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Hernandez V. Hillsides: Evolving Calif. Privacy Law

Law360, New York (August 13, 2009) -- The two ends of the workplace privacy spectrum have been fairly well defined by prior California law. On the one hand are those cases which have allowed covert videotaping in open and accessible workplace areas.

On the other hand are those cases that find a violation of the right to privacy by videotaping areas reserved for personal acts such as employee restrooms and dressing areas.

In *Hernandez v. Hillsides Inc.*, S147552 (Aug. 3, 2009), the California Supreme Court was confronted with a scenario that falls between those extremes and further delineated the extent to which an employer may conduct workplace video surveillance of its employees without violating their right to privacy.

Hernandez involves a situation in which two employees shared an office where the employer placed a hidden video camera. The employer was a residential treatment center for abused and neglected children.

Hillsides' director placed the camera in the office hoping to identify a third party suspected of accessing pornography at night from a company computer there. The camera was connected to a monitor and recorder in another room.

The director did not notify the office occupants about the camera because he was concerned that the suspected culprit would learn of the camera. However, he did not activate the monitor or recorder during times when the employees occupied the office and the plaintiffs were never videotaped.

At the trial court level, the court granted defendant's motion for summary judgment. Plaintiffs appealed and the Court of Appeal reversed, finding that a triable issue existed as to whether an intrusion into a protected zone of privacy had occurred and whether

the intrusion was so unjustified as to constitute a privacy violation. Defendants appealed that decision.

The specific issue before the Supreme Court was whether the employees could assert a cause of action for invasion of privacy based on the camera being placed in their office, even though the camera was operated only after normal working hours and did not capture any video of the employees who worked in the office.

Even though the court found that the employer had intruded upon the reasonable expectation of privacy of two of its employees, it nonetheless dismissed their claims, finding that the employer's acts were not highly offensive nor did they constitute "an egregious violation of prevailing social norms."

Noting that its decision is not meant to encourage workplace surveillance, the court nonetheless concluded such measures may be permissible if narrowly tailored in place, time and scope and prompted by legitimate business concerns.

The Legal Framework for Invasion of Privacy in California Law

In California, an employee can assert a claim for an invasion of privacy by a private employer based on two distinct but parallel legal theories. The first is based on the state constitution, which includes privacy as an inalienable right.

The other is a common law invasion of privacy tort claim. In *Hernandez*, the plaintiffs asserted both causes of action. Though legally distinct, these claims share many common requirements.

The right to privacy was added to the California Constitution by initiative in 1972. The California Supreme Court articulated the scope of the provision's protections in a landmark 1994 case involving athlete drug testing by the National Collegiate Athletic Association (NCAA). *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1.

To prove a claim based on the constitutional privacy right, the plaintiff must show that: 1) the plaintiff had a privacy interest protected by law; 2) the plaintiff had a reasonable expectation of privacy under the circumstances; and 3) the defendant's conduct constituted a serious invasion of the privacy right.

The *Hill* court explained that whether an individual had a reasonable expectation of privacy in such information is a question of social norms and factors related to the specific context (such as the physical setting, whether the individual with the privacy interest had notice of the claimed invasion of privacy, and the presence or absence of an opportunity to consent).

The seriousness of an invasion of privacy is also assessed according to social norms: the invasion must be "an egregious breach" of the norms that underlie the particular

privacy right. If the plaintiff successfully makes this three-part showing, the defendant still may be able to show the intrusion was justified.

The court will weigh the intrusion against the defendant's justification to determine whether the privacy violation is actionable. Valid justifications include legitimate countervailing interests such as an employer's interest in the efficient operation of the workplace or in preventing workplace harassment.

The comparable common law claim for invasion of privacy requires an intentional intrusion into a private place or into private affairs, in a manner that would be highly offensive to a reasonable person.

Social norms determine whether a privacy interest existed in a particular case, and the question is often posed in terms of whether a reasonable expectation of privacy existed, especially in view of competing social interests arising in the situation.

Offensiveness is also determined in context, taking into consideration factors including the degree of intrusion, the setting in which it occurred, the motives of the intruder, and the expectations of those whose privacy was invaded. (See *Shulman v. Group W Productions* (1998) 18 Cal.4th 200.)

The Effect of *Hernandez v. Hillside Inc.*

Whether based on the constitutional privacy right or the common law right, a claim for invasion of privacy involves a balancing of interests and a determination of reasonable expectations in the circumstances.

