

INTRODUCTION

Under federal and Texas law, individuals enjoy protection from certain inquiries and methods of inquiry from prospective or current employers. For employers who investigate applicants for employment or existing employees, it is imperative to know which inquiries and methods of inquiry are impermissible or subject to regulation.

The unwary employer can suffer dire consequences. Legal fees for defending a privacy claim routinely reach six figures. Potential liability for an invasion of privacy can reach seven figures under certain laws.

It is not the intent of this paper to provide a comprehensive dissertation of all federal and state laws which regulate privacy in the workplace. The laws which may be implicated in an employer conducted investigation number in the hundreds. Indeed, this paper does not address privacy laws which apply only to federal and state government entities. This paper is likewise not intended to provide legal advice in general or with respect to any particular factual scenario. Any such legal advice should be obtained directly from legal counsel.

Rather, the purpose of this paper is to provide information helpful to a basic understanding of the preeminent federal and state laws which govern privacy in the workplace. It is the hope of the author that employers find the information provide useful in this respect.¹

¹ This paper was first prepared in 2002 by Robert G. Chadwick, Jr., who has regularly updated its contents. All rights reserved, January 3, 2005 ©

SOURCES OF PRIVACY RIGHTS

In the private sector, privacy rights are governed by federal and state law.

FEDERAL STATUTES

There is no general right of privacy statute at the federal level for the private sector. Federal legislation and corresponding administrative regulations protect specific privacy interests, such as background and credit investigations, medical and psychological information, polygraph tests, the U.S. mail and wire, oral and electronics communications.

TEXAS STATUTES

There is no general right of privacy statute at the state level for the private sector. The Texas Legislature has enacted legislation which substantially mirrors federal statutes regulating the interception of wire and electronic communications. Texas law also regulates access to computers belonging to others.

TEXAS COMMON LAW

The Texas courts have recognized certain rights enjoyed by all persons which may not be infringed by any other person, including a private employer. These rights include a general right of privacy. In addition to the tort of invasion of privacy, the Texas courts have also recognized other related torts such as false imprisonment, intentional infliction of emotional distress, defamation and conversion.

LAWS OF OTHER STATES

For certain interstate activities, laws of other states must also be consulted. Such interstate activities would include the interception of interstate wire and electronic communications and background and credit investigations and drug testing of persons residing outside the State of Texas.

RELATIONSHIP AMONGST LAWS

Although some privacy interests may have only one source of protection, others may be regulated by more than one law. To the extent a federal statute provides greater protection than provided by state law, the state law is preempted. Otherwise, an overlap between or amongst two or more laws may provide multiple remedies for privacy infringement.

TEXAS COMMON LAW

In Texas, the source of the most general privacy and related protections in the private sector is Texas common law.

INVASION OF PRIVACY

In Texas, individuals enjoy a right of privacy the invasion of which constitutes an injury for which a remedy will be granted. *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973)

Privacy Interests Protected: The tort of invasion of privacy broadly protects three recognized privacy interests:

1. The right of a person to be free from an unreasonable intrusion into his/her physical solitude, seclusion or private affairs;
2. The right of a person to be free from publication of his/her private affairs with which the public has no legitimate concern; and
3. The right of a person to be free from the unwarranted appropriation or exploitation of his/her personality.

Indus. Found. of the South v. Texas Indus. Accidental Board, 540 S.W.2d 668 (Tex. 1976)

Intrusion Into Private Affairs: To state a claim under the tort of invasion of privacy based upon an unreasonable intrusion into a person's physical solitude, seclusion or private affairs, a claimant must show:

1. An intentional intrusion;
2. Which is unreasonable, unjustified or unwarranted;
3. Upon the solitude, seclusion or private affairs of the claimant;
4. That would be highly offensive to a reasonable person.

Farrington v. Sysco Food Service, Inc., 865 S.W.2d 247, 253 (Tex.App. [1st Dist.] 1993, writ denied)

Public Disclosure of Private Facts: To state a claim under the tort of invasion of privacy based upon public disclosure of private facts, a claimant must show:

1. A public disclosure;
2. Of a private fact;
3. Which would be offensive and objectionable to a reasonable person; and
4. Which is not of legitimate public concern.

Indus. Found. of the South v. Texas Indus. Accidental Board, 540 S.W.2d 668 (Tex. 1976)

Appropriation of Name or Likeness: This invasion of privacy tort occurs when a person appropriates to his own use or benefit the name or likeness of another. Restatement (Second) of Torts § 652C. The tort protects a person's interest in the exclusive use of his or her identity, insofar as it is of benefit to him or others. *Id.* at Comment A.

Consent: Consent is an absolute defense to a claim for invasion of privacy. *Jennings v. Minco Technology, Inc.*, 765 S.W.2d 497, 500 (Tex.App. - Austin 1989, writ denied)

FALSE IMPRISONMENT

An individual detained by another individual or entity against his/her will may have a claim under Texas law for false imprisonment.

Elements: To state a claim under the tort of false imprisonment, a claimant must show:

1. The claimant was willfully detained by the defendant through violence, by threats or other means, which restrained the claimant from moving from one place to another;
2. The claimant did not consent to the detention; and
3. The claimant was detained without authority of law.

Sears, Roebuck & Co. v. Castillo, 693 S.W.2d 374 (Tex. 1985)

Threat: Where a false imprisonment claim rests upon a threat, the question is whether “the threat was such as would inspire in the threatened person a just fear of injury to his person, reputation or property.” *Johnson v. Randall Food Markets, Inc.*, 891 S.W.2d 640, 645

(Tex. 1995) An employer's direction as to where an employee should be during work hours is, without more, not an unlawful detention. *Id.*

Investigation of Theft: Under Texas law, a person reasonably believing another has stolen or is attempting to steal property is privileged to detain the person in a reasonable manner and for a reasonable period of time for the purpose of investigating ownership of the property. Tex. Rev. Stat. Ann Art 1 d.

Consent: Consent is a legitimate defense to a claim of false imprisonment. If a person voluntarily complies with a request to remain and establish his/her innocence, there is no claim for false imprisonment. *Martinez v. Goodyear Tire & Rubber Co.*, 651 S.W.2d 18, 20 (Tex.App. - Houston [1st Dist.] 1983, no writ)

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

An individual who is the victim of outrageous conduct by another person may have a claim under Texas law for intentional infliction of emotional distress.

Elements: To state a claim under the tort of intentional infliction of emotional distress, a claimant must show:

1. The defendant acted intentionally or recklessly;
2. The defendant's conduct was extreme and outrageous;
3. The defendant's conduct caused the other emotional distress; and
4. The emotional distress suffered by the claimant was severe.

Twymann v. Twymann, 855 S.W.2d 619, 621-22 (Tex. 1993)

Outrageous Conduct: To be extreme and outrageous, conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Id.* at 621 (quoting Restatement (Second) of Torts § 46, cmt. d (1965))

Employment Investigations: In a recent case, a Texas Court of Appeals confirmed that intentional infliction of emotional distress is a tort which may be claimed in conjunction with an employment investigation. In *Texas Farm Bureau Insurance Cos. v. Sears*, _____

S.W.3d ___, 2001 WL 840607 (Tex.App. - Waco 2001), the court upheld a plaintiff's claim of intentional infliction of emotional distress based upon the employer's conduct after discharging an employee for alleged criminal activity in connection with a kickback scheme. In particular, the court focused on the employer's continued pursuit of the plaintiff by its reports to the IRS and its efforts to have the plaintiff's professional license revoked.

