electronic Communications Privacy Act of 1986[21] which affords privacy protection to electronic communications and

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[13] *Id.*

[14] *See*, *e.g.*, Troxel v. Granville, 120 S.Ct. 2054 (2000) (parents' rights to make decision concerning care and custody of children); Wade, 410 U.S. 113 (right to abortion); Loving v. Virginia, 388 U.S. 1 (1967) (freedom to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to marital privacy in the use of contraceptives); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parents' rights to teach own children); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to teach foreign language).

[15] ALASKA CONST. art. I., § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, §§ 1, 23; FLA. CONST. art. I, § 12 (amended 1982); HAW. CONST. art. I, §§ 6, 7; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST art. I, § 7.

[16] CAL. CONST. art. I, §§ 1, 23.

[17] See, *e.g.,* N.J. CONST., art. I, para. 1 (amended 2014); Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 17 (1992) (applying public policy against private random drug testing).

[18] 42 U.S.C., §§ 1320d et. seq. (2016).

[19] 5 U.S.C., § 552a (2016).

[20] 42 U.S.C., § 12112(a) (2016).

[21] 18 U.S.C. §§ 2510-2522 (2016).

restricts access to stored wire and electronic communications and transactional records, the Federal Wiretap Act of 1968[22] which prohibits interception of wire and oral communications, the Stored Communications Act,[23] and the Fair Credit Reporting Act[24] which limits access to credit reports.

Many state statutes mirror federal statutes. For example, the California Confidentiality of Medical Information Act[25] protects the confidentiality of individually identifiable medical information obtained from a patient by a health care provider and limits when the release of such information is permissible.

The protections and restrictions afforded by state statutes extend to off-duty activities, romantic relationships, sexual orientation, smoking, medical history and electronic surveillance, among others.[26] For example, the Illinois Right to Privacy in the Workplace Act prohibits an employer from inquiring into an applicant's previous workers compensation filings and prohibits discrimination based upon an employee's use of lawful products.[27] Both Illinois and Michigan limit off-duty surveillance of employees.[28]

In addition to the constitutional and statutory privacy protections, every state in the United States now recognizes "some general form of common law protection for privacy."[29] A majority of the states adopt the legal principles reflected in the Restatement (Second) of Torts.[30] Under these principles, the right of privacy may be invaded in four different ways: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public.[31]

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[22] Formally known as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-351, tit. III, §§ 801-804, 82 Stat. 211 (codified and amended at 18 U.S.C. §§ 2510-2522 (2016)).
[23] 18 U.S.C. § 2702(a)(2) (2016).
[24] 15 U.S.C. §§ 1681 et seq. (2016).
[25] CAL. CIV. CODE §§ 56 et. seq. (2016).
[26] Cynthia F. Cohen & Murray E. Cohen, *On-duty and Off-duty: Employee Right to Privacy and Employer's Right to Control in the Private Sector*. 19 EMP. RESP. & RTS. J. 235 (2007).
[27] 820 ILCS 55/et. seq. (2016).
[28]Cohen & Cohen, *supra* note 26.
[29] Michael Z. Green, *A 2001 Employment Law Odyssey: The Invasion of Privacy Tort Takes Flight in the Florida Workplace*, 3 FLA COASTAL L.J. 1, 9 (2001).
[30] *See* RESTATEMENT (SECOND) OF TORTS (1977), § 652B.
[31] *See*, e.g., Forsher v. Bugliosi, 608 P.2d 716, 725 (Cal. 1980); Goodrich v. Waterbury Republican-American, Inc., 448 A.2d 1317, 1329 (Conn. 1982); State Farm Fire & Cas. Co. v. Compupay, Inc., 654 So. 2d 944, 948-49 (Fla. Dist. Ct. App. 1995); Cabaniss v. Hipsley, 151 S.E.2d 496, 500 (Ga. Ct. App. 1966); Miller v. Motorola, Inc., 560 N.E.2d 900, 901 (Ill. App. Ct. 1990); Beaumont v. Brown, 257 N.W.2d 522, 527 (Mich. 1977); Corcoran v.

With respect to unreasonable intrusion upon the seclusion of another, the courts generally require the plaintiff plead and prove four elements: (1) an unauthorized intrusion or prying into the plaintiff's seclusion; (2) an intrusion that is offensive or objectionable to a reasonable person; (3) the matter upon which the intrusion occurs is private; and (4) the intrusion causes anguish and suffering.[32] Most workplace and non-workplace privacy issues involve the issue of unreasonable intrusion upon the seclusion of another.

The appropriation of another's name or likeness as an invasion of privacy primarily protects a persons' property interest.[33] When someone makes an unauthorized use of another's identity for his own commercial advantage, he is unjustly enriched, having usurped both profit and control of that individual's public image.[34] In many venues, this appropriation tort is known as the "right of publicity."[35] The protection of a person's name or likeness has some parallels to federal copyright law.[36] However, the Copyright Act[37] protects pictorial, graphic, and sculptural works, including photographs, not the name, identity or persona of a person.[38] Both Federal law and the right of publicity protect a form of intellectual property that society deems to have some social utility.[39]

The third aspect of the common law right of privacy concerns unreasonable publicity given to another's private life.[40] The following elements musts be proven: (1) the fact or facts disclosed must be private in nature; (2) made to the public; (3) highly offensive to a reasonable person; (4) the fact or facts disclosed cannot be of legitimate concern to the public;

Southwestern Bell Tel. Co., 572 S.W.2d 212, 214 (Mo. Ct. App. 1978); Killilea v. Sears, Roebuck & Co., 499 N.E.2d 1291, 1294 (Ohio Ct. App. 1985).

[32] *See*, e.g., Melvin v. Burling, 141 490 N.E.2d 1011 (Ill. App. Ct.1986) (intrusion found when using the plaintiffs' names to order items through the mail).

[33] Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979) (involving licensing rights of the likeness and appearance of Bela Lugosi in the role of Count Dracula), quoting Prosser, *supra* note 4 at 389.

[34] *Id.*

[35] Christoff v. Nestle USA, Inc., 62 Cal. Rptr.3d 122 (Cal. Ct. App. 2007) (involving use of a professional model's likeness to market Tasters' Choice coffee).

