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ACC Association of Corporate Counsel
BALTIMORE

FOCUS

President's Message

Kimberly Neal

I suppose we all start to feel that time flies as we age, but this year, serving as your Chapter President, I feel things have flown by even more than in prior years. We've accomplished a lot, and yet there is still so much to be done! The good news is that we remain in excellent hands as Taren takes on the President role at our end-of-year board meeting on December 7. Taren has been a wonderful partner all year and a superb member of our executive team for the last two years. I have no doubt that the chapter will continue to thrive under her leadership.

I have many reasons to smile in reflecting on this past year. We returned to in-person lunches, meetings, and socials at some old favorites such as Barcocina, Citron, Ruth's Chris, and Topside, and tried out some new locations such as Manor Hill Farm, Ampersea, Guilford Hall Brewery, and Blackwall Hitch. Our attendance waxed and waned at times, but our sponsors remained committed and engaged. Golf/ Wine moved back to the Spring and the feedback was that it may have been one of our best events yet. The ACC Annual Meeting's in-person return was well-received, leaving many of us excited for next year's event in San Antonio. We welcomed new board members, while saying goodbye to a few, and we made progress on our primary goal of increasing our chapter's exposure on social media and planting seeds for stronger marketing initiatives. ACC National recognized our chapter's strengths by naming us a Silver Chapter of Distinction – quite appropriate as we also celebrated our chapter's Silver (25th) Anniversary. We have much to be proud of!

In closing, thanks to everyone for your continued commitment to the chapter. On a personal note, thank you for your support of me this last year. It was an honor to serve as your President. I look forward to continued involvement as Immediate Past President and to assisting in any way with the chapter's continued success and growth.

Onward and Upward!

Kimberly Neal

If you ever want to share any ideas or comments with the board, here is the current list of officers and directors:

Kimberly Neal
President

Board Members:

Taren Butcher
President elect

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Immediate Past President

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Nathan Wilner

Lynne Durbin
Chapter Administrator

Member Administrator
Andrew Lapayowker

Why Accessibility Matters

By Yosr Hamza, Gartner Director, Legal Counsel


Kachka / Shutterstock.com

I recently traveled with my kid. As a caregiver to a pushchair/wheelchair user, we were automatically asked to use the wheelchair line. While waiting in line for our turn, I could not help but notice that our check-in counter was lower than all the other counters. As a newbie to the disability community who has become accustomed to many things being inaccessible for people like my kid, I asked the security officer if the lower counter was intentional.

"Yes. We want everyone to be equal. They need a lower counter so they can communicate with the security officer with confidence, ease, and comfort. Their experience should be a pleasant one."

Security officer at check-in counter

The incident triggered many thoughts and emotions. That something so simple can make a whole community visible blew my mind. More than diversity and equity matters: Inclusion matters too.

Consider the entire experience

And accessibility needs special attention. Because even though people who have disabilities may want to participate in the world fully and independently, they struggle when they undertake simple services, shop, dine out, go to cultural and sports events, and maintain vehicles. They can't always find accessible offices and workstations that enable them to hold jobs. Education may be out of reach too. Even when accessibility is addressed, it's not always adequate and yet, it often could be easily. Much is designed without people with disabilities being taken in consideration.

Much is designed without people with disabilities being taken in consideration.

Although it sounds so simple while writing it, including everyone is more than just the right thing to do. It is a smart business decision, and will eventually provide you with a larger pool of customers and employees.

Most of us will at some time will deal with a temporary or situational disability (e.g., broken wrist, sprained neck, etc.). Accessibility, keep in mind, is much more than building wheelchair ramps and posting signs in braille. It is about the entire experience of how something is designed to be used — to assure someone dealing with any kind of impairment can participate as fully as possible and glean what is wanted to be gleaned for what they are doing.

Accessibility, keep in mind, is much more than building wheelchair ramps and posting signs in braille.

Lead by example

There are many ways that we can nudge the status quo and encourage employers or shops or service providers to make services, products, or premises more accessible. Go beyond the law and beyond ideal environmental, social and governance (ESG) recommendations. Help your organization shine and lead as an example. Prove to your disabled employees and customers, and the world at large, that all are valued, and that you are making conscious effort to ensure they can benefit from an ideal experience, like the one I and my kid had.

There are many ways that we can nudge the status quo and encourage employers or shops or service providers to make services, products, or premises more accessible.