DEFAMATION

An individual who is the victim of a false statement of fact may have a claim under Texas law for defamation:

Elements: To state a claim for defamation in Texas, a claimant must show that:

1. The defendant made a false or defamatory statement;
2. The defendant made the statement in an unprivileged communication to a third party;
3. The defendant was at least negligent in publishing that statement; and
4. The statement was either actionable irrespective of special harm (defamatory *per se*) or proximately caused the claimant special harm.

Restatement (Second) of Torts § 558. Where a conditional or qualified privilege attaches to a defamatory statement, the claimant must also show that the defamatory statement was made with malice. *Hagler v. Procter & Gamble*, 884 S.W.2d 771 (Tex. 1994)

Slander: Slander is a defamatory statement that is orally communicated. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995)

Libel: Libel is written defamation. *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994)

Expressions of Opinion: Such expressions are not defamation unless the expression contains an implied assertion of fact. *Shearson-Lehman Hutton, Inc. v. Tucker*, 806 S.W.2d 914 (Tex.App. - Corpus Christi 1991, writ dismissed w.o.j.)

Defamation Per Se: Statements which are defamatory *per se* include statements imputing criminal behavior, deviate sexual behavior and conduct incompatible with the conduct of a person's business, trade, profession or office.

Employee Investigations: A conditional or qualified privilege attaches to communications made in the course of an investigation following a report of employee wrongdoing. *Randall's Food Markets, Inc.*, 891 S.W.2d at 646 The privilege remains intact

as long as communications pass only to persons having an interest or duty to which the communications relate. *Id.*

CONVERSION

Conversion is the intentional, unauthorized and wrongful assumption and exercise of dominion and control over the personal property of another, to the exclusion of or inconsistent with the owner's rights. *Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 445 (Tex. 1971) It is unnecessary to a conversion claim that there be a manual taking of the property. *First State Bank Morton v. Chesshir*, 634 S.W.2d 742, 745 (Tex.App. - Amarillo 1982, writ ref'd n.r.e.)

BACKGROUND AND INVESTIGATIVE REPORTS

The Fair Credit and Reporting Act (“FCRA”), 15 U.S.C., 1681, *et seq.*, regulates the circumstances under which employers may obtain and use background and investigative reports regarding prospective or existing employees from outside agencies.

COVERAGE

The FCRA applies to all employers.

OUTSIDE AGENCIES

The FCRA regulates reports generated by a consumer reporting agency, but this term is broadly defined by the Act to include “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages . . . in the practice of assembling or evaluating consumer credit information or other information . . . for the purpose of furnishing consumer reports to third parties.” 15 U.S.C. § 1681a(f)

Private Investigators: The foregoing definition is certainly broad enough to include private investigators and outside legal counsel.

Employer’s Personnel: The FCRA does not apply to reports obtained from an employer’s own personnel. FCRA Staff Opinion (August 31, 1999)

REPORTS

The FCRA regulates “consumer reports” and “investigative consumer reports”, but these terms are defined broadly to include any information used for employment purposes.

Consumer Reports: A consumer report means any communication of information bearing on an individual’s creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used for the purpose of evaluating the individual for employment, promotion, reassignment or retention as an employee. 15 U.S.C. §1681a (d)(1) and (h)

Investigative Consumer Reports: An investigative consumer report is one in which information on an individual’s character, reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the individual or with others with whom he is acquainted or may have knowledge concerning such information. 15 U.S.C. §1681a(e)

Oral Reports: Even oral reports are covered by the FCRA. 15 U.S.C. § 1681a(d)

FACT: The Fair and Accurate Credit Transactions Act (“FACT”) was signed by President Bush into law on December 4, 2003. FACT amends the definition of “consumer report” to exclude communications made by a third party to an employer in connection with an investigation of (1) suspected misconduct relating to employment; or (2) suspected noncompliance with Federal, State or local regulations, the rules of a self-regulated organization, or any pre-existing written policies of the employer. 15 U.S.C. § 1681a(x)(1) The FACT exclusion applies only if the investigator’s communications are “not made for the purpose of investigating a consumer’s credit worthiness, credit standing or credit capacity” and are not shared with anyone but the employer and certain government personnel.

Reports by Placement Agencies: The FCRA provides a limited exclusion from the Act’s requirements for reports made to a prospective employer for the purpose of procuring an employee for the employer or for procuring an opportunity for a person to work for the employer. 15 U.S.C. § 1681a(o)

AGE OF INFORMATION

The FCRA expressly regulates the age of information which may be included in a consumer report by an outside agency.

Prohibited Information: The following information cannot be included in a consumer report (15 U.S.C. § 1681c(a)):

1. Chapter 11 bankruptcy adjudications which antedate the report by more than ten (10) years.
2. Civil suits, judgments, and records of arrest which antedate the report by more than seven (7) years.
3. Paid tax liens which antedate the report by more than seven (7) years.
4. Accounts placed for collection or charged to profit and loss which antedate the report by more than seven (7) years.
5. Any other adverse item of information, other than records of convictions of crimes, which antedates the report by more than seven (7) years.

High-Salaried Employee Exemption: The foregoing prohibitions are inapplicable with respect to the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal \$75,000, or more. 15 U.S.C. § 1681c(b)

DISCLOSURE AND AUTHORIZATION - CONSUMER REPORTS

Before an employer may obtain a report covered by the FCRA regarding an applicant or employee, the employer must adhere to the following requirements:

Disclosure: The employer must send a clear and conspicuous written disclosure statement to the applicant or employee indicating that the employer intends to obtain a consumer report for employment purposes. The disclosure statement must be set forth in a separate document consisting solely of the disclosure. 15 U.S.C. § 1681b(b)(2)

Authorization: The employer must obtain written authorization from the applicant or employee to obtain the consumer report. The written authorization may be a part of the written disclosure statement. 15 U.S.C. § 1681b(b)(2)

Certification: The employer must provide the outside agency with a certification of compliance. The certification must certify:

1. The disclosure and authorization requirements of the FCRA have been followed;
2. The other requirements of the FCRA with respect to adverse actions (outlined below) will be followed; and
3. The information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation.

15 U.S.C. § 1681b(b)(1)

Refusal of Authorization: The FCRA does not prohibit an employer from taking an adverse action against an applicant or employee who refuses to authorize the procurement of an investigative report. FCRA Staff Opinion (October 1, 1999)

DISCLOSURE - INVESTIGATIVE CONSUMER REPORTS

To obtain an investigative consumer report of an applicant or employee, an employer must, in addition to the foregoing requirements, adhere to the following requirements:

Disclosure: The employer must, within 3 days after the date upon which the report was first requested, inform the employee or applicant in writing of the following:

1. A clear and accurate disclosure that an investigative consumer report including information as to the applicant or employee's character, general reputation, personal characteristics, and mode of living may be made;
2. A statement regarding the right of the applicant or employee to request additional disclosures, as provided below; and
3. A written summary of the rights of the applicant or employee regarding inaccurate or incomplete reports.

