

An Employer's Guide to Hidden Cameras in the Workplace¹

By David B. Wilson²

It's a typical work day for Jane Bond. She hops into her car, leaves her suburban home and battles rush hour traffic on the Interstate for 20 minutes before arriving at her job at ABC Oil Company in Center City. She remembers to lock her car in the parking lot and glances up to see the security camera on the corner of ABC Oil's building. Thanks to that camera Jane got her iPod and sunglasses back after they were stolen out of her unlocked car by a now terminated employee. Jane was thankful that ABC Oil's security tapes quickly identified the employee and actually showed him going into the car and removing her possessions.

Jane has worked at ABC Oil for ten years and recently became aware that there are concealed surveillance cameras viewing the interior reception area where visitors are received. Employees have not been notified, by signs or otherwise, about the cameras at ABC Oil.

Jane does not know that ABC Oil has placed a hidden camera in the 10' x 12' room where she works with a service window open to the public. The camera faces the cash register and the service window. Jane deals with customers billing and service issues and receives vendors at the window.

Is Jane's experience with cameras in the workplace typical? The American Management Association's 2005 Employer Survey showed fifty-one percent (51%) of employers surveyed use video surveillance to counter theft, violence or sabotage. Sixteen percent (16%) use video surveillance to monitor employee performance. Most employers tell their employees about the company's video surveillance practices, but one in five chooses to keep their use of cameras secret.

Analyzing the Rights of Public and Private Employers

Courts generally analyze invasion of privacy/surveillance cases by conducting a fact-specific balancing of an employee's reasonable expectation of privacy against an employer's legitimate business interests in conducting surveillance. *Vega-Rodriguez v. Puerto Rico Telephone Co.*, 110 F.3d 174, 179 (1st Cir. 1997). Courts analyze the employee's privacy expectation by asking first if the employee has a subjective expectation of privacy. Courts consider how much notice an employer gives its employees and where in the workplace a camera is placed. Employees generally have a diminished expectation of privacy in more public areas like employee parking lots. When employers chose not to give notice, an employee's expectation of privacy is heightened as the employee moves into the building and then into a cubicle or office.

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If the employee subjectively expects privacy, the court will consider whether the expectation is objectively reasonable and one which society would generally want to preserve. In determining the legitimacy of the employer's business interests in conducting surveillance, courts will consider factors such as safety and monitoring of worker productivity. Additionally, if the employer were public – such as a public schools or government agency, then the court must ensure the employer complies with Fourth Amendment protections against unreasonable searches and seizures. *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987). Private employers have a looser standard of compliance except to the extent dictated by common-law tort, contract constraints, or state statute. Massachusetts private employers are subject to the Massachusetts Privacy Act which states: “A person shall have a right against unreasonable, substantial or serious interference with his privacy.”

Analyzing Jane Bond's Privacy Expectations

Parking Lot

Jane does not object to cameras in the parking lot because it is an open and public area and the cameras are readily visible. Jane also recognizes her employer's legitimate business interest in monitoring the parking lot to provide personal safety and protect employee's cars from theft and vandalism, and to address legitimate security concerns.

Reception Area

Jane is less comfortable knowing that there are cameras over the reception area. Jane has looked through the employee handbook and cannot find any policy regarding surveillance cameras. She has only heard one manager mention to another that “nothing showed up on the cameras” in relation to a fight between a service tech and a driver months ago. ABC Oil's counsel believes ABC Oil is within its rights to have these cameras in open and undifferentiated workspaces based on the First Circuit's decision in *Vega-Rodriguez v. Puerto Rico Telephone Co.* In *Vega*, a quasi-public telephone company installed several cameras to monitor a large open workspace and to view all traffic passing through the main entrance. The cameras did not record sound. The employees were notified prior to the installation of the cameras and they objected to the cameras claiming the surveillance constituted an unreasonable search under the Fourth Amendment. The *Vega* court held that unconcealed video surveillance in a worker's common area does not violate the worker's privacy rights, especially when the employer discloses its use of surveillance. The court recognized the telephone company's legitimate interest in the efficient operation of the workplace in monitoring that which is in plain view within an open work area. The court specifically cautioned that “cases involving the covert use of clandestine cameras...may be quite another story.”

Here ABC Oil does not want to tell its employees about the cameras because it believes that will defeat the purpose of having them and may negatively impact morale.

Jane's Service Counter Room

Unaware that there is a hidden camera in her workspace, Jane believes that the service counter room is her “office” and that she has a reasonable expectation of privacy there. Objectively, Jane’s service counter serves the public as well as ABC Oil’s service techs and drivers. Jane also has a cash register in the room and on busy days may handle substantial sums of cash. With Jane’s counter open to the public, ABC Oil believes that her room should not be considered private.