[36] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (applied to a local television show news clip of Hugo Zacchini performing his human cannonball act at the Geauga County Fair).

[37] 17 U.S.C. § 101 (2016).

[38] Downing v. Abercrombie & Fitch, 265 F.3d 994 (9th Cir. 2001) (names and likenesses of models used in catalog without authorization were not copyrightable and thus privacy claims were not preempted by federal copyright law).

[39] Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001) (applying a balancing test between First Amendment protection and the right of publicity to unlicensed lithographs and T-shirts bearing a likeness of The Three Stooges).

[40] *See* RESTATEMENT (SECOND) OF TORTS (1977), § 652B.

and (5) the defendant acted with reckless disregard of the private nature of the fact or facts disclosed.[41] In contrast, facts related to an individual's sexual relations, or "unpleasant or disgraceful" illnesses are considered private in nature and the disclosure of such facts would constitute an invasion of the individual's right of privacy.[42] If the facts disclosed are already public, no invasion of privacy will exist.[43]

The communication of information must be to the public in general or to a large number of persons, as distinguished from one individual or a few.[44] The facts and circumstances of each case must be taken into consideration in determining whether the disclosure was sufficiently public so as to support a claim for invasion of privacy.[45]

The disclosure must be highly offensive to a reasonable person. The term "highly offensive" has been construed to mean the disclosure would cause emotional distress or embarrassment to a reasonable person.[46] This determination is a question of fact and depends on the circumstances of a particular case.[47]

The fourth requirement for an invasion of privacy tort is the facts disclosed are not of legitimate concern to the public. The right of privacy must be balanced with the rights of free speech and free press guaranteed by the United States Constitution.[48] The rights of free speech and free press

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[41] Robert G. Ozer, P.C. v. Borquez, 940 P.2d 371 (Colo. 1997) (en banc) (applied to an employer's disclosure of an employee's sexual orientation and exposure to the Human Immunodeficiency Virus).

[42] Restatement (Second) of Torts § 652D cmt. b (1976).

[43] *See* Aquino v. Bulletin Co., 154 A.2d 422, 426-27 (Pa. 1959) (holding that issuance of marriage license or divorce decree was matter of public record and could be disclosed without invading right of privacy); and Alarcon v. Murphy, 248 Cal.Rptr. 26, 29-30 (Cal. Ct. App. 1988) (holding that arrest warrant which was part of court file is public record and could be disclosed without violating right of privacy).

[44] *See* Brown v. Mullarkey, 632 S.W.2d 507, 509-10 (Mo. Ct. App.1982) (holding that no public disclosure occurred when plaintiff's personnel file was released to attorneys representing defendant in personal injury suit); and Porten v. Univ. of San Francisco, 134 Cal.Rptr. 839, 841 (Cal. Ct. App.1976) (holding that no public disclosure occurred when plaintiff's school grades were disclosed to scholarship and loan commission because grades were not released to public in general or large number of persons).

[45] *See*, *e.g.*, Kinsey v. Macur, 165 Cal.Rptr. 608, 611 (Cal. Ct. App. 1980) (holding that defendant's dissemination of copies of a letter to only twenty people constituted public disclosure).

[46] *See* Brown v. Am. Broad. Co., Inc., 704 F.2d 1296, 1302 (4th Cir. 1983) (involving a film broadcast of the plaintiff talking to investigators investigating fraudulent practices in the sale of insurance to the elderly).

[47] *Compare* Urbaniak v. Newton, 277 Cal.Rptr. 354, 360 (Cal. Ct. App. 1991) (holding that disclosure of HIV positive status was highly offensive to reasonable person) with Virgil v. Sports Illustrated, 424 F.Supp. 1286, 1289 (S.D.Cal.1976) (holding that disclosure of person's unflattering habits and idiosyncracies was not highly offensive to reasonable person).

[48] *See* U.S. CONST. amend. I.

protect the public's access to information on matters of legitimate public concern.[49] Therefore, the right of the individual to keep information private must be balanced against the right to disseminate newsworthy information to the public.[50] In *Gilbert v. Medical Economics Co.*, the defendant published a periodical in which it discussed the plaintiff's history of psychiatric and related personal problems and suggested a connection between the plaintiff's personal issues and alleged acts of medical malpractice. The Tenth Circuit Court of Appeals stated, "to properly balance freedom of the press against the right of privacy, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest."[51] The term newsworthy is defined as "[a]ny information disseminated 'for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.' "[52]

A legitimate public interest stops "when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake."[53] The newsworthiness test "properly restricts liability for public disclosure of private facts to the extreme case, thereby providing the breathing space needed by the press."[54] Therefore, the requirement that the facts disclosed must not be of legitimate concern to the public protects the rights of free speech and free press guaranteed by the United States Constitution.

The final requirement of an invasion of privacy is the defendant acted with reckless disregard of the private nature of the fact or facts disclosed. A person acts with reckless disregard if, at the time of the publicity, the person knew or should have known that the private fact or facts disclosed were false.[55]

The last aspect of the common law right of privacy involves publicity that unreasonably places another in a false light before the public. The requirements are that (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge

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[49] *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491-92 (1975) (holding that publication of a deceased rape victim's name obtained from public records was a matter of legitimate public concern).

[50] *See* Gilbert v. Med. Econs. *Co.*, 665 F.2d 305, 307 (10th Cir.1981) (finding that the defendant's publication of private information concerning the competency of a licensed professional was newsworthy and protected by the First Amendment).

[51] *Id*. at 308.

[52] Gilbert, 665 F.2d at 308 (quoting Restatement (Second) of Torts § 652D cmt. j (1976)).

[53] RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1976).

[54] Gilbert, 665 F.2d at 308.

[55] *See*, e.*g.*, Diversified Management, Inc. v. The Denver Post, Inc., 653 P.2d 1103, 1109-10 (Colo.1982) (en banc) (finding that reckless disregard involves a high degree of awareness that published statements are probably false).

of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[56]

As the foregoing indicates, privacy rights are recognized at all levels of jurisprudence and in varying degrees. A working knowledge of privacy rights at all levels and contexts is critical to an understanding of when an employer's monitoring of an employee outside the workplace will be viewed as a violation of the employee's rights.