15 U.S.C. § 1681d(a)

Additional Disclosures upon Request: Upon written request by the applicant or employee, within a reasonable period of time after the disclosures specified above, the employer must also, within five days of the written request, make a complete and accurate disclosure of the nature and scope of the investigation requested. 15 U.S.C. § 1681d(b)

ADVERSE ACTION

An employer who relies on a consumer report in any way, even if only partially, in an adverse employment action is subject to additional requirements under the FCRA.

Adverse Actions: An adverse action includes a denial of employment or any other decision that adversely affects a current or prospective employee. 15 U.S.C. §1681a(k) Among the actions which can be adverse are termination of employment, demotion, denial of promotion, transfer or reassignment, denial of transfer or reassignment, a negative performance appraisal and a negative employment reference.

Copy of the Report: Before taking the adverse action, the employer must provide the applicant or employee with a copy of the consumer report obtained. 15 U.S.C. §1681b(b)(3)

Notice of Rights: Before taking the adverse action, the employer must provide the employee with a description in writing of his or her rights under the FCRA. 15 U.S.C. § 1681b(b)(3) For this requirement, the FTC has prescribed a specific document entitled "A Summary of Your Rights Under the Fair Credit Reporting Act."

Waiting Period: The FCRA provides no guidance as to how long an employer must wait after making the disclosures required by Act before taking the adverse action. The FTC

has informally suggested that a waiting period of five business days “appears reasonable”, but cautions that “the facts of any particular employment situation may require a different time.” FCRA Staff Opinion (June 27, 1997)

Written Explanation: After using the consumer report to take an adverse action, an employer must provide a written explanation to the applicant or employee which contains the following information:

1. Notice of the adverse action;
2. The name, address and telephone number (including a toll-free number, if available) of the agency that provided the report;
3. A statement that the agency did not take the adverse action and is not able to explain why the decision was made;
4. A statement setting forth the applicant or employee’s rights to obtain free disclosure of their file from the agency within 60 days; and
5. A statement setting forth the applicant or employee’s right to dispute directly with the agency the accuracy or completeness of any information provided.

15 U.S.C. § 1681m

CIVIL ENFORCEMENT

An employer who violates the FCRA is subject to a civil suit in federal court by the FTC or an aggrieved applicant or employee.

Negligent Noncompliance: An employer who negligently fails to comply with the requirements of the FCRA is subject to the following liability:

1. Actual damages sustained by the applicant or employee; and
2. The costs of the action together with reasonable attorney’s fees.

15 U.S.C. § 1681o

Willful Noncompliance: An employer who willfully fails to comply with the requirements of the FCRA is subject to the following liability

1. Actual damages sustained by the applicant or employee, or damages of not less

than \$100 and not more than \$1,000;

2. For an employer who obtains a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the applicant or employee or \$1,000, whichever amount is greater;
3. Punitive damages; and
4. The costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681n

Limitations: A civil action under the FCRA must be brought within two years. 15 U.S.C. § 1681p

CRIMINAL ENFORCEMENT

Criminal penalties may apply where an employer knowingly and willfully obtains information from a consumer reporting agency under false pretenses. 15 U.S.C. § 1861q

INTERSTATE INVESTIGATIONS

Special problems arise for background and credit investigations of persons located outside the State of Texas. The laws of some states, most notably California, have more stringent requirements than those provided by the FCRA.

MEDICAL AND PSYCHOLOGICAL INFORMATION

Employer access to medical and psychological information regarding applicants and employees is regulated by at least three federal laws and four Texas Statutes.

FCRA

Absent the express consent of an applicant or employee, the FCRA prohibits an outside agency from furnishing, and thereby an employer from obtaining, a report that contains medical information about the applicant or employee. 15 U.S.C. §1681b(g)

AMERICANS WITH DISABILITIES ACT

Subject to the following notes, the general prohibition in the Americans With Disabilities Act (“ADA”) of employment discrimination against qualified individuals with a disability includes medical examinations and disability-related inquiries by employers covered by the Act. 42 U.S.C. § 12112(d)(1)

Coverage: The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5) In *Board of Trustees of University of Alabama*, 531 U.S. 356 (2001), the U.S. Supreme Court ruled that the Eleventh Amendment bars enforcement of the ADA against state governments.

Medical Examinations: The medical examinations addressed by the ADA are any procedures or tests that seek information about an individual’s physical or mental impairments or health. Medical examinations regulated by the ADA include, but are not limited to, the following:

1. Vision tests conducted and analyzed by an ophthalmologist or optometrist;
2. Blood, urine, saliva, and hair analyses to detect disease or genetic markers (e.g. for conditions such as sickle cell trait, breast cancer, Huntington’s disease);
3. Blood pressure screening and cholesterol testing;
4. Nerve conduction tests (i.e., tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome);
5. Range-of- motion tests that measure muscle strength and motor function;

6. Pulmonary function tests (i.e., tests that measure the capacity of the lungs to hold air and to move air in and out);
7. Psychological tests that are designed to identify a mental disorder or impairment; and
8. Diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI)

Other Examinations: Other types of procedures and tests which are generally **not** considered to be medical examinations regulated by the ADA include the following:

1. Test to determine the current illegal use of drugs, 42 U.S.C. § 12114(d);
2. Physical agility tests, which measure an employee's ability to perform actual or simulated tasks, and physical fitness tests, which measure an employee's performance of physical tasks, such as running or lifting, as long as these test do not include examination that could be considered medical;
3. Tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions;
4. Psychological tests that measure personality traits such as honesty; and
5. Polygraph examinations.

Disability-Related Inquiries: The disability-related inquiries addressed by the ADA include any question that is likely to elicit information about a disability. Disability related inquiries regulated by the ADA include, but are not limited to, the following:

1. Asking an applicant or employee whether he/she has or has ever had a disability, how he/she became disabled and the nature or severity of the disability;
2. Asking an applicant or employee to provide medical documentation regarding a disability;
3. Asking an applicant or employee's co-worker, family member, doctor, or another person about the applicant or employee's disability;

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4. Asking about an applicant or employee's genetic information;
 5. Asking about an applicant or employee's workers' compensation history;
 6. Asking an applicant or employee whether he/she is currently taking any prescribed drugs or medications, whether he/she has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications; and
 7. Asking an applicant or employee a broad questions that is likely to elicit information about a disability (e.g., What impairments do you have?)

Permissible Inquiries: An employer may make inquiries into the ability of an applicant or employee to perform job-related functions. It is also generally permissible for an employer to make the following inquiries:

1. Asking about an applicant or employee's well being (e.g., How are you?)
2. Asking an applicant or employee about nondisability-related impairments (e.g., How did you break your leg?)
3. Asking an applicant or employee whether he/she has been drinking?
4. Asking an applicant or employee about his/her current illegal use of drugs?
5. Asking an applicant or employee to provide the name and number of a person to contact in case of a medical emergency.

Preemployment Examinations: Before an offer of an employment has been made to an applicant, an employer may not conduct a medical examination or make inquiries of the applicant as to whether such applicant is an individual with a disability or as to nature or severity of such disability. 42 U.S.C. § 12112(d)(2)(A).