And always remember: It often takes just one person to make a change.

ACC News

ACC In-house Counsel Certification Program: Dec. 5-15, Virtual

The In-house Counsel Certification Program covers the core competencies identified as critical to an in-house career. This virtual training is a combination of self-paced online modules and live virtual workshops. The workshops will be conducted over a two-week period, four days a week for three hours each day.

Business Education For In-house Counsel: Nov. 30 - Dec. 2, Boston, MA

In today's evolving climate, it is more important than ever for in-house lawyers to take on a more strategic role, investing in the company's ability to grow. ACC and the Boston University Questrom School of Business are offering their popular Mini MBA for In-house Counsel in-person again, November 30-December 2 in Boston, MA, USA! Master the executive skills needed to ensure that you—and your organization—continue to move forward.

ACC365 App Now Available to Download

Your work goes beyond your desktop and now so does the ACC member experience. The brand-new ACC365 app is now available to download. Stay connected and get the ACC experience in the palm of your hand. With one tap, you are plugged into the people, resources, and knowledge that accelerate your career.

If Sun Tzu Was a Lawyer – The Art of Litigation

By Jeff Golimowski, Womble Bond Dickinson (US) LLP

This article is part of Womble Bond Dickinson's ***The Evolving Dance: The Changing Role of Company Counsel and Compliance Officers*** thought leadership series, which examines how leaders balance a myriad of strategic business and compliance mandates in an ever-evolving landscape. For more insights, visit The Evolving Dance hub.

In a recent conversation with a large holding company's general counsel, the GC opined that he viewed litigation, either as a plaintiff or a defendant, as an opportunity to play the long game. When I noted that many GCs viewed litigation as something to be avoided at almost all costs, he explained why his view was different. When circumstances were favorable to the company, he said he would not hesitate to enter litigation, if he thought the end result was achievable and beneficial in the long term – even if it carried risk and expense in the short term.

His comments reminded me of *The Art of War* – strategic insights borne of long experience. Which got me thinking: given that litigation can sometimes feel like a battle, what would the ancient Chinese strategist think of modern litigation? What follows are strategic considerations for commercial litigation, liberally adapted from Sun Tzu's maxims.

Take Out Emotion

No ruler should put troops into the field merely to gratify his own spleen; no general should fight a battle simply out of pique. If it is to your advantage, make a forward move; if not, stay where you are.

Most corporate counsel are familiar with the moment when a business leader calls, furious over a letter received or action taken, and demands that counsel do something. By instinct, many GCs will do their best to dissuade their angry colleague because the GC knows, probably much better than the business leader, what they are really asking for and what it entails.Yet, in-house counsel are most valuable when they can dispassionately evaluate all circumstances and determine whether, despite the discomfort and difficulty, litigation may be the best option. If it is to your advantage, make a forward move.

For instance, a multinational client of mine was once faced with a flurry of small lien suits that raised exactly the pique Sun Tzu warned about – where did all these suits come from and why are they draining my time and budget now? Individually, none of them were cost effective to fight – but together, the total exposure was significant. Spread across a variety of jurisdictions with similar fact patterns, the client and I determined that settling all of them was inadvisable. Even though it would cost more than any individual case's demand to litigate, a favorable verdict in one could be used as precedent to attack the others. The result was a careful analysis of the cases asserted and an informed decision to litigate a handful of cases. Following a few favorable decisions, settlement negotiations in the remaining cases were generally short and favorable to the client.

Preparing to Fight

The art of war teaches us to rely not on the likelihood of the enemy's not coming, but on our own readiness to receive him; not on the chance of his not attacking, but rather on the fact that we have made our position unassailable.

Like most litigators, I'm often asked for advice during a transaction as to the potential risk involved in specific circumstances: what happens if we take action X? Will we be sued? What's the likelihood the enemy is coming?

Unlike determining whether to initiate litigation, where control rests with the client, it's impossible to determine if and when a potentially adverse party will bring suit. Just as a good prosecutor can convince a grand jury to indict the proverbial ham sandwich, a good litigator will find a way to sue that same ham sandwich for fraud. Involving litigators prior to transactions or major actions that carry risk can dramatically improve your chance of winning if you do find yourself in a lawsuit.