III. EMPLOYER MONITORING AND CONTROL

Employers have a legitimate interest in monitoring and controlling their employees.[57] They must ensure that policies and procedures are being followed. Employers must be assured that employees are acting legally and ethically because they face vicariously liability for the actions of their employees and direct liability for their own negligence in failing to control and supervise their employees. With respect to the workplace, employers must make sure they are providing a safe work environment. For example, if employees are carelessly operating equipment, all employees could be exposed to injury. In many cases, monitoring may serve as a deterrent to wrongful employee behavior involving sexual harassment and violence. Employers are liable for employee actions that occur within the scope of the employee's employment. Employers must take whatever steps are reasonably necessary to ensure that their employees act reasonably and with due care. Finally, employers have an economic interest in monitoring and controlling their employees to achieve the greatest efficiency and production possible.

Because of the many legitimate interests, the monitoring and controlling of employees in the workplace has become commonplace.[58] More than 60% of mid and large employers surveyed indicated they use one or more electronic means of employee surveillance[59] and more than 90% of large companies reported they monitor email.[60] In an effort to monitor and control employee conduct, employers are using global positioning satellites, monitoring of email, telephone, computer usage and voicemail, video surveillance, polygraph tests, and drug testing and searches.[61] Behavioral restrictions include prohibitions against drug use and smoking, restrictions on

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[56] RESTATEMENT (SECOND) OF TORTS § 652E.
[57] *See* Ali v. Douglas Cable Communications, 929 F. Supp. 1362 (D. Kan. 1996) (monitoring telephone calls is a matter of legitimate concern).
[58] Byron R. Crossen, *Managing Employee Unethical Behavior Without Invading Individual Privacy*, 8 J. OF BUS. & PSYCHOL. 227 (1993).
[59] Kenneth A. Kovach, Jennifer Jordan, Karens Tansey, & Eve Framinan, *The Balance between Employee Privacy and Employer Interests,* 105 BUS. SOC. REV. 289 (2000).
[60] *Id.* at 291.
[61] Cohen & Cohen, *supra* note 26, at 236.

weight and personal appearance, limitations on personal relationships, and limits on moonlighting and other outside activities.[62]

While the desire to monitor and control employees is nothing new, the ability to do so has been greatly enhanced by advancements in technology. The availability of relatively inexpensive software now makes it affordable for employers to engage in more extensive monitoring.

Nevertheless, employees do have some expectation of privacy in the workplace. In many cases the common law tort for invasion of privacy involves an unreasonable intrusion upon the seclusion of another that is highly offensive to a reasonable person.[63] For example, with respect to a purse, wallet or briefcase that an employee brings to the workplace, the employee does have a reasonable expectation that the contents of these items will remain private.[64] Similarly, in change rooms and private offices, an expectation of privacy exists.[65] In *Soliman v. Kushner Cos.*, the court held that the defendant employer violated the plaintiffs' right to privacy by secretly installing a video surveillance system in the bathroom smoke detectors even though the cameras were directed as the "common areas" of the bathroom.[66]

Likewise, in *O'Conner v. Ortega*, the U. S. Supreme Court addressed the issue of a search of an employee doctor's office at a hospital.[67] Because the hospital was a public entity and the doctor was a public employee, the Court considered whether the hospital's actions violated the Fourth Amendment to the Constitution, applied to the States through the Fourteenth Amendment to the Constitution.[68] The Court held that searches by government employers of employees' private property are subject to the restraints of the Fourth Amendment.[69] The Court went on to reason that most places within a public facility, like hallways, the cafeteria, offices, desks, and file cabinets, among other areas, are all part of the workplace and that these areas remain part of the workplace context even if the employee has placed

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[62] *Id.*
[63] RESTATEMENT (SECOND) OF TORTS § 652B (1977).
[64] O'Conner v. Ortega, 480 U. S. 709 (1987) (In this case the doctor's desk and file cabinets contained personal items that were not work related and the Court found a reasonable expectation of privacy existed with respect to those areas.).
[65] Gustafson v. Adkins, 803 F.3d 883 (7th Cir. 2015) (finding a reasonable expectation of privacy in a private office that female employees used to change clothes).
[66] 77 A.3d 1214 (N. J. Super. Ct. App. Div. 2013) (The Court found the claim was predicated on the intrusion into the plaintiff's solitude or seclusion).
[67] 480 U. S. (Hospital officials searched the doctor's office, desk and file cabinets without his knowledge while investigating misconduct and a sexual harassment claim.).
[68] New Jersey v. T.L.O., 469 U.S. 325, 334-335 (1985) (In this case the Fourteenth Amendment was applied to school officials as representatives of the state when they searched a 14 year-old girl's purse.).
[69] *Id.*

personal items in them, such as a photograph placed in a desk or a letter posted on an employee bulletin board.[70] Notwithstanding the public nature of the workplace, certain items and locations, even though they are located at the workplace, warrant a reasonable expectation of privacy. Because work environments differ greatly, the question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.[71]

IV. PRIVACY OUTSIDE THE WORKPLACE

In the previous sections we surveyed the legal framework governing an employee's right to privacy. We also identified the legitimate interests of employers in monitoring and controlling their employees and the extent to which such interests interfere with an employee's reasonable expectation of privacy. We now examine employer efforts to monitor and control employee conduct and activities outside the workplace by analyzing specific areas that raise privacy concerns.

A. *Medical Information*

With respect to public employees, a Constitutional right to privacy has been recognized for private medical information.[72] For example, in *Nat'l Ass'n of Letter Carriers, AFL-CIO v. United State Postal Serv.*, the United States Postal Service and its Office of Inspector General violated their employees' right to privacy when they instituted a policy of obtaining employees' personal medical information from health care providers without the employees' knowledge or consent.[73] The Constitutional right, however, is "conditional" and "can be overcome if the government can demonstrate a substantial interest that outweighs the plaintiffs' right to privacy."[74] When balancing the government's interest against an individual's privacy rights, the court must consider the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record

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[70] *Id.*
[71] *Id.*
[72] Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994) ("Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over.").
[73] 604 F. Supp. 2d 665 (S.D.N.Y. 2009) (finding plausible privacy rights claims under the Constitution as well as HIPAA privacy regulations and the Privacy Act).
[74] *Id*.

was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.[75]