Employment Entrance Examinations: An employer may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of employment duties, but only if all entering employees are subjected to such an examination regardless of ability. 42 U.S.C. § 12112(d)(3)

Prohibited Employment Examinations and Inquiries: An employer generally may not require a medical examination and may not make inquiries of an existing employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination is shown to be job-related or consistent with business

necessity. 42 U.S.C. § 12112(d)(4)

Job-Related and Consistent with Business Necessity: An examination or inquiry is job related or consistent with business necessity under the following circumstances:

1. The employer has a reasonable belief, based upon objective evidence, that an employee's ability to perform essential job functions will be impaired by a medical condition;
2. The employer has a reasonable belief, based upon objective evidence, that an employee will pose a direct threat due to a medical condition.
3. An employee requests reasonable accommodation, but the need for accommodation is not known or obvious to the employer;
4. An employee requests sick leave; and
5. Periodic medical examinations and other monitoring under specific circumstances may be job-related and consistent with business necessity. (.e.g., periodic medical examinations of employees in positions affecting public safety, such as police officers and firefighters)

Permitted Employment Examination and Inquiries: An employer may conduct voluntary medical examinations, including voluntary medical histories which are part of an employee health program available to employees at the work site. 42 U.S.C. § 12112(d)(4)

Confidentiality of Medical Records: Information otherwise lawfully obtained regarding the medical condition or history of an applicant or employee must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record which may be disclosed only to those personnel or government officials with a need to know such information. 42 U.S.C. § 12112(d)(3)(B)

Use of Medical Records: Information otherwise lawfully obtained regarding the medical condition or history of an applicant of employee must not be used to unlawfully discriminate against the applicant or employee. 42 U.S.C. § 12112(d)(3)(B)

FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act (“FMLA”) requires that documents relating to medical certifications and other medical information on employees and their families be maintained in separate files and treated as confidential medical records. 29 C.F.R. § 825.500(g)

Coverage: The FMLA applies to employers with 50 or more employees. 29 U.S.C. § 2611(4) The Fifth Circuit has ruled that the Eleventh Amendment bars enforcement of the FMLA against state governments. *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000)

TEXAS LABOR CODE

The Texas Labor Code indirectly addresses medical and psychological information of applicants and employees in three provisions.

Genetic Information: Section 21.402 of the Texas Labor Code makes it unlawful for an employer to fail or refuse to hire, discharge or otherwise discriminate against a person for refusing to submit to a genetic test. Section 21.403 of the Texas Labor Code requires that genetic information be maintained and treated by an employer as confidential medical records.

Worker’s Compensation Information: A prospective employer who has worker’s compensation insurance coverage is entitled to obtain information from the Texas Worker’s Compensation Commission (“TWCC”) on the prior injuries of an applicant for employment. To obtain such information, a prospective employer must do the following:

1. Obtain written authorization from the applicant before making the request;
2. Make the request by telephone or in writing not later than the 14th day after the date upon which the application for employment was made; and
3. Certify either it is not covered by ADA; or
4. Certify that it is covered by the ADA, that it is requesting the information prior to hiring the applicant but after having made a conditional offer of employment, and that it is requesting the information regarding all job applicants in this job category, regardless of disability.

Tex.Labor Code § 402.087. For requirements 1, 3 & 4, the TWCC has prescribed a form entitled “Prospective Employment Authorization and Certification”

Workers’ Compensation Retaliation: Besides being troublesome under the ADA, obtaining prior work related injury information regarding an applicant also can come back to haunt an employer under state law. Section 451 of the Texas Labor Code provides that an employer may not discharge or in any other manner discriminate against an employee because

the employee has (1) filed a worker's compensation claim in good faith; (2) hired a lawyer to represent the employee in a claim; (3) instituted in good faith a worker's compensation proceeding; or (4) testified or is about to testify in such a proceeding. Although inquiring about an employee's worker's compensation history is not, in and of itself, unlawful under the Texas Labor Code, such an inquiry may constitute evidence of discrimination.

TEXAS OCCUPATIONS CODE

The Texas Occupations Code regulates the manner in which patient records may be obtained from a physician and the disclosure of such records once lawfully obtained.

Confidential Information: The Texas Occupations Code makes the following information confidential and privileged from disclosure except as provided by the Code:

1. A communication between a physician and patient, relative to or in connection with any professional services as a physician to the patient; and
2. A record of the identity, diagnosis, evaluation, or treatment by a physician that is created or maintained by the physician.

Tex.Occ. Code § 159.002(a) & (b)

Consent for Release of Confidential Information: A physician cannot release information regarding a patient absent a writing signed by the patient which specifies:

1. The information or medical records to be covered by the release;
2. The reasons or purposes of the release; and
3. The person to whom the information is to be released.

Tex.Occ. Code §159.005(a) & (b)

Withdrawal of Consent: A patient is entitled to withdraw consent at any time. Withdrawal does not affect information disclosed beforehand. Tex.Occ. Code § 159.005©

Disclosure: A person or entity who receives confidential information may disclose the information only to the extent consistent with the authorized purposes for which the consent to release the information is obtained. Tex.Occ. Code §§ 159.002© and 159.005(e)

Civil Action: An aggrieved person may seek injunctive relief and damages for a violation of the foregoing requirements. Tex. Occ. Code § 159.009

TEXAS HEALTH & SAFETY CODE

The Texas Health & Safety Code regulates the confidentiality of records of persons who consult or are interviewed by a mental health professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism or drug addiction. Tex. Health & Safety Code § 611.001(1)

Confidential Information: Communications between a patient and mental health professional, and records of the identity, evaluation, or treatment of a patient that are created or maintained by a mental health professional are confidential. Tex. Health & Safety Code § 611.001(1)

Mental Health Professional: This term includes any of the following:

1. A person authorized to practice medicine in any state or nation;
2. A person licensed or certified in Texas to diagnose, evaluate, or treat any mental or emotional condition or disorder; or
3. A person the patient reasonably believes is so authorized, licensed or certified.

Tex. Health & Safety Code § 611.001(2)

Consent for Release of Information: A mental health professional may disclose confidential information to a person who has the written consent of the patient. Tex. Health & Safety Code § 611.004(a)(4)

Revocation of Consent: A patient is entitled to revoke the consent to the release of any information. A revocation is valid only if it is written, dated and signed by the patient. Revocation of consent does not affect information disclosed beforehand. Tex. Health & Safety Code § 611.007)

Disclosure: A person or entity who receives confidential information may disclose the information only to the extent consistent with the authorized purposes for which the consent to release the information is obtained. Tex. Health & Safety Code § 611.0044(d)

Civil Action: An aggrieved person may seek injunctive relief and damages for a violation of the foregoing requirements. Tex. Health & Safety Code § 611.005

TEXAS BUSINESS & COMMERCE CODE

In much the same manner as the FCRA, the Texas Business and Commerce Code prohibits an outside agency from furnishing to an employer, and thereby an employer from obtaining, a report that contains medical information about the applicant or employee without the consent of the applicant or employee. Tex.Bus.&Com. Code § 20.05©

DRUG AND ALCOHOL TESTING

Drug and alcohol testing of applicants and employees is addressed expressly by the ADA and impliedly by Texas common law.

