

»Business Alert

September 2009—CA Supreme Court Clarifies Employees' Right to Privacy in the Workplace

The California Supreme Court recently handed down a ruling in *Hernandez v. Hillside, Inc.* addressing two employees' right to privacy where their employer used a hidden surveillance video camera to monitor their office after hours. The Court held that while a jury could find that the employer intruded upon the employees' reasonable privacy expectations, the intrusion was not sufficiently offensive or serious enough to give rise to liability.

In *Hillside*, the defendant employer ran a non-profit residential facility for neglected and abused children. The plaintiffs worked for the defendants in a semi-private office which had a door that could be locked and blinds that could be closed. The employer discovered someone was accessing pornography online in the office after hours so it set up an undercover video camera to catch the perpetrator. Although the plaintiffs were not suspected of wrongdoing they were not notified of the camera to ensure that the perpetrator would not be alerted. The hidden camera was only turned on after business hours.

When the plaintiffs discovered the hidden camera they filed suit for invasion of privacy. The trial court granted the employer's motion for summary judgment, but was ultimately reversed on appeal. The Court of Appeal held that the mere placement of the surveillance camera in the office without the plaintiffs' knowledge invaded their privacy. The defendants appealed to the California Supreme Court.

The Supreme Court agreed with the Court of Appeal that the plaintiffs had a reasonable expectation of privacy that their employer would not film them in their office without their knowledge or consent. However, the high Court disagreed with the Court of Appeal that the intrusion was "highly offensive" to a reasonable person and "sufficiently serious" to be an "egregious breach" of "social norms." Critical to the Court's analysis was the narrow scope of the recordings and the fact that defendant never captured the plaintiffs on camera. Also, the court considered the defendants' legitimate business reason for installing the camera: to protect the at-risk youths living on-site. Thus, it

determined that the intrusion was not egregious or offensive enough to create liability for the employer.

PRACTICAL EFFECT OF HILLSIDES · Even though the *Hillside* decision found the employer was not liable for monitoring employee activities via a hidden surveillance camera, employers should be extremely cautious when implementing such a device. The Supreme Court stated that its ruling was not meant to "encourage" such surveillance measures. Whether an employee's right of privacy has been violated is entirely dependent on the specific circumstances at issue. Notably, the employer in *Hillside* had a sensitive legitimate business concern: protecting sexually abused children from their potential exposure to pornography. In addition, the employer's limited use of the surveillance system and the fact that the employees were never captured on video were important considerations. Although the Court refused to require employers interested in monitoring employees to use the least offensive alternative, employers should, nevertheless, always consider feasible alternatives and consult with experienced employment law counsel before implementing video or audio monitoring.

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