As was previously stated, federal and state statutes exist recognizing a right to privacy with respect to medical information.[76] The Health Insurance Portability and Accountability Act of 1996 grants privacy rights for patients and provides for medical record privacy.[77] However, HIPAA does not grant employees a private right of action for violations of the Act.[78]

In addition, the Americans with Disabilities Act contains a number of explicit provisions related to employer-required medical examinations, establishing different rules applicable to various stages of the application and employment process.[79] In the initial stage of the application process, prior to an offer of employment, the ADA prohibits any covered employer from conducting a medical examination of any applicant.[80]

After an employer has made an offer of employment and before the applicant begins his employment, the ADA provides that an employer may require an applicant to undergo a medical examination, and may condition its offer of employment on the results of such examination.[81] The ADA mandates (1) all entering employees are subjected to such an examination regardless of disability, (2) information obtained through the examination regarding the medical condition or history of the applicant is collected and maintained in separate medical files and is treated as a confidential medical record, and (3) the results of the examination are used only in accordance with the other provisions of the ADA (i.e., the results may not be used to discriminate against a qualified individual with a disability).[82]

Finally, after an employee has been hired and has begun working, the ADA provides that an employer "shall not require a medical examination unless such examination is shown to be job-related and consistent with business necessity."[83]

At the state level, several statutes mirror the Americans with Disabilities Act and some, like Wisconsin's right of privacy statute, explicitly

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[75] *Id.* (quoting United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980) (balancing the confidentiality of medical records and the need for disclosure).
[76] See *supra*, notes 18, 20, and 25.
[77] 42 U.S.C., § 1320d et. seq. (2016).
[78] Byrne v. Avery Ctr. For Obstetrics & Gynecology 102 A.3d 32 (Conn. 2014) (only the Department of Health and Human Services has authority to enforce HIPAA regulations).
[79] 42 U.S.C. § 12101 et seq. (2016).
[80] *Id.* § 12112(d)(2)(A).
[81] *Id.*
[82] *Id.*§ 12112(d)(3).
[83] *Id.* § 12112(d)(4)(A).

acknowledge a right of privacy to medical information when the disclosure of such information would be highly offensive to a reasonable person.[84] In *Marino v. Arandell Corp.*, the court allowed an employee's privacy claim when his employer conducted prohibited medical inquiries about his condition, chronic Hepatitis C, and intentionally failed to maintain confidentiality with his medical records.[85]

Nevertheless, some courts strictly construe the right to privacy. The Illinois Right to Privacy in the Workplace Act prohibits any employer from inquiring into whether a prospective employee has ever filed a claim for benefits under the Illinois Worker's Compensation Act or the Illinois Workers' Occupational Diseases Act or received benefits under the Acts.[86] In *Carter v. Tennant Co.*[87] The employer had questioned the prospective employee regarding whether he had suffered prior occupational injuries, lost time from work for a work-related injury or illness, or seen a medical doctor for any work-related injury or illness. The court denied the prospective employee's claim for a violation of the privacy act because the employer did not specifically ask whether the prospective employee had ever filed a workers compensation claim.[88]

An employee's right to privacy with respect to medical information is clear and compelling. Employers should use great restraint when obtaining an employee's medical information and should use great care in maintaining the confidentiality of such information.

B. *Drug Use*

The ADA places some significant limitations upon the circumstances under which an employer may require current employees or applicants for employment to undergo medical examinations. However, the act contains a specific provision declaring "a test to determine the illegal use of drugs shall not be considered a medical examination."[89] The legislative history and the administrative regulations make clear that the ADA was not intended to restrict an employer's use of drug testing to determine whether an applicant

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[84] 1 F. Supp.2d 947 (E. D. Wis. 1998) (finding disclosure of health information to co-workers would violate the plaintiff's privacy rights).
[85] *Id.*
[86] 820 ILL. COMP. STAT. 55/10 (2016).
[87] 383 F.3d 673 (7th Cir. 2004) (the employee failed to report a back injury from a previous job and was fired after re-aggravating the injury and filing a worker's compensation claim against his new employer).
[88] *Id.* at 680.
[89] 42 U.S.C. § 12114(d) (2016).

for employment or a current employee is engaging in the illegal use of drugs.[90]

Challenges to drug testing at the state level have been viewed similarly. In *Loder v. City of Glendale*[91], a taxpayer filed a suit to enjoin the City of Glendale, California from using tax revenues to drug test everyone who applied for an employment position with the city. The plaintiff argued that the city's drug testing program violated a provision of California's Confidentiality of Medical Information Act.[92] This legislation was intended to protect the confidentiality of individually identifiable medical information obtained from a patient by a health care provider and to set forth limited circumstances in which the release of such information to specified entities or individuals would be permissible.[93]

The plaintiff in Loder argued that the disclosure of drug test results to the employer violated the Act.[94] The city treated the results of the drug testing program with the same degree of confidentiality as all other confidential medical information of job applicants and employees, retaining the information in confidential medical files and disclosing the results of the testing only to the city personnel director.[95] The court rejected the plaintiff's argument stating that the disclosure of the drug test results was permissible and that an employer who relies on such information to disqualify an employee or applicant has not "discriminated" against the employee or applicant.[96]

Even in states that permit the use of drugs like marijuana for medical or non-medical purposes,[97] drug testing by employers has not be found to violate any right of privacy or any discrimination law. For example, in Colorado the use of marijuana does not violate state law.[98] Colorado's Lawful Activities Statute prohibits an employer from discharging an employee for "engaging in any lawful activity off the premises of the employer during nonworking hours," subject to certain exceptions.[99] Nevertheless, when confronted with the issue, the Colorado Court of Appeals held that marijuana use is not a "lawful activity" under the Lawful Activities

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[90] 927 P.2d 1200 (Cal. 1997) (the purpose of the ADA was to prevent discrimination against qualified individuals with disabilities, not to restrict drug testing).
[91] *Id.*
[92] CAL. CIV. CODE, § 56 et seq. (2016).
[93] *See*, *e.g.*, Heller v. Norcal Mutual Ins. Co. 876 P.2d 999 (Cal. 1994) (permitting the disclosure of medical information in defense of a medical malpractice action).
[94] Loder, 972 P.2d at 701; California Civ.Code, § 56 et seq.
[95] *Id*. at 703.
[96] *Id.*
[97] Darrell G. Ford & Marty Ludlum, *Medical Marijuana and Employment Discrimination*, 23 S. L.J., 289 (2013).
[98] COLO. CONST. art. XVIII, § 14.
[99] COLO. REV. STAT. § 24-34-402.5 (2016).