In a similar case, *Cowles v. State*, 23 P.3d 1168, 11975, the Alaska Supreme Court found that a university's theater box office was sufficiently public in nature to defeat a reasonable expectation of privacy on the part of the box office manager, who was observed by a hidden surveillance camera. The court noted that the manager’s desk could be seen by the public through the ticket window and by other employees circulating in the office area behind the box office. The court reasoned that if a person's activities are open to view by the public, then surveillance for the purpose of detecting misconduct does not violate the Fourth Amendment. The court concluded that when an individual enters into an employment situation with high security requirements, such as handling large amounts of cash, it is less reasonable for employees to assume their conduct on the job will be private.

Nelson v. Salem State College

In 2006 the Massachusetts’ Supreme Judicial Court in *Nelson v. Salem State College*. 446 **Mass.** 525 (2006) expanded the scope of use of hidden cameras in the workplace. The court found that Gail Nelson’s privacy was not invaded when she was caught on a hidden camera and videotaped while changing clothes in her cubicle after working hours. The court stated that Gail Nelson had no reasonable expectation of privacy in that workspace. This decision may shed light on whether Massachusetts would recognize a reasonable expectation of privacy in Jane Bond’s service counter area and in similar circumstances.

What is Private in the Workplace?

Courts generally recognize a reasonable expectation of privacy as to an employee’s exclusive private office, desk, and file cabinets containing personal matters not shared with other workers. For instance, in *United States v. Taketa*, 923 F.2d 665 (1991), the Ninth Circuit found a reasonable expectation of privacy where the Drug Enforcement Agency installed a hidden camera, without a warrant, in the ceiling of an office used by an employee of the Nevada Bureau of Investigations. The court found the hidden video surveillance unreasonable given that the targeted office was not open to the public and was not regularly visited by DEA agents. The court noted that “even ‘private’ business offices are often subject to the legitimate visits of co-workers, supervisors, and the public, without defeating the expectations of privacy unless the office is ‘so open to fellow employees or the public that no expectation of privacy is reasonable.’”

In more private areas such as locker rooms, changing rooms and bathrooms, courts have generally recognized employees’ reasonable expectations of privacy. For instance, an action brought by hotel employees was settled for over \$200,000 after a Massachusetts Superior Court denied defendant’s motion for summary judgment. *Clement et al, v. Sheraton-Boston Corp.*,

Suffolk Super. Court Docket Nos. 93-0909F, 93-3405F and 94-4233F. The hotel installed hidden surveillance cameras in the locker room after suspecting drug dealing in the locker room. While the cameras did not focus on the toilet or shower area, they recorded some of the employees in various stages of undress. Similarly, in *Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422 (1991), the Eighth Circuit Court, ruled that models taped while changing during a fashion show had a cause of action for invasion of privacy. Some exceptions to this general rule include a locker room area that is not enclosed or used exclusively by the employee and where employee's activities could be seen by anyone walking into or through a storage area in the locker room. *Thompson v. Johnson County Community College*, 930 F. Supp. 501, 507 (D. Kan. 1996).

Unionized Employers

The National Labor Relations Board position is that installing cameras in the workplace should be considered "a mandatory subject of bargaining." *Colgate-Palmolive Co. & Local 15, International Chemical Workers Union*, 323 N.L.R.B. 515 (Nat'l. Lab. Rel. Bd. 1997). At a minimum union contracts should indicate that the employer may use cameras and their purpose, but need not apprise the union of camera locations or times when they will be in use. *Brewers and Maltsters, Local Union No. 6 v. National Labor Relations Board*, 2005 WL 1560399 (D.C. Cir. 2005).

Recommendations

Employers may install surveillance cameras without fear of invading its employee's reasonable expectation of privacy by giving employees clear and specific notice. We recommend the following for employers:

1. Identify and document the business reasons for having surveillance cameras. Legitimate reasons include health, safety, theft prevention, workplace productivity, and security.
2. Give advance notice to employees of the cameras and give reasons for using them. Remember to advise new employees in advance of their employment if possible.
3. Hold meetings with the employees to address concerns. Surveillance cameras can send a message that employees are not trusted, create resentment and lead to employee morale issues. Each employer should explain which areas of the workplace their employees should not expect to be private.
4. Adopt a written policy reserving the right to monitor the workplace with visible and hidden cameras. The policy should reserve the right to use hidden cameras on the premises when the employer reasonably suspects health, safety or company policy violations.
5. For unionized labor forces, ensure that camera use has been addressed as part of the collective bargaining process. Although you need not reveal exact camera location and times of use, you should discuss the general use and need for surveillance.

6. Consider limiting the times during the day the cameras will be in use to achieve the business purpose.

7. Limit who can review the surveillance tapes, and keep that group on a “need to know basis.”

8. Do not put cameras in bathrooms or locker rooms where employees may change their clothes.

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