Making one's own position unassailable means inserting language into deals providing for indemnity, control of defense, and choice of law/choice of venue that will be most favorable to your side, which litigators are often in the best position to identify. While the sides in a deal are looking to best case scenarios, litigators are used to dealing with the aftermath of a deal going sideways. Involving the people who will fight the battle in choosing the ground on which that battle will be fought will not stop the battle, but it will make the battle more easily won.

Follow the Goal, Not the Fight

In war, then, let your great object be victory, not lengthy campaigns.

In hard fought, contentious litigation, every individual motion or deposition can take on outsized importance. When you've been fighting an intransigent opponent for three years, a ruling on a motion to continue suddenly becomes the most important decision since *Plessy v. Ferguson*. Your litigators are fighting the lengthy campaign, but your object, as a general counsel, is victory in your business objectives.

To achieve this balance, it's important to identify the goal of a litigation as early as possible and subject that goal to constant re-evaluation. Perhaps you are choosing to bring suit in order to obtain a favorable judicial ruling that can be used as precedent in other actions; that may mean you want your litigators to go to trial and win. This necessitates a dramatically different litigation strategy from trying to end a case – and consequent resource stress – as soon as possible.

Hence, communication with your outside counsel on the ultimate goal is critical. While it is tempting to expect outside counsel to concentrate on "winning" and letting in-house counsel worry about the time to end the war, if your definition of victory is not communicated to,

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or aligned with outside counsel, you may find yourself at odds with your litigators and fighting battles where tactical withdrawal may be a better move.

Reaching Victory

When you surround an army, leave an outlet free. Do not press a desperate foe too hard.

Human nature being what it is, it is tempting after a long litigation to demand nothing less than unconditional surrender. The key here, however, is that even when victory appears secure, in-house counsel need to be prepared to be magnanimous and offer settlement on reasonable terms.

For instance, I had a case where it was obvious the other side would ultimately lose. Settlement offers were initially rebuffed, forcing us to proceed with briefing and discovery. My client's general counsel was, understandably, frustrated at the expense involved and what we perceived to be the utter irrational nature of the other side. Nevertheless, the in-house counsel made a point to step back prior to a major hearing and authorize one more attempt at settlement.

Even though we had the opposing party "surrounded" and were headed for near-certain victory, my client's GC recognized that even the most unassailable legal position could be overcome in strange circumstances. Offering settlement terms that were on a par with those offered prior to briefing resulted a settlement that eliminated all possible risk, and the nominal amount saved was still less than what my client would have spent to obtain total victory. Leaving the avenue open for the opponent to retreat in this instance ensured a more satisfactory and cost-effective outcome than forcing the other party to fight to the end.

Recognition

What the ancients called a clever fighter is one who not only wins, but excels in winning with ease. Hence his victories bring him neither reputation for wisdom nor credit for courage.

Let's end on a counter-intuitive truth. One of my favorite law school professors always reminded his students that if one is left with the feeling a lawyer won the case despite the odds, the lawyer failed. It's up to the lawyer to present her case in such a way as to make the outcome appear blindingly obvious, so much so that an observer is inclined to say "well, anyone could have won that case!"

In other words, "victories bring neither reputation for wisdom nor credit for courage" when a general wins "with ease." When justifying outside counsel's cost or even the necessity for a litigation, non-lawyer business leaders may easily fall into this mindset: of course we won; the case was simple. So why did it cost so much? Or, why did we settle?

The case looked easy because in-house and outside counsel worked together to identify the litigation's goals, develop the facts and legal arguments necessary to reach that goal, adjusted the strategy as the case evolved, and ultimately executed the strategy to reach the goal. What looks "easy" is actually the result of huge amounts of effort behind the scenes. Ultimately, setting expectations can alleviate this concern. If counsel has been providing dispassionate and clear-eyed evaluations of exposure and risk throughout, the value of the victory – and the victory's architect, the general counsel – will be apparent.

Author:

Jeff Golimowski (Associate, Tysons) - Jeff counsels companies when they face their most difficult moments. From $200 million contract disputes to bet-the company litigation to corporate divorces, he is well versed in every aspect of complex business disputes and bringing them to successful resolution.

Jeff Golimowski

Pre- And Post-Closing Due Diligence Is Vital After DOJ Memo

By Holly Drumheller Butler and Kristin Burtzlaff, Miles & Stockbridge

New guidance from the U.S. Department of Justice may affect how companies conduct acquisition due diligence and integration.