Statute because at the time the plaintiff's employment was terminated for failing a drug test, marijuana use was prohibited by federal law.[100]

Even though drug testing does not generally raise a privacy or discrimination issue, employers must still follow federal and state mandates with respect to the timing, purpose and nature of drug tests. For example, in *Nat'l Fed'n of Fe. Emps. –IAM v. Vilsack*, the court invalidated as unconstitutional a random drug testing policy applied to all employees working at Job Corps Civilian Conservation Centers operated by the U.S. Forest Service.[101] The court held that the agency failed to demonstrate "special needs" rendering the Fourth Amendment requirement of individualized suspicion impractical in the context of Job Corps employment.[102]

C. *Lawful Outside Activities*

In some instances, information regarding an employee's outside activities may be important to an employer. If an employee is working for a competitor during his or her off-duty hours, it may affect the employee's loyalty to the employer.[103] If an employee is engaging in questionable activities involving moral turpitude or illegal conduct, it could affect the public image of the employer.[104] If an employee is engaging in dangerous activities like sky diving or bull riding, it could jeopardize an employer's investment in the employee if the employee is injured and unable to perform.[105] Because the consequences of employee activities such as these could negatively affect the employer, a risk averse employer may choose to monitor employees for such activities in an effort to reduce or prevent negative consequences. When an employer chooses to monitor employees for such activities outside the workplace it necessarily raises an issue of employee privacy.

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[100] Coats v. Dish Network, L.L.C., 2013 COA 62 (Colo. App., 2013), citing 21 U.S.C. § 844(a); Gonzales v. Raich, 545 U.S. 1, 29 (2005) (state law authorizing possession and cultivation of marijuana does not circumscribe federal law prohibiting use and possession); and Ross v. RagingWire Telecommunications, Inc., 174 P.3d 200, 204 (Cal. 2008) ("No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users.").

[101] 681 F.3d 483 (D.C. Cir. 2012).

[102] *Id.*

[103] Carolyn Hirschman, *Do You Need a Moonlighting Policy*? 41.10 HR MAGAZINE, (2000).

[104] *See*, *e.g.*, Dible v. City of Chandler, 515 F.3d 918 (9th Cir. 2007) (off-duty police officer working for a disreputable sexually explicit website business).

[105] Gillian Flynn, *Companies Should Stay out of Employees' Off-work Hours*, 73 PERS. J. 19 (1994).

In connection with the privacy issue, prying into the personal lives of employees outside the workplace could expose the employer to charges of unlawful discrimination. Almost every state has adopted the employment-at-will doctrine[106] which allows an employer to discharge an employee for any reason or no reason at all as long as the reason for the termination does not violate federal or state law.[107] Numerous statutory and common law exceptions to the doctrine exist, including exceptions protecting employees from unlawful discrimination.[108]

Most notably among the statutes protecting employees from unlawful discrimination are the Title VII of the Civil Rights Act[109], the Americans with Disabilities Act[110], the Age Discrimination in Employment Act[111], and the Uniformed Services Employment and Reemployment Rights Act.[112] These laws protect employees from discrimination based on race, color, national origin, religion, disability, age and military service in the reserves. As a result, any employer inquiry involving these protected class characteristics or traits, whether it be at the workplace or outside the workplace, will not only raise a privacy issue but will also expose the employer to a possible discrimination claim.

Many state laws protect employees from invasions of privacy activities conducted outside the workplace by restricting employers' rights to base employment decisions on such information. For example, New York has a statute that protects several outside off-duty activities including the legal use of consumable products, political actions and legal recreational activities.[113] Colorado[114] and California,[115] among other states, have statutes that prohibit an employer from discharging an employee for engaging in lawful activities off the premises of the employer during nonworking hours.[116] Of course a

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[106] Daniel J. Koys, Steven Briggs, & Jay Grenig. *State Court Disparity on Employment At-Will*. 40 PERS. PSYCHOL. 565 (1987).
[107] *See* Cocchiara v. Lithia Motors, Inc., 297 P.3d 1227 (Or. 2013) (en banc); Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah, 1989) (tracing the history and nature of the employment at-will doctrine).
[108] *See* Koys, Briggs, & Grenig, *supra* at note 106; Berube, 771 P.2d (finding breach of an implied covenant of good faith and fair dealing by terminating the plaintiff's employment based on her refusal to take a third polygraph test).
[109] 42 U.S.C. §§ 2000e et seq. (1970 ed. and Supp. V) (2016).
[110] *Id.* § 12112(a).
[111] 29 U.S.C. § 633a (2016).
[112] 38 U.S.C. 4313 (2016).
[113] N.Y. LAB. LAW, § 201-d (2016).
[114] *See supra* note 99.
[115] CAL. LAB. CODE § 96 (2016).
[116] *See* North Dakota's Lifestyle Activities law, N.D. CENT. CODE §§14-02.4-01 - 21.

public employee's off-duty activities must not conflict with their official duties.[117]

In addition, at least twenty-four states include marital status as a protected category.[118] Employers are prohibited from restricting unmarried employees who cohabitate. At least seventeen states have statutes banning discrimination based on sexual orientation that would restrict policies against same-sex relationships.[119] Other types of off-duty behavior in varying forms are also protected at the state level. One of the most common protected off-duty protected behaviors is the use of tobacco products. In all, at least twenty-nine states provide some form of protection for off-duty behavior.[120] Some states limit off-duty surveillance of employees to further reduce the possibility that employers will unlawfully use information regarding an employee's outside activities. For example, a Michigan statute prohibits the installation, placement, or use of any device for observing, recording, transmitting, photographing, or eavesdropping on the sounds or events in a private place without the consent of the employees.[121]