Indeed, the court in *Hernandez* acknowledged the largely parallel elements of the two privacy claims and distilled them into two elements, "(1) the nature of any intrusion upon reasonable expectations of privacy and (2) the offensiveness or seriousness of the intrusion, including any justification and other relevant interests."

While the Supreme Court determined that the court of appeal below did not err in determining that a jury could find the requisite intrusion, the court also found the appellate court erroneously determined that such an intrusion was highly offensive and sufficiently serious to constitute a privacy violation.

The prior pleadings of the parties had focused in substantial part on the element of intrusion upon reasonable expectations of privacy and on what constitutes "intentional intrusion."

The court however made short shrift of those arguments, finding that while privacy expectations may be diminished in the workplace, they are not lacking altogether.

The court noted that "employees who retreat into a shared or solo office, and who perform work and personal activities in relative seclusion there, would not reasonably

expect to be the subject of televised spying and secret filming by their employer.” (Pg. 22.)

The court concluded that either a physical or sensory penetration into a private place or matter, or the gaining of unwanted access to private information was enough to find the requisite intrusion.

The court then focused on the element of offensive conduct, i.e., if the employer’s conduct constituted an “egregious violation of prevailing social norms.”

In reviewing the relevant circumstances, the court noted the limited scope of the surveillance and that such surveillance was done by the employer who was motivated by a concern of exposing its wards to inappropriate conduct.

Because the plaintiffs in this case were not at risk of being monitored or recorded during regular work hours and were never actually caught on camera or videotape, the court concluded that as a matter of law, plaintiffs could not have established and cannot reasonably expect to establish that the particular conduct of the defendants was highly offensive.

Considerations for California Employees

1) Employers should reexamine their policies regarding employee privacy or confidentiality in a specified context. Providing employees notice of such a policy can reduce or eliminate a reasonable expectation of privacy.

However, the employer must take care to follow the formal policy, because informal practices granting employees privacy can create a reasonable expectation despite the formal policy.

2) Because the scope of employees’ privacy interest in the workplace will depend on the specific circumstances, the employer must consider factors such as whether an employee works in an open area or an office with a door that closes or even locks, whether the workplace is open to the public, and whether contemplated employer actions will extend to areas where employees keep personal belongings or engage in personal conduct such as making private telephone calls.

3) In situations involving surveillance and searches of employees, an employer should exercise caution to avoid unnecessary invasions of privacy. The employer should consider what interests justify both its need for the information sought and the means by which the employer seeks the information.

The countervailing interest must be sufficiently significant to outweigh the employees’ privacy interest. Because the strength of the privacy interest will vary depending on the exact circumstances, careful deliberation will help the employer avoid an actionable violation of privacy rights.

4) While the Hernandez court reiterated the rule that private employers need not justify their conduct as the least offensive alternative, an employer should also consider alternatives to the proposed course of action.

If feasible alternatives existed when an employer undertook monitoring or another course of action leading to a privacy violation, a court may view the employer's countervailing interests less favorably.

At times, it will be more prudent for the employer to try to stop employees' inappropriate behavior through an open policy of monitoring or other controls, rather than trying to catch a suspected culprit "in the act."

5) If an employer contemplates having video surveillance, it must bear in mind the clear statutory prohibitions against some forms of invasion of privacy.

In the surveillance context, for example, the California eavesdropping statute (Penal Code section 632) and the federal wiretap statute (18 U.S.C. § 2511(1)) place limits on the ability to listen to or record communications.

This means that audio recording is subject to additional legal limits. See, also, Cal. Penal Code § 647 (j)(3)(A) prohibiting secret videotaping a person in state of undress in area where person has a reasonable expectation of privacy.

Conclusion

The California Supreme Court was mindful to point out that workplace privacy inquiries are fact-specific and that the circumstances of each case must be taken into account.

While the court did not reach far beyond the specific facts of this case, and ultimately ruled against the plaintiff, it nonetheless did not hold that a plaintiff must prove that the employer had a specific intent to invade a particular employee's privacy.

Moreover, the court reaffirmed the employee's reasonable expectation of privacy, even in a semi-private shared office to which several employees had access.

Had the plaintiffs actually been videotaped, would a claim survive? If the goal of protecting abused children from potential exposure to pornography was not present, would a claim survive? Such questions will be left to future decisions.

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