ADA

A test to determine the illegal use of drugs by applicants or employee is not considered to be a medical examination subject to regulations of the ADA. 42 U.S.C. § 12114(d)

INVASION OF PRIVACY

The Texas tort of invasion of privacy based upon intrusion into the physical solitude of another governs the drug and alcohol testing of applicants and employees.

Consent: Consent by an applicant or employee is a necessary prerequisite to drug or alcohol testing. *Farrington v. Sysco Food Services, Inc.*, 865 S.W.2d 247, 253 (Tex.App. - Houston [1st Dist.] 1993, writ denied)

Condition of Employment: Consent may be effective even if obtained under threat of termination or refusal to hire. *See e.g., Jennings v. Minco Technology Labs, Inc.*, 765 S.W.2d 497, 502 (Tex.App.- Austin 1989, writ denied)

NEGLIGENT INVESTIGATION

To the extent negligent investigation is a viable tort in Texas, the tort governs the drug and alcohol testing of employees and applicants. The application of the tort of negligent investigation is illustrated by *Mission Petroleum Carriers, Inc. v. Solomon*, 37 S.W.3d 482 (Tex.App.- Beaumont 2001) There, a truck driver tested positive for marijuana on a urine drug test conducted by his employer and was ultimately fired. Because of the positive test result, the truck driver was unable to find employment. The truck driver denied that he had ever used marijuana and produced a negative test result performed by a laboratory shortly after his termination.

The appellate court upheld the jury's finding of negligence by the employer in collecting the urine sample. The evidence showed that the urine sample was collected by the employer's own employees rather than a laboratory. No procedures were followed to prevent a contaminated urine sample. Indeed, a beaker used by other employees was used to collect the truck driver's sample.

POLYGRAPH TESTING

The Employee Polygraph Protection Act (“EPPA”) regulates the use of polygraph and other lie detector tests in the work place.

COVERAGE

The EPPA extends to all private employers engaged in or affecting commerce or the production of goods for commerce. 29 U.S.C. § 2002 The EPPA does not apply to the United States or any State or local government or political subdivision thereof. 29 U.S.C. § 2006(a)

REGULATED INSTRUMENTS AND DEVICES

The EPPA regulates a wide variety of instruments and devices which are used for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

Polygraphs: A polygraph is defined by the EPPA as an instrument that continuously, visually, permanently and simultaneously records changes in cardiovascular, respiratory, and electro dermal patterns. 29 U.S.C. § 2001(4)

Lie Detector: In addition to polygraphs, the EPPA also regulates such other lie detector tests as deceptographs, voice stress analyzers, psychological stress analyzers and other similar devices (whether mechanical or electrical). 29 U.S.C. § 2001(3)

Excluded Tests: The EPPA does not address medical tests used to determine the presence or absence of controlled substances or alcohol, written or oral tests commonly referred to as “honesty or “paper and pencil tests”, or graphology tests commonly referred to as handwriting tests. 29 C.F.R. § 801.2(d)

GENERAL PROHIBITIONS

The EPPA contains the following general prohibitions on the use of lie detectors.

Don’t Ask: An employer cannot require, request, suggest or cause any employee or prospective employee to take or submit to any lie detector test. 29 U.S.C. § 2002(1)

Don’t Use: An employer cannot use, accept, refer to, or inquire concerning the results of any lie detector test of an employee or prospective employee. 29 U.S.C. § 2002(1)

Don't Discriminate: An employer cannot discharge, discipline, discriminate in any manner, or deny employment or promotion to, or threaten to take any such action against:

1. Any employee or prospective employee who refuses, declines, or fails to take or submit to a lie detector test;
2. Any employee or prospective employee on the basis of the results of any lie detector test;
3. Any employee or prospective employee who has filed any complaint or otherwise instituted a proceeding under the EPPA;
4. Any employee or prospective employee who has testified or is about to testify in any EPPA proceeding; or
5. Any employee or prospective employee who has exercised, on behalf of himself or another person, a right provided by the EPPA.

29 U.S.C. § 2002(3) & (4)

Simulated Use: The EPPA also prohibits the simulated use of a polygraph instrument so as to lead an individual to believe that an actual test is being or may be performed, (e.g., to elicit confessions or admission of guilt). 29 C.F.R. § 801.4(d)

Cooperation With Law Enforcement: An employer does not violate the prohibitions of the EPPA by cooperating with law enforcement officials who deem it necessary to administer a polygraph test during a criminal investigation. 29 C.F.R. § 801.4(b)

EXEMPTION FOR INVESTIGATIONS OF ECONOMIC LOSS OR INJURY

The EPPA provides a limited exemption for the use of polygraphs only for employers conducting ongoing investigations of economic loss or injury to the employer's business. 29 U.S.C. § 2006(d) Four requirements must be met for the exemption to be available:

First: The test must be administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, or an act of unlawful espionage or sabotage. 29 U.S.C. § 2006(d)(1) The ongoing investigation must be of specific incident or activity. 29 C.F.R. § 801.12(b) This requirement is not met for the following types of investigations:

1. An investigation to determine whether or not any thefts have occurred;

2. An investigation regarding continuous problems, such as inventory shortages;
3. An investigation regarding unintentional losses or injuries stemming from truck, car, workplace, or other similar type accidents or routine inventory or cash shortages; or
4. An investigation regarding theft by one employee against another employee.

29 C.F.R. § 801.12(b)

Second: The employee must have had access to the property that is the subject of the investigation. 29 U.S.C. § 2006(d)(2)

Third: The employer must have a reasonable suspicion that the employee was involved in the incident or activity under investigation. 29 U.S.C. § 2006(d)(2)

Fourth: The employer must sign a statement, given to the employee beforehand, that:

1. Sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees;
2. Is signed by a person (other than a polygraph examiner) authorized to legally bind the employer.
3. Is retained by the employer for at least 3 years; and
4. Contains at a minimum an identification of the specific economic loss or injury to the business of the employer, a statement indicating that the employee had access to the property that is the subject of the investigation, and statement describing the basis of the employers' reasonable suspicion that the employee was involved in the incident or activity under investigation.

29 U.S.C. § 2006(d)(4)

Restriction on Use: The exemption is not available if the employee is discharged, disciplined, denied employment or promotion, or discriminated against in any manner on the basis of the analysis of a polygraph test or the refusal to take a polygraph test, without

additional evidence. The evidence required by the EPPA to conduct the polygraph test may

serve as additional supporting evidence. 29 U.S.C. § 2007(a)(1)

OTHER EXEMPTIONS

The EPPA also provides limited exemptions for other employees of employers engaged in sensitive business operations. The most notable exceptions are the following:

Security Companies: A limited exemption applies for polygraph tests of prospective employees by employers whose primary business purpose consists of providing armored car personnel, personnel engaged in the design, installation and maintenance of security alarm systems, and security personnel whose function includes protection of the following:

1. Facilities engaged in the production, transmission, or distribution of electric or nuclear power;
2. Public water facilities;
3. Shipments of radioactive or other toxic waste materials;
4. Public transportation; and
5. Currency, negotiable securities, precious commodities or instruments, or proprietary information.