When an employer violates laws restricting their ability to monitor and control employees outside the workplace, the employer also may violate the employee's privacy rights. Generally, this type of employer conduct involves an unauthorized intrusion or prying into the employee's seclusion, or unreasonable publicity given to the employee's private life. For example, in *Robert G. Ozer, P.C. v. Borquez*, the employee, a homosexual, informed his employer that his romantic partner had been diagnosed with Acquired Immune Deficiency Syndrome (AIDS).[122] The employee's physician advised him that he should be tested for the human immunodeficiency virus (HIV) immediately.[123] The employer then disclosed the information to several other employees.[124] One week after the disclosure, the employee was fired. The employee filed suit against the employer claiming wrongful discharge and invasion of privacy. The employee alleged that his discharge violated the Colorado lawful activities statute[125] which makes employee discharge an unfair and discriminatory labor practice based upon the employee's lawful activities outside the workplace. Additionally, the employer violated a city

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[117] CAL. GOV'T CODE § 1126 (2016).
[118] Cohen & Cohen, *supra* note 26.
[119] *Id.* at 240.
[120] *Id.* at 240.
[121] MICH. COMP. LAWS § 750.539d (2016).
[122] 940 P.2d 371 (Colo. 1997).
[123] *Id*.
[124] *Id.*
[125] *Supra*, note 99, at 1 (The Colorado lawful activities statute provides that "It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of an employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours...).

and county municipal ordinance which makes it unlawful for a private employer to discharge an employee in the City and County of Denver on the grounds that the employee is homosexual.[126] Finally, the employer had violated his right to privacy by disseminating private facts which the employee had revealed and requested remain confidential.[127] The jury returned a verdict in favor of the employee which was later reversed in part by the appellate court on procedural grounds. The case was remanded to the district court for a new trial.

Gathering information about an employee's outside off-duty activities may create an issue with respect to the employee's right of privacy. Monitoring may suggest a violation of statutory protections for such activities. Legitimate interests in gathering such information may outweigh the risks. In *Totonelly v. Galichia Med. Grp., P.A.*, the employee was a medical doctor who provided interventional cardiology services to patients of the defendant. Unknown to his employer, the employee also provided similar services to a former employer at the same time. The employee was fired for working for a competitor during his off-duty hours in violation of his employment agreement.[128] Because the employer did not monitor the employee's outside moonlighting activities, the employee was able to receive more than $300,000.00 in fees that should have been paid to the employer.[129]

The legitimate interests of ensuring that employees are following policies and procedures and behaving legally and ethically may dictate that employers monitor their employees' outside off-duty activities. In *Dible v. City of Chandler*, the employer was a municipal police department and the employee was a police officer.[130] During his off-duty hours the employee actively participated in a disreputable sexually explicit website business.[131] The employee tried to conceal his off-duty activities but when his participation became public knowledge he was fired for engaging in outside employment and conduct that brought disrepute to the police department and the City.[132] The employee's right of privacy defense was negated. The court

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[126] DENVER, COLO., REV. MUNICIPAL CODE § 28-93(a)(1) (1991) (Providing, "It shall be a discriminatory practice to do any of the following acts based upon the race, color, religion, national origin, gender, age, sexual orientation, marital status or physical or mental disability of any individual who is otherwise qualified: 1) By an employer: To fail or to refuse to hire an applicant or to discharge any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment...").
[127] Ozer, 940 P.2d at 379.
[128] No. 09-1234-JTM, 2012 WL 628231 (D. Kan. 2012) (the employee breached the employment agreement by engaging in outside activities).
[129] *Id.*
[130] 515 F.3d 918 (9th Cir. 2007).
[131] *Id.*
[132] *Id.*

indicated the City did not release any information that connected the employee to his website.[133]

One guiding principle regulates monitoring an employee's lawful outside activities. Overly zealous monitoring and investigation may violate an employee's privacy rights and may expose the employer to claims for violating statutory protections of such activities. Employers must understand that their monitoring activities cannot involve unauthorized intrusions or prying into the employee's seclusion, and that they cannot give unreasonable publicity to the employee's private life. In addition, employers must be mindful of the statutory prohibitions and restrictions regarding the lawful outside activities of their employees. Nevertheless, employers have a legitimate need to monitor an employee's outside activities. In doing so, the employer must act reasonably and with restraint.

D. *Love Interests*

Both large and small employers often restrict certain outside relationships of their employees. The restrictions include a wide variety of personal and social associations. Employers may have policies that regulate employee dating of customers, competitors or co-workers, that discourage sexual relationships out of wedlock, or that discourage same-sex relationships.[134] The validity of these restrictions depend largely on state statutes and state common law of the state where the employer is located. The restrictions are motivated by several factors, including the belief that workplace romances can disrupt productivity and that such romances can later become grounds for sexual harassment claims.[135] Needless to say, such restrictions raise serious privacy issues not only because of the subject they address but also because most of the restrictions apply to relationships fostered outside the workplace.

When public employees are involved, a Constitutional issue is raised. Although the Constitution does not explicitly mention a right to privacy aside from the Fourth Amendment's search and seizure context, the Supreme Court has recognized a right to personal autonomy, containing the right to "intimate associations," implicit in the Due Process Clause of the Fourteenth Amendment.[136] This right to personal privacy includes such personal

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[133] *Id.*

[134] Stephen D. Sugarman, *"Lifestyle" Discrimination in Employment* 24 BERKELEY J. EMP. & LABOR. L. 377, 378-437 (2003).

[135] Lynn Hoffman, Sharon Clinebell, & John Kilparick, *Office Romances: The New Battleground over Employees' Right to Privacy and the Employers' Right to Intervene*, 10.4 EMP. RESP. & RTS. J. 263 (1997).