In company acquisitions, legal, business and operation due diligence typically examine the target company's business activities to identify and mitigate risks arising from the company's historic business practices, among other things.

This often includes evaluating a target company's current and historical governance structure; contractual arrangements with customers and vendors; existing debt and financing relationships; employment, compensation and benefits matters; pending or potential lawsuits; and compliance with legal and regulatory requirements.

Recent DOJ guidance may cause acquirers to reexamine existing practices, as it reinforces the importance of both preclosing and post-closing compliance due diligence.

On Sept. 15, DOJ Deputy Attorney General Lisa Monaco announced several new guidelines[1] for prosecutors to employ in their prosecutorial decisions for corporate offenders. The same day, the department issued a memorandum[2] outlining the new policies in further detail.

Both the announcement and subsequent memorandum make clear that the department has reinvigorated its focus on corporate recidivism.

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Among the litany of enforcement policies announced, two may have immediate and practical implications for how companies conduct acquisition due diligence.

First, the department emphasized its consideration of prior company misconduct — including the full criminal, civil and regulatory record stemming from domestic and foreign activities of the company. This consideration of prior misconduct suggests that the DOJ will evaluate the prior record of acquired companies.

Second, the department directed prosecutors to assess the adequacy and effectiveness of the company's compliance program at the time of the offense and at the time of the charging decision.

This focus on an evolving compliance review highlights that the DOJ may take the position that due diligence does not end when the deal is closed but extends into post-acquisition.

As Monaco stated in her announcement:

[W]e do not want to discourage acquisitions that result in reformed and improved compliance structures. We will not treat as recidivists companies with a proven track record of compliance that acquire companies with a history of compliance problems, so long as those problems are promptly and properly addressed post-acquisition.

The department's guidance should assure diligent acquirers that they will not be treated as recidivists where, post-acquisition, the acquirer implements improved compliance structures.

But the DOJ guidance forewarns that a head-in-the-sand due diligence approach will not be well received in any subsequent investigation. Rather, such an approach increases post-closing risks to the acquirer, as the department appears to suggest that it will assert that an acquirer will assume the risks of becoming associated with the prior business activities of the target company at closing, but without the benefit of understanding the full scope of those prior activities.

Further, the acquirer will have no game plan to take corrective action and mitigate risks on a go-forward basis, instead relying on indemnification provisions in the purchase agreement that may not fully mitigate the risks associated with such activities.

An acquirer that identifies risks from a target company's business activities during the due diligence process should prioritize development and implementation of a corrective action and risk mitigation plan with respect to such activities promptly following closing to reduce the risk that the acquirer may be encumbered by the prior bad acts of the target company.

Target companies should expect that acquirers may negotiate more heavily for specific indemnification provisions addressing risky business activities undertaken by the target company that are discovered during the due diligence process to cover the potential for increased risks to acquirers as a result of the department's guidance.

Following the DOJ's guidance, appropriate consideration should be given to due diligence of:

- Prior criminal, civil and regulatory investigations, domestic and foreign, including any penalties or resolutions with the target company and key management. The department generally disfavors multiple deferred prosecution or nonprosecution agreements, especially where the issue involves the same or similar types of misconduct, the same personnel or the same entities. Therefore, preacquisition due diligence should look for prior incidences of misconduct, and post-acquisition due diligence should reduce the likelihood that the problematic conduct either has reoccurred or is reoccurring;
- Compliance programs — the playbook: code of conduct, policies, risk assessment, training and reporting. To the extent possible, this may include an understanding of who was charged with compliance oversight, relevant reporting structures and budget allocations, and an evaluation of compliance tone, as well as any open issues; and
- The target company's compliance with applicable legal and regulatory requirements, particularly in heavily regulated industries such as government contracting and health care.

Perhaps the greatest takeaway is that post-acquisition, an acquirer should have a renewed focus on compliance review and risk assessment in the post-closing integration of the target company into its existing business structure.

[1]https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement.

[2]https://www.justice.gov/opa/speech/file/1535301/download.

Authors:

Holly Drumheller Butler

Holly Drumheller Butler co-leads the White Collar, Fraud and Government Investigations practice at Miles & Stockbridge, and is deeply experienced in counseling clients in government and internal investigations, corporate compliance and complex commercial litigation.