29 U.S.C. § 2006(e)

Drug Companies: A limited exemption (29 U.S.C. § 2007(f)) applies to polygraph tests by any employer authorized to manufacture, distribute, or dispense a controlled substance which are administered to:

1. A prospective employee who would have direct access to the manufacture, storage, distribution, or sale of any controlled substance; or
2. An employee in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of a controlled substance, who had access to the person or property that is the subject of the investigation.

Restrictions: As with the exemption for ongoing investigations of economic loss or injury, a polygraph examination, or the refusal to take a polygraph examination, cannot be the exclusive basis for an adverse employment action under the foregoing exemptions; additional

supporting evidence must exist for the adverse employment action. 29 U.S.C. § 2007(a)(2)

POLYGRAPH EXAMINERS

Even where a polygraph is otherwise authorized by an EPPA exemption, the employer is liable under the EPPA, as if no exemption applies, for any polygraph conducted by an examiner who fails to adhere to certain qualifications and requirements.

Qualifications: The polygraph examiner must have a valid and current license to conduct polygraph examinations in the State where the polygraph is to be conducted and must maintain either a \$50,000 bond or \$50,000 in professional liability insurance coverage. 29 U.S.C. § 2007(c)(1)

Report Preparation: An opinion or conclusion by the examiner regarding a test must be in writing and based solely upon the analysis of polygraph test. The opinion or conclusion must not contain information other than admissions, information, case facts, and interpretation of the charts relevant to the purpose and stated objectives of the chart, and must not include any recommendation concerning the employment of the examinee. 29 U.S.C. § 2007(c)(2)

Frequency and Duration: An examiner cannot conduct and complete more than five polygraph tests on a calendar day and shall not conduct any such test for less than a 90-minute duration. 29 U.S.C. § 2007(b)(5)

Report Maintenance: All opinions, reports, charts, written questions, list and other records relating to the test must be maintained by the examiner for a period of 3 years. 29 U.S.C. § 2007(c)(2)

RIGHTS OF EXAMINEE DURING POLYGRAPH EXAMINATION

Even where a polygraph is otherwise authorized by an EPPA exemption, the employer is liable under the EPPA, as if no exemption applies, for any polygraph examination which violates certain prescribed rights of the examinee.

Right of Termination: An examinee has the right to terminate the test at any time. 29 U.S.C. § 2007(b)(1)(A) If the examinee terminates the test before completion, the examiner may not form an opinion regarding the examinee's truthfulness. 29 C.F.R. § 801.24

Manner of Examination: An examinee may not be asked questions in a manner designed to degrade, or needlessly intrude upon, the examinee. 29 U.S.C. § 2007(b)(1)(B)

Prohibited Questions: An examinee cannot be asked any questions concerning the following matters:

1. Religious beliefs or affiliations;
2. Beliefs or opinions regarding racial matters;
3. Political beliefs or affiliations;
4. Any matter relating to sexual behavior; or
5. Beliefs, affiliations, opinions or lawful activities regarding labor organizations.

29 U.S.C. § 2007(b)(1)(C)

Medical or Psychological Conditions: No examination may be conducted if there is sufficient evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the actual testing phase. 29 U.S.C. § 2007(b)(1)(D)

Rights Before Testing: Before a polygraph examination may be conducted, the prospective examinee must:

1. Be provided with reasonable written notice of the date, time, and location of the test, and of such examinee's right to obtain and consult with legal counsel or an employee representative before each phase of the test;
2. Be informed in writing of the nature and characteristics of the tests and the instruments involved;
3. Be provided, read and sign a notice of the examinee's rights under the EPPA;
4. Be provided the opportunity to review all questions to be asked during the test.

29 U.S.C. § 2007(b)(2); 29 C.F.R. § 801.23 (Appendix A)

Rights During Testing: During actual testing the examinee may not be asked any question that was not presented in writing for review before testing. 29 U.S.C. § 2007(b)(3)

Adverse Action: Before any adverse employment action, the employer must:

1. Further interview the examinee on the basis of the results of the test;
2. Provide the examinee with a written copy of any opinion or conclusion rendered as a result of the test; and
3. Provide the examinee with a copy of the questions asked during the test along with the corresponding charted responses.

29 U.S.C. § 2007(b)(4)

CONFIDENTIALITY OF TEST RESULTS

The EPPA expressly limits the persons to whom an employer or polygraph examiner may disclose information obtained during a polygraph test.

Polygraph Examiner: A polygraph examiner may disclose information acquired from a polygraph examination only to the following persons:

1. The examinee or any other person specifically designated in writing by the examinee;
2. The employer that requested the test; or
3. Any court, governmental agency, arbitrator, or mediator, in accordance with due process of law, pursuant to an order from a court of competent jurisdiction.

29 U.S.C. § 2008(b)

Employer: An employer for whom a polygraph test is conducted may disclose information from the test only to the persons identified above or a governmental agency, but only insofar as the disclosed information is an admission of criminal conduct. 29 U.S.C. § 2008(b)

RECORD KEEPING

All documents required by the EPPA must be kept for 3 years. 29 C.F.R. § 801.30

WAIVER

The rights provided to an employee or prospective employee under the EPPA cannot be waived by contract or otherwise. 29 U.S.C. § 2005(d)

ENFORCEMENT BY SECRETARY OF LABOR

The regulations and prohibitions of the EPPA are subject to civil enforcement by the U.S. Secretary of Labor.

Civil Penalties: The Secretary of Labor may assess an employer who violates the EPPA a civil penalty of up to \$10,000 for each violation. 29 U.S.C. 2005(a)

Injunction: The Secretary of Labor is also empowered to seek injunctive relief to restrain violations of the EPPA. 29 U.S.C. § 2005(b)

ENFORCEMENT BY PRIVATE CIVIL ACTION

The regulations and prohibitions of the EPPA are subject to civil enforcement by private action by the employee or prospective employee affected by the violation. 29 U.S.C. § 2005©

Class Claims: The EPPA allows an aggrieved person to file a legal action for or on behalf of him and others similarly situated. 29 U.S.C. § 2005(c)(2)

Remedies: An employer who violates the EPPA may be liable in a private civil action for legal and equitable remedies, including employment, reinstatement, promotion, and the payment of lost wages and benefits. 29 U.S.C. § 2005(c)(1)

Fees and Costs: A prevailing party may recover reasonable costs, including attorney's fees. 29 U.S.C. § 2005(c)(3)

Limitations: No private action may be commenced more than 3 years after the alleged violation. 29 U.S.C. § 2005(c)(2)

INTERCEPTION OF WIRE, ELECTRONIC AND ORAL COMMUNICATIONS

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (“Title III”) and the Stored Communications Act (“SCA”) regulate the interception of wire, electronic and oral communications by private individuals and businesses. The interception of such communications is also regulated by state law.

COVERAGE

Title III applies to any individual, partnership, association, joint stock company, trust or corporation and any employee or agent of the United States or any State or political subdivision thereof. 18 U.S.C. § 2150(6) The SCA applies to “whoever.” 18 U.S.C. § 2701(a)

COMMUNICATIONS

Title III and the SCA regulate the interception of a broad range of communications.