[136] Roe v. Wade, 410 U.S. 113, 152 (1973).

decisions as marriage, procreation, contraception, and the right to engage in "certain intimate conduct."[137] The right exists whether a person is married or unmarried but remains limited to only those "matters so fundamentally affecting a person".[138]

The Constitutional privacy right was addressed in *Stevens v. Holder*, which involved two former Federal Bureau of Investigation ("FBI") trainees who were terminated from the FBI Academy after it was discovered that they were engaged in a romantic relationship.[139] At the time, the employees were both married but separated from their spouses. During their training, the employees resided in dormitories on FBI property. It was alleged that the employees were engaging in a sexual relationship which violated a strict rule prohibiting sexual relations on government property. The employees were terminated on suitability grounds and for violating curfew rules. In response, the employees argued that their termination violated their Constitutional rights. Although the court acknowledged a Constitutional right, the court found that the Constitution does not provide a fundamental right to engage in a non-marital, non-familial, non-sexual personal relationship, and the FBI's rules affecting personal relationship conduct on government property did not violate substantive due process.[140]

The fact that the employees in *Stevens v. Holder*, were not married and that their extramarital relationship occurred on government property were critical factors.[141] The court recognized that a right to privacy does exist in relationships that occur outside the workplace.[142] In that context, public employers may violate a right to privacy by restricting private, off-duty personal activities.[143]

In another case a state court found that the Constitutional right of privacy had been violated in the dismissal of a public employee.[144] In *Via v. Taylor*, an action was brought by a former employee of the Delaware Department of Correction alleging that she was wrongfully dismissed from her job at a state correctional institute as a result of her off-duty relationship with a paroled former inmate.[145] The Department of Corrections had a code of conduct that prohibited employee contact with offenders.[146]

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[137] *See*, *e.g.*, Lawrence v. Texas, 539 U.S. 558, 562 (2003) (homosexual activities in a private residence).
[138] *Id.* at 565, (quoting Eisenstadt v. Baird, 405 U.S. 438, 453, (1972)).
[139] 966 F.Supp.2d 622 (E. D. Va. 2013).
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] See, *e.g.*, Shuman v. City of Philadelphia, 470 F.Supp. 449, 459 (E.D. Pa. 1979) (an off-duty police officer was wrongfully dismissed for living with an 18 year old woman).
[144] 224 F.Supp.2d 753 (D. Del., 2002).
[145] *Id*.
[146] *Id*.

The court acknowledged that the Due Process Clause of the Fourteenth Amendment extends to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education[147] but that the degree of constitutional protection afforded to these private decisions depends on the nature of the interest at stake.[148] Thus, while an individual's decision to cohabitate with another individual or engage in sexual activity is within the zone of privacy afforded some constitutional protection; they are not considered fundamental rights.[149] Accordingly, courts have concluded that regulations impacting the privacy interests in cohabitation and sexual activity of public employees should be evaluated under the intermediate scrutiny standard of review.[150]

Applying intermediate scrutiny to the code of conduct regulation, the court held that the regulation was not substantially related to an important government interest.[151] The relationship had no security impact, did not affect discipline between the prison's staff and the inmates, and did not have a significant negative impact on the employee's job performance. As a result, the Department's inquiry into the employee's personal relationship and the adverse employment action taken as a result violated the employee's right to privacy and freedom of association.[152]

As previously discussed, numerous state statutes exist prohibiting an employer's restriction of lawful outside activities.[153] The common law privacy protections against conduct involving an unauthorized intrusion or prying into an employee's seclusion, and giving unreasonable publicity to an employee's private life, will be at issue when examining relationship restrictions.

An important factor is whether the restrictions pertain to workplace conduct or outside workplace conduct. With respect to regulation of workplace conduct, courts generally uphold such restrictions as long as the employer acts reasonably and consistently, both in implementation and execution of anti-fraternization policies.[154] To avoid privacy right violations, employers must be reasonable not only with the content of their relationship

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[147] Planned Parenthood v. Casey, 505 U.S. 833, 851, (1992) (abortion); Zablocki v. Redhail, 434 U.S. 374, 384-385, (1978) (collecting cases).
[148] Via, 224 F.Supp.2d at 760.
[149] Kukla v. Village of Antioch, 647 F.Supp. 799, 808 (N.D. Ill.1986) (holding that "cohabitation and sexual choice fall in the category of rights given intermediate scrutiny in public employee discharge cases" for both freedom of association and the right to privacy).
[150] *Id.* at 807.
[151] Via 224 F.Supp.2d at 762.
[152] *Id*.
[153] *See supra* notes 113 – 116.
[154] *See* Sanguinetti v. United Parcel Serv., 114 F.Supp.2d 1313 (S.D. Fla. 2000) (dismissing invasion of privacy claim brought by employee fired for violating no-dating rule).

restrictions, but also with the means by which they investigate and enforce such restrictions.[155]

A stronger showing of a legitimate employer interest is required with respect to restrictions on relationships that occur outside the workplace. The employer interest must outweigh the intrusion into the employee's seclusion. Further, the restrictions, and any means employed to monitor or enforce the restrictions, must not be highly offensive to a reasonable person or give unreasonable publicity to an employee's private life if the employer wants to avoid violating the employee's common law privacy rights.

Likewise, employers must be cognizant of the statutory protections regarding lawful outside employee activities. In each case and in each jurisdiction, employers must determine whether the restrictions on personal relationships violate the protections afforded by the statute. In New York, for example, the courts have considered whether an employer policy against employees dating each other violates the state's lawful activities statute.[156] In *McCavitt v. Swiss Reinsurance America Corp.*, the court applied the state law prohibiting discrimination against an employee for engaging in lawful recreational activities,[157] but held that dating was not a "recreational activity."[158]

The conclusion to be drawn is that restrictions on outside relationships do raise a significant privacy issue. Intrusions into the private relationships of employees outside the work place will violate privacy rights unless the outside activity impacts a legitimate business objective. Such intrusions will include not only the restrictions themselves, but the means by which employers monitor, investigate and enforce the restrictions.

E. *Social Media*

A final area related to employee conduct outside the workplace involves an employee's use of social media. The number of people using social media has grown rapidly over the past decade.[159] The use of Facebook, Twitter,

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[155] *See* Watkins v. United Parcel Serv., 797 F.Supp. 1349 (S.D. Miss. 1992) (finding no violation of privacy resulting from bad faith or utterly reckless prying by the employer).
[156] *See* 237 F.3 166 (2d Cir. 2000); and New York v. Wal-Mart Stores, 621 N.Y.S.2d 158 (N.Y. App. Div. 3d Dep't 1995) (both finding that dating is not a recreational activity and not covered by the statute).
[157] New York Labor Law, § 201-d.
[158] McCavitt, 237 F.3d at 168.
[159] Johnathan Thomas & Chris Brook-Carter, *Social Media in the Food and Drinks Industry*. The Social Media Landscape (Aug. 2011).