Kristin Burtzlaff

Kristin Burtzlaff is a lawyer in the firm's Corporate & Securities practice who focuses in the areas of mergers and acquisitions, private capital markets and general corporate law.

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ACC 25th Anniversary Event
Guilford Hall Brewery
October 11 2022










ACC Baltimore Social Event
Citron
sponsored by Jackson Lewis
September 22, 2022



California Attorney General Reaches $1.2 Million Settlement with Sephora as Part of his Office's Continued Enforcement of the California Consumer Privacy Act

By Patrick Hromisin & Austin Strine. Saul Ewing LLP

On August 23, 2022, the California Attorney General reached a $1.2 million settlement with Sephora USA, Inc. based on allegations that the company violated the California Consumer Privacy Act's ("CCPA") prohibition on selling consumer data to third parties. The Attorney General had notified Sephora of the alleged violation and provided it with a 30-day window to cure the potential transgressions. The company failed to cure the alleged violations prompting an expansive investigation and culminating with this enforcement action.

What You Need to Know:

- If a company subject to the CCPA collects consumer data through a website, it must configure the site to detect and honor global privacy control signals (such as users' browser settings) or opt-out requests.
- Companies must be cautious when exchanging consumer data to third parties, including "advertising networks, business partners, [and] data analytics providers," for services as the transaction may constitute a "sale" of personal information under the CCPA, triggering heightened compliance obligations.
- If a company sells consumer information, as defined by the CCPA, it must inform the consumer of that fact and provide them with an opportunity to opt-out of that sale.
- The California Attorney General appears to be taking an aggressive approach to enforcing the CCPA, particularly relating to failures to implement and process global privacy control opt-out protocols.

The California Attorney General began exercising enforcement authority under the CCPA on January 1, 2020. Among the CCPA's enumerated rights for consumers, the cornerstone of the CCPA is the right to opt-out of the collection of personal information. In Sephora's case, the Attorney General discovered that Sephora had installed on its website tracking devices supplied by third parties that monitored consumer's shopping behavior. These devices collected data that included, but was not limited to, "whether a consumer is using a MacBook or a Dell, the brand of eyeliner that a consumer puts in their 'shopping cart,' and even the precise location of the consumer." The stockpiled data also included purchasing practices that may lead to the conclusion that a woman is pregnant or entering menopause.

Under the CCPA, a consumer has the right to opt out of the collection and sale of this personal data by exercising a Global Privacy Control or simply clicking on a "Do Not Sell My Personal Information" link. Sephora's website, however, failed to include these measures. The Attorney General became aware of Sephora's shortfalls as part of an "enforcement sweep" of online retailers. The Attorney General's office notified Sephora of its potential CCPA liability, and provided it with 30 days to cure its noncompliance. According to the Attorney General, Sephora did not cure any of the alleged CCPA violations, and the Attorney General initiated an investigation and concluded that Sephora was "selling" consumer data as defined by the CCPA. Moreover, it discovered that Sephora's website was not configured to "detect or process and global privacy control signals," which would exclude consumers who informed the company through a global opt-out signal not to sell their data. Based on these suspected violations the Attorney General initi-

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ated enforcement proceedings against Sephora, leading to a $ 1.2 million settlement with the company.

The Attorney General's approach to Sephora reinforces the CCPA foundation that if a company sells consumer data as defined by the CCPA, then it must inform the consumer that 1) it is collecting and selling their data; and 2) they have the right to opt-out of the sale of their information. Sephora did neither. It is evident that the Attorney General is taking an aggressive stance on enforcing the CCPA. Indeed, after announcing the settlement with Sephora, the Attorney General sent notices to a number of businesses alleging CCPA non-compliance relating to the business's failure to provide opt-out requests in general and process opt-out request made via Global Privacy Controls. In light of these steps by California authorities, companies subject to the CCPA must do their due diligence and review their vendor contracts and practices involving user-tracking data to determine if consumer data is being collected, exchanged, or sold, and if so should take steps to comply with their CCPA obligations.

Authors:

Patrick Hromisin,

Patrick Hromisin, counsel, handles data privacy, enforcement, and complex litigation for a broad array of clients ranging from health care to manufacturing to higher education on data privacy and cybersecurity. He has guided dozens of clients on compliance with the European Union's General Data Protection Regulation (GDPR), the California Consumer Privacy Act (CCPA), the Gramm-Leach-Bliley Act (GLBA), and the Health Insurance Portability and Accountability Act (HIPAA). He also helps clients prepare for cybersecurity incidents; respond to potential breaches and conduct related internal investigations; and provides representation in related litigation. Patrick is credentialed as a Certified Information Privacy Professional/United States (CIPP/US) and a Certified Information Privacy Professional/Europe (CIPP/E) through the International Association of Privacy Professionals (IAPP).