Wire Communications: Protected wire communications include any aural communications using wire, cable or like connection, such as voice telephone communications. 18 U.S.C. § 2510(1)

Electronic Communications: Protected electronic communications include any transmission of signs, signals, writing, images, sounds, data or intelligence of any nature, such as e-mail and fax communications. 18 U.S.C. § 2510(12)

Oral Communications: Protected oral communications include any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such an expectation. 18 U.S.C. § 2510(2)

Stored Communications: The SCA protects wire or electronic communications while they are in electronic storage in an electronic communication service or system. 18 U.S.C. § 2701(a)

Intra-Company Communications: Neither Title III nor the SCA purports to apply to internal company communications systems, such as internal e-mail, telephone and voice mail systems. To the extent a company uses outside communication systems, such as telephone lines and internet service providers, such are subject to regulation under Title III and the SCA.

PROHIBITED CONDUCT

Title III makes the following conduct criminally unlawful and subject to fines or imprisonment, or both.

Interception: It is unlawful for any person to intentionally intercept, endeavor to intercept, or procure any other person to intercept, any wire communication. 18 U.S.C. § 2511(1)(a)

Disclosure: It is unlawful for any person to intentionally disclose or endeavor to disclose to any other person the contents of any wire, oral or electronic communication knowing or having reason to know that the information as obtained through an unlawful interception of the communication. 18 U.S.C. § 2511(1)(c)

Use: It is unlawful for any person to intentionally use or endeavor to use the contents of any wire, oral or electronic communication knowing or having reason to know that the information as obtained through an unlawful interception of the communication. 18 U.S.C. § 2511(1)(c)

CONSENT

It is not unlawful under Title III for a person to intercept a wire, electronic or wire communication under the following circumstances:

1. The person is a party to the communication; or
2. One of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2511(2)(d). As long as one of the foregoing requirements is met, the consent exemption applies even though one of the parties to the wire, electronic or oral communication did not consent to the interception.

BUSINESS EXTENSION EXEMPTION

Title III also provides a limited exemption for business extension telephones which are provided either by the telephone company or the subscriber.

Consent: The business extension exemption does not require consent.

Business Extension Telephones: The exemption applies only to extension phones on

which a company can listen to conversations by its employees. The exemption does not permit a recorder attached to the telephone line. *Pascale v. Carolina Freight Carriers Corp.*, 898 F.Supp. 276 (D.N.J. 1995)

E-Mail: The exemption does not purport apply to any devices other than telephone equipment. E-mail interception, even for business purposes, is not expressly exempted.

Ordinary Course of Business: The exemption applies only if the business extension telephone is used in the ordinary course of business. 18 U.S.C. § 2510(5) The exemption does not authorize a business to monitor all calls that interest the business; a company must have a legitimate business reason to monitor communications. The following business reasons have been recognized as meeting the ordinary course of business requirement:

1. Determining whether an employee was divulging trade secrets to a competitor, *Briggs v. American Filter Co.*, 630 F.2d 414 (5th Cir. 1980);
2. Determining whether or not employees were using the telephone for personal calls in violation of company policy, *Simmons v. Southwestern Bell Tel. Co.*, 452 F.Supp. 392 (W.D. Okla. 1978), *aff'd*, 611 F.2d 342 (10th Cir. 1979)
3. Quality control monitoring of telephone calls, *James v. Newspaper Agency Corp.*, 591 F.2d 579 (10th Cir. 1979)

Personal Telephone Calls: The exemption does not ordinarily apply to personal calls by employees. A personal call may be intercepted only to the extent necessary to guard against unauthorized use of a telephone or to determine whether the call is personal or not. With regard to the latter, once it is determined that a telephone call is personal, the listener would be obliged to stop listening. *See Watkins v. L.M. Berry Co.*, 704 F.2d 577 (11th Cir. 1983)

CIVIL LIABILITY

In addition to criminal penalties, Title III authorizes private civil action by any person whose wire, oral or electronic communication is intercepted, disclosed or used in violation of the Act. 18 U.S.C. § 2520(a)

Relief: A person who prevails in civil action under Title III is entitled to:

1. Equitable and declaratory relief;

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2. Statutory damages of up to \$10,000;
 3. Actual damages in excess of the statutory damages;
 4. Punitive damages in appropriate cases; and
 5. Reasonable attorney's fees and costs.

18 U.S.C. § 2520(b)

Limitations: A civil action under Title III must be commenced within two years after the claimant has a reasonable opportunity to discover the violation. 18 U.S.C. § 2520(e)

PROHIBITED CONDUCT: SCA

The SCA makes it criminally unlawful to obtain, alter or prevent authorized access to a stored wire or electronic communication. 18 U.S.C. § 2701(a)

TEXAS STATUTES

Texas law prohibits the interception of wire, oral, electronic and radio (cordless phone) communications in much the same manner as federal law.

Texas Penal Code: In addition to the conduct prohibited by Title III, the Texas Penal Code provides that a person commits a criminal offense if he/she knowingly or intentionally effects a covert entry for the purpose of intercepting wire, oral or electronic communications. Tex.Pen. Code § 16.02

Civil Right of Action: In addition to criminal penalties, Texas provides aggrieved persons with the right to pursue a civil action against any person who violates the proscriptions of the Texas Penal Code. Tex.Civ. Prac. & Rem. Code § 123.002

Relief: A person who prevails in a civil action is entitled to:

1. Injunctive relief;
2. Statutory damages of \$1,000;
3. All actual damages in excess of \$1,000;
4. Punitive damages in an amount determined by the court and jury; and

5. Reasonable attorney's fees and costs

Tex.Civ. Prac. & Rem. Code § 123.004

INVASION OF PRIVACY

The common law tort of invasion of privacy based upon an unreasonable intrusion into a person's physical solitude, seclusion or private affairs governs eavesdropping upon private conversations by wiretapping, microphones or spying into windows. *See Gonzalez v. Southwestern Bell Telephone Co.*, 555 S.W.2d 219, 221 (Tex.App. - Corpus Christi 1977, no writ)

ETHICS RULES FOR ATTORNEYS

In 1996, the Texas Professional Ethics Committee issued an opinion reaffirming the State Bar's position that a lawyer may not record conversations unless the lawyer advises all parties to the conversation that the call is being taped. This notice must occur before the taping begins. Ethics Op. No. 514, Texas Committee on Professional Ethics (1996)

INTERSTATE COMMUNICATIONS

Special problems arise for the interception of interstate communications. Many states have laws which are more onerous than Title III or the Texas code. Under some laws, interception of a communication is unlawful unless all of the parties to the communication consent to the interception. A recording made in another state or a recording made of a person in another state may be subject to the laws of the other state.

SEARCHES

Searches of certain categories of property belonging to an applicant or employee are expressly governed by federal and Texas statutes and impliedly by the Texas common law right of privacy.

FEDERAL PENAL CODE

Federal law prohibits any person from taking mail addressed to another person before it has been delivered with the intent “to obstruct the correspondence or pry into the business or secrets of another.” 18 U.S.C. § 1702

Delivery: The prohibition against interception applies only until the correspondence is physically delivered to the person to whom it is addressed or to that person’s agent. *U.S. v. Gaber*, 745 F.2d 952 (5th Cir. 1984) Thus, where letters have not yet been mailed or have already been received, the federal mail statute does not apply. *Schownegerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987), *cert. denied*, 112 S.Ct. 1514 (1992)

Penalties: The law imposes a fine or up to \$2,000 or imprisonment for up to five years, or both, for each violation. 18 U.S.C. § 1702

TEXAS HARMFUL ACCESS BY COMPUTER ACT

The Texas Penal Code and the Texas Civil Practice & Remedies Code provide that a person commits a criminal offense and a civil tort if the person knowingly accesses a computer, computer network or computer system without the effective consent of the owner. Tex. Pen. Code § 32.02; Tex. Civil Prac. & Rem. Code § 143.001

Criminal Penalty: The offense is a class C misdemeanor.