LinkedIn, Instagram and other networks has become pervasive.[160] Employers have taken notice of the opportunity that these networks provide for gathering and obtaining information on employees and employee applicants.[161]

Many employers contend that access to social media accounts is needed to protect the employer's proprietary information or trade secrets, to comply with federal and state regulations and to prevent the employer from being exposed to legal liabilities.[162] Employers are also using the information these networks provide to ensure that employer policies and restrictions are being followed and to ensure that employees are behaving legally and ethically.[163]

With respect to employee applicants, some employees use social media postings as another tool to gather information for screening purposes.[164] However, the use of social media to screen applicants may be on the decline because of the perceived legal risks associated with such practices.[165] According to Society for Human Resource Management research from 2013, only 20% of human resource professionals now use social media to screen applicants.[166]

In most cases, social media networks provide the opportunity for users to determine whether access to the information they post will be generally available to the public or restricted in some way.[167] Postings of public information obviously do not raise the same privacy right issues as postings of private information. Although some employers may attempt to use software that overrides the privacy protections placed on social media sites by employees, the more common practice has been for an employer to request access.[168] The concern from the employee or applicant perspective is that a refusal to provide access to a social media account will result in an adverse employment action. Further, many employees may regard access to a

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[160] Pietro Cipresso et al., *Psychometric Modeling of the Pervasive use of Facebook through Psychophysiological Measures: Stress or Optimal Experience*? 49 COMPUTERS IN HUM. BEHAV. 576 (2015).
[161] Jon Vegosen, *Employee Monitoring and Pre-Employment Screening*, 57.8 RISK MGMT. (2010).
[162] Greg Mgrditchian, *Employment and Social Media Privacy; Employer Justifications for Access to "Private" Material*. 41 RUTGERS COMPUTER & TECH. L. J. 108 (2015).
[163] *Id*.
[164] Vegosen, *supra* note 161.
[165] Alilah D. Wright, *More States Prohibit Social Media Snooping*, 59.10 HR MAGAZINE 14 (2014).
[166] *Id*.
[167] Erin Egan, *Protecting Your Passwords and Your Privacy*, FACEBOOK (March 23, 2012) https://www.facebook.com/notes/facebook-and-privacy/protecting-your-passwords-and-your-privacy/326598317390057/.
[168] Leslie Horn, *Employers Asking Applicants for Facebook Passwords*, PCMAG (March 7, 2012) http://www.pcmag.com/article2/0,2817,2401254,00.asp.

personal social media network, even with permission, as an invasion of the employee's right to privacy.[169]

Unlike other intrusions into outside activities that rely on constitutional or common law protection, the predominant protection in the social media area comes from state statutes. These laws prohibit employers from asking job applicants and current employees for their login information, including passwords, to social media sites.[170] To date, twenty-three states have enacted laws that prohibit an employer from requesting login information and passwords to personal internet accounts to get or keep a job.[171] In addition, similar legislation is pending in at least twelve other states in 2016.[172]

The Oklahoma statute restricting employer access to employee social media accounts is typical.[173] It prohibits an employer from requiring an employee or applicant to disclose a username, password or other means for accessing a personal online social media account.[174] The law also prohibits an employer from requiring that that employee or applicant access the social media account in the employer's presence.[175] Additionally, the law prohibits an employer from retaliating against an employee for refusing to provide a username or password and from refusing to hire a prospective employee for refusing to provide a username or password.[176]

The Oklahoma law does recognize exceptions when computer equipment has been provided by the employer and the online accounts relate to employer business purposes.[177] The law also does not restrict employer investigations to ensure compliance with applicable laws and to protect proprietary information.

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[169] Dave Johnson, *States Protect Employees' Social Media Privacy*, CBS MONEY WATCH (Jan. 11, 2013).
[170] NAT. CONF. OF ST. LEGIS., *Access to Social Media Usernames and Passwords* (2016).
[171] ARK. CODE § 11-2-124 (2016); CAL. LAB. CODE § 980 (2016); COLO. REV. STAT. § 8-2-127 (2016); CONN. GEN. STAT. § 31-40x (2016); DEL. CODE 19 § 709A (2016); 820 ILL. COMP. STAT. 55/10 (2016); LA. REV. STAT. §§ 51:1951, 1953, 1955; ME .REV .STAT. tit. 26 §§ 616 - 619; MD. CODE ANN., LAB. & EMPL. § 3-712; MICH. COMP. LAWS § 37.271-37.278 (2012); Montana: 2015 H.B. 343, Chap. 263; NEV. REV. STAT. § 613.135 (2013); N.H. REV. STAT. ANN. § 275:74 (2014); N.J. STAT. ANN. § 34:6B-6 (2013); N.M. STAT. § 50-4-34 (2013); OKLA. STAT. 40 § 173.2 (2016); OR. REV. STAT. § 659A.330 (2016); R.I. GEN. LAWS § 28-56-1 – 6 (2016); TENN. CODE §§ 50-1-1001 – 1004 (2015); UTAH CODE § 34-48-201 et. seq. (2016); VA. CODE § 40.1-28.7:5 (2015); WASH. REV. CODE §§ 49.44.200, 49.44.205; WIS. STAT. § 995.55.
[172] *Supra* note 170.
[173] OKLA. STAT. 40 § 173.2 (2016).
[174] *Id*. at § 173.2 (A) (1).
[175] *Id*. at § 173.2 (A) (2).
[176] *Id*. at § 173.2 (A) (3).
[177] *Id*. at § 173.2 (B).

The privacy right in this area has been recognized and codified. Employers should refrain from intruding into the private domain of employees' social media accounts.

V. CONCLUSION

Privacy is regarded in the country as a fundamental right. As such it is afforded protection through a variety of federal and state constitutional, statutory and common law provisions. In the employment context, employees acknowledge that while at the workplace, they have a low expectation of privacy and privacy rights are minimal. However, when the employee leaves the workplace, employee privacy becomes a personal right.

Technology allows employers to extend their monitoring and controlling of employees beyond the workplace. However, as the foregoing discussion illustrates, employers must proceed with caution. They must be aware of the legal standards that protect privacy rights, especially with regard to employee activities outside the workplace. If a legitimate business interest can be advanced by monitoring or controlling employee activities outside the workplace, the means by which employers act must be reasonable, must be disclosed and must not violate any legal protection.