Austin Strine

Austin Strine, associate, represents clients in complex civil litigation in state and federal courts. His experience includes matters ranging from data privacy and cybersecurity issues and commercial breach of contract claims to corporate and shareholder disputes and business defamation cases. He also represents business clients in defending claims of medical malpractice, employment discrimination, and civil rights violations.

Saul Ewing Arnstein & Lehr's Cybersecurity and Data Privacy practice group can help companies determine whether they fall within the scope of the CCPA or other privacy frameworks and can help them achieve compliance with their requirements.

A Comprehensive Remote Employee Monitoring Policy is a Must Have in Order for Employers to Avoid Liability Under Relevant Privacy Laws

By Alex Cranford and Tonecia Brothers-Sutton, Jackson Lewis

Remote work became the norm during the Covid-19 pandemic. While the end of the pandemic seems to be in sight, for many employers, remote work, is here to stay. Now, more than ever, employees and job candidates are demanding remote work options, causing employers to create remote positions and integrate remote work technologies into their business. While many employees enjoy remote work for personal convenience, remote work can cause unease for employers because it undermines their ability to monitor and ensure employee productivity. To address these challenges, a growing number of employers have implemented employee monitoring software, also known as "bossware," which allows employers to:

- Access employees' webcams
- Access employees' computer microphones to listen to employees' online teleconferences and remote workspace
- Know when employees step away from their computers
- Record employees' keystrokes
- Access employees' internet browsing histories, including their access of their personal email accounts

While employers possess a legitimate interest in ensuring remote employees' productivity, intrusive remote surveillance can impact morale and pose a potential risk of liability for privacy violations.

Summary of Applicable Law

The United States, unlike Canada and the European Union, has yet to pass comprehensive employee workplace privacy legislation. Currently, there are three sources of authority that can apply to employee monitoring in Maryland: (1) the Federal Electronic Communications Privacy Act (ECPA), which encompasses both the Wiretap Act and Stored Communications Act, 18 U.S.C. § 2510, *et seq.*; (2) the Maryland Wiretap Act Md. Code Ann., Cts. & Jud. Proc. ["CJP"] § 10-401, *et seq.*; and (3) a common law claim for intrusion upon seclusion.

The Federal Electronic Communications Privacy Act and the Maryland Wiretap Act (together "Wiretap Acts") both prohibit the intentional interception of any wire, oral, or electronic communications. In order for a communication to be protected under either act, an employee's communication must be one for which the employee possesses a

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reasonable expectation of privacy. The Wiretap Acts do not apply if an employee has consented to the interception or if the employer intercepts the communications for a legitimate business purpose.

Maryland defines the tort of invasion of privacy as "[t]he intentional intrusion upon the solitude or seclusion of another or his private affairs or concerns that would be highly offensive to a reasonable person." *Furman v. Sheppard*, 130 Md. App. 67, 744 A.2d 583, 585 (Md. App. 2000). Like the Wiretap Acts, intentional intrusion upon seclusion requires a showing that the individual had a reasonable expectation of privacy in his or her communications. See *Trundle v. Homeside Lending, Inc.*, 162 F.Supp.2d 396, 401 (D. Md. 2001).

Employers may avoid potential legal claims under the theories of liability discussed above through a well-crafted and comprehensive employee monitoring policy and consent agreements.

A. Reasonable Expectation of Privacy.

Courts routinely hold that employees do not possess a reasonable expectation of privacy in their workplace computers if their employer disseminates a policy that clearly informs employees that company computers will be subject to monitoring and are not to be used for personal activity. *See United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000) ("Therefore, regardless of whether Simons subjectively believed that the files he transferred from the Internet were private, such a belief was not objectively reasonable after FBIS notified him that it would be overseeing his Internet use.")

Accordingly, employers should implement a clear monitoring policy that sets forth defined boundaries for use. An effective policy puts employees on notice that they are not to use their work computers, even when working remotely, for personal reasons and that the employer will be monitoring all aspects of activity.