Civil Remedies: An aggrieved person may sue for and recover actual damages and reasonable attorney’s fees and costs. Tex. Civ. Prac. & Rem. Code § 143.002

Limitations: A person must bring suit before the earlier of the fifth anniversary of the last date in the course of conduct constituting a violation or the second anniversary of the date the claimant first discovered or had reasonable opportunity to discover the violation. Tex. Civ. Prac. & Rem. Code § 143.001

Computer Owned by Employer: An employer who accesses a computer which is in the possession, custody or control of an employee, but which is owned by the employer, is not violating the Texas Harm Access by Computer Act.

RIGHT OF PRIVACY

The Texas tort of invasion of privacy based upon an unreasonable intrusion into a person's physical solitude, seclusion or private affairs governs employee searches. Two Texas cases illustrate the application of the tort to employee searches:

***K-Mart Corporation v. Trotti*, 677 S.W.2d 632 (Tex.App. Houston [1st Dist.] 1984):** In *Trotti*, the court found an employer liable for invasion of privacy where it searched an employee's locker and purse, which was located in the locker, without the employee's consent. The court determined that, since the employee purchased and used her own lock on the locker, she has a reasonable expectation that the locker and its contents would be free from intrusion.

***Sabrah v. Lucent Technologies*, 1998 W.L. 792503 (N.D.Tex. 1998):** In *Sabrah*, the court found that there were genuine issues of material fact sufficient to warrant a jury trial of an employee's claim of invasion of privacy where the employer opened mail sent to an employee at the employer's address. One package was marked "private" and contained information regarding the employee's accounts.

CONVERSION

The Texas tort of conversion governs searches of employee property without consent. An employer may be liable for conversion for unauthorized access to an employee's car, purse, briefcase or clothing.

INTERVIEWS AND INTERROGATIONS

The National Labor Relations Act (“NLRA”) and Texas common law provide certain protections to applicants and employees during interrogation and interviews by employers.

NLRA

The NLRA provides protection from employer interference and discrimination of the rights of employees to engage in concerted activities for their mutual aid and protection.

Inquiries Regarding Union Affiliation: Employer inquiries of applicants or employees as to union sympathy or affiliation or concerted activities has been held to be interference with protected rights under Section 8(a)(1) of the NLRA. 29 U.S.C. § 158(a)(1) *See NLRB v. West Coast Casket Co.*, 205 F.2d 902 (9th Cir. 1953)

Investigatory Interviews in a Union Shop: An employee is entitled to union representation where the employee reasonably believes the investigatory interview might result in discipline, including termination.. *See NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975)

Investigatory Interviews in a Non-Union Shop: In a recent decision, the NLRB held that even an employee who is not represented by a union is entitled to have a co-worker present at an investigatory interview which the employee reasonably believes might result in discipline, including termination. *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (2000)

FALSE IMPRISONMENT

False imprisonment extends to employee interrogations and interviews. *See e.g., Randall’s Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644-45 (Tex. 1995).

***Black v. Kroger, Inc.*, 527 S.W.2d 794, (Tex.Civ.App. - Houston [1st Dist.] 1975, writ dismissed):** In *Black*, the court held that a jury could reasonably conclude that threats of being taken to jail and not seeing her daughter for a long time could have intimidated the plaintiff to the extent that she was unable to exercise her free will to leave the interview room.

***Kroger Co. v. Warren*, 420 S.W.2d 218, 220-22 (Tex.Civ.App.- Houston [1st Dist.] 1967, no writ):** Warren upheld the trial court’s finding of false imprisonment where the plaintiff was told she could not leave the interview room until she signed a statement and was physically restrained when she attempted to leave.

SURVEILLANCE

Surveillance of applicants and employees is impliedly governed by the NLRA and the Texas common law right of privacy.

NLRA

Employer surveillance of employees engaged in union organizing activities or other concerted activities has also been held to be interference with protected rights under Section 8(a)(1) of the NLRA. *See Consolidated Edison v. NLRB*, 305 U.S. 197 (1938)

Employee Knowledge: According to the National Labor Relations Board (“NLRB”), surveillance of concerted activities may be unlawful regardless of whether the employees know of it. *See NLRB v. Grower-Shipper Vegetable Ass’n*, 122 F.2d 368 (9th Cir. 1941) Accordingly, surveillance by hidden cameras and microphones may also violate the NLRA.

Impression of Surveillance: An employer may also violate Section 8(a)(1) merely by creating an impression of surveillance, even if no surveillance occurs. *See NLRB v. Rybold Heater Co.*, 408 F.2d 888 (6th Cir. 1969)

Electronic Surveillance: The prohibition against employer surveillance of concerted activities includes photographing, videotaping and, ostensibly, monitoring of e-mails.

Employer Defenses: An employer may be able to defend a claim of unlawful surveillance where such surveillance is justified by legitimate concerns for security, product integrity or quality control. *Lechmere, Inc.*, 295 NLRB No. 15, 131 LRRM 1480 (1989)

TITLE III

The act of secretly videotaping or photographing another does not meet the technical requirements of the prohibitions of Title III against the interception of wire, oral and electronic communications. *See Duffy v. State*, 33 S.W.3d 17, 23 (Tex.App. -El Paso 2000, no pet.) *See also United States v. Torres*, 751 F.2d 875, 880 (7th Cir. 1984)

TEXAS PENAL CODE

Texas outlaws the use of electronic or mechanical tracking devices to identify, monitor, or record the location of a motor vehicle owned or leased by another person. Tex.

Pen. Code § 16.06

Consent: Effective consent of the owner or lessee of the motor vehicle being tracked is a recognized affirmative defense. Tex. Pen. Code § 16.06

RIGHT OF PRIVACY

The common law tort of invasion of privacy based upon an unreasonable intrusion into a person's physical solitude, seclusion or private affairs governs employee surveillance.

Workplace: In the context of surveillance, the viability of the tort of invasion of privacy turns not only on the question of consent but also on whether a person is able to show a reasonable expectation of privacy in the area under surveillance. Such a showing is especially difficult in common work areas, but is less difficult for offices with closed doors and not at all difficult for employee lavatories.

Video Surveillance: In *Clayton v. Richards*, 47 S.W.3d 149, 156-57 (Tex.App. - Texarkana 2001), Justice Ross compared video surveillance to the interception of oral and wire communications in suggesting that video surveillance may be subject to greater scrutiny under the Texas common law right of privacy than other forms of surveillance:

An individual's right of privacy is compromised no less from being secretly videotaped than from being secretly recorded. A secret videotape of an individual who presumes to be in a private place is an even greater intrusion of privacy than secretly recording conversations. [citations omitted] Videotapes are a simultaneous audio and visual recording of events.