B. Consent.

An employer's monitoring policy should also include clear language indicating that the employee consents to the exact types of monitoring being implemented. Consent is a defense to claims under the Wiretap Act and intrusion upon seclusion claims. *Washington v. Glob. Tel*Link Corp.*, Civil Action 2022 U.S. Dist. LEXIS 153075 (D. Md. Aug. 24, 2022) ("It is well established that a plaintiff's consent to the claimed invasion is a defense to the supposed intrusion."). The consent exception allows an employer to monitor or intercept employee communications so long as the employer consents to the surveillance. Consent can either be expressor implied. However, the District Court of Maryland held that consent cannot be cavalierly implied because the Wiretap Acts possess a "strong purpose to protect individual privacy." *Rassoull v. Maximus, Inc.*, Civil Action No. DKC 2002-0214, 2002 U.S. Dist. LEXIS 21866, at *12 (D. Md. Nov. 8, 2002).

Accordingly, where possible, employers should obtain written consent to monitor all possible types of communications used on work-computers during remote employment.

C. Business Use Exception.

When establishing a monitoring policy, it is also imperative that employers inform employees that monitoring can occur at any time, for any reason, for *any legitimate business purpose* so that they will be able to avail themselves of the business use exception to the Wiretap Act. The Wiretap Acts excludes any telephone instrument, equipment or facility that is: (1) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business, and (2) used by the subscriber or user in the ordinary course of its business. 18 U.S.C. § 2510(5)(a)(i). For the business use exception to apply, both prongs of the section must be satisfied. *Sanders v. Robert Bosch Corporation*, 38 F.3d 736, 740 (4th Cir. 1994).

Accordingly, employers should include language in their policies that warns employees that monitoring can occur at any time, for any reason, with or without notice, for any legitimate business-related purpose. Additionally employers who use "bossware" should be careful to ensure they have protocols in place to ensure they do not intercept or record employee's personal telephone conversations. Such protocols should include: only accessing phone calls for legitimate business purposes, disconnecting any interception after it is determined that the phone call is of a personal nature, and non-disclosure of any personal information gleaned from a business-related call.

Authors:

Tonecia Brothers-Sutton

Tonecia Brothers-Sutton is a law graduate at the Baltimore, Maryland, office of Jackson Lewis P.C. Her practice focuses on representing employers in all aspects of workplace litigation, including wrongful termination, retaliatory discharge, and discrimination and harassment based on race, color, sex, age, religion, national origin, and disability. Prior to joining Jackson Lewis, Tonecia interned for the Hon. Elizabeth Morris in the Circuit Court for Anne Arundel County. While attending law school, Tonecia served as the Executive Symposium and Manuscripts Editor for the Journal of Business and Technology Law. She was also a member of the National Trial Team, winning the 2022 American Association for Justice Regional Competition. Upon graduation, Tonecia was inducted into the Order of Barristers for her excellent trial advocacy skills. Prior to law school, Tonecia graduated magna cum laude from Virginia Commonwealth University majoring in broadcast journalism and political science.

Alexander Cranford

Alexander ("Alex") Cranford is an associate in the Baltimore office of Jackson Lewis P.C., where he advises employers in all employment matters, with a focus on defending employers in all aspects of workplace litigation, including wrongful termination, retaliatory discharge, discrimination and harassment based on race, color, sex, age, religion, national origin, and disability. Prior to working for Jackson Lewis, Alex spent three years as an associate at a regional law firm in Maryland where he defended employment and legal malpractice claims. Prior to that, Alex clerked for the Civil Magistrates' Office in the Circuit Court for Baltimore City.

Board Leadership

President
Kimberly Neal
General Counsel
Harford County Public Schools
Kimberly.Neal@hcps.org

President Elect
Taren Butcher
Allegis Group
tbutcher@allegisgroup.com

Immediate Past President
Dan Smith
Under Armour
daniel.smith@underarmour.com

Secretary
Kristin Stortini
Assistant General Counsel
Baltimore Ravens
kristin.stortini@ravens.nfl.net

Communications Chair
Raissa Kirk
Senior Associate General Counsel
The Johns Hopkins University
Applied Physics Laboratory
raissa.kirk@gmail.com

Program Chair
Matthew Wingerter
Catholic Relief Services
matthew.wingerter@crs.org

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Chapter Administrator
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ldurbin@inlinellc.net