

THE AMERICAN BAR ASSOCIATION
EMPLOYEE RIGHTS AND RESPONSIBILITIES COMMITTEE

REPORT OF THE
SUBCOMMITTEE ON LEGISLATIVE DEVELOPMENTS

INDIAN RIVER PLANTATION
STUART ISLAND, FLORIDA
MARCH 24, 1999

Annual Report of the Legislative Developments Subcommittee

1999 REPORT OF THE
SUBCOMMITTEE ON LEGISLATIVE DEVELOPMENTS
OF THE AMERICAN BAR ASSOCIATION
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Indian River Plantation, Stuart Island, Florida
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I. FEDERAL LAW

A. Private Employers/Employees

1. Compliance Assistance Authorization Act of 1998 (Public Law 105-197) 112 Stat. 638. Employers will be able to consult with State personnel regarding OSHA compliance under an agreement between the U.S. Secretary of Labor and the states.

2. Workforce Investment Act of 1998 (Public Law 105-220) 112 Stat. 936. The goal of the Act is to increase employment, retention, skills, and earnings of participants. Ultimately, this act seeks to improve the quality of the workforce and the productivity of the nation. These goals will be achieved by working with the states to establish programs that will improve the workforce.

3. Amy Somers Volunteers at Food Banks Act (Public Law 105-221) 112 Stat. 1248. The definition of employee for the purposes of the FLSA does not include people who volunteer their services solely for humanitarian purposes to private, non-profit food banks.

4. Commission on the Advancement of Women and Minorities in Science, Engineering and Technology Development Act (Public Law 105-255) 112 Stat. 1889. This Act establishes a commission that will research the roles of women, ethnic minorities and disabled people in the sciences, engineering and technology fields. Additionally, the commission will evaluate whether and how women and minorities are prepared for careers in these areas. Finally, the commission will formulate how employers and labor unions can advance women and minorities in these areas.

B. Federal or Public Employers/Employees

1. Amendment to the Occupational Safety and Health Act (Public Law 105-198) 112 Stat. 640. The Secretary of Labor cannot use the results of enforcement activities to evaluate employees that were involved with enforcement activities or impose quotas or goals.

2. Intelligence Authorization Act for 1999 (Public Law 105-272) 112 Stat. 2396. This act provides for, inter alia, enhanced protection for CIA personnel and their families, appropriates \$201,500,000 for the retirement and disability fund and authorizes increases in appropriations for salary, retirement and benefits.

3. Postal Employees Safety Enhancement Act (Public Law 105-241) 112 Stat. 1572. This Act makes OSHA applicable to the United States Postal Service (USPS) in the same way that it would apply to any other employer. The Act contains provisions for closing and/or consolidating non-complying offices. The USPS cannot eliminate or restrict services because of having to pay penalties.

4. Voluntary Services for the Chief Justice's Administrative Assistant (Public Law 105-233) 112 Stat. 1535. The Chief Justice's Administrative Assistant, with the Chief Justice's approval, can accept volunteer personnel to assist with public programs and visitors. The volunteer must agree in writing to waive any claims against the US in connection with their services. The volunteers are not considered employees for any purpose other than for Ch. 81 of Title 5 or Ch. 171 of Title 28. The services of volunteers will not result in reduction of pay or displacement of any Supreme Court employee.

5. Federal Employees Health Care Protection Act of 1998 (Public Law 105-266) 112 Stat. 2363. Improves the administration of sanctions against health care providers under the Federal Employees Health Benefits Program.

II. ALABAMA

A. Vocational Training for Disabled Persons

HB343 makes an appropriation of money for the Special Mental Health and Mental Retardation Program to provide, among other things, educational and vocational services to disabled persons.

B. State Prohibition Against Recognition of Same Sex Marriages

HB152 prohibits marriages between persons of the same sex in Alabama and prohibits recognition of same sex marriages formed elsewhere.

III. ALASKA

No pertinent employment statutes were passed in 1998.

IV. ARIZONA

A. Employment Protection Act

On February 20, 1998, the Arizona Supreme Court heard oral argument in Beeles v. Offset Separations Corp., Supreme Court No. CV 97-0016-CQ, a case challenging the constitutionality of Arizona's Employment Protection Act, Ariz. Rev. Stat. § 23-1501. A summary of the EPA was provided in the Subcommittee's 1998 Report. The plaintiffs in Beeles contend that the EPA unconstitutionally abolishes the ability of employment discrimination victims to bring common law tort actions and limits their remedies; usurps the Arizona Supreme Court's authority to define the common law and conduct that is violative of public policy; discriminates between victims of similar misconduct by limiting protection against employment discrimination to employees of employers with at least fifteen employees; and impairs contract rights. The Arizona Supreme Court ultimately dismissed the Beeles case as moot due to the parties' underlying settlement of the litigation. However, on January 12, 1999, the Court will consider the same constitutional challenges at issue in Beeles in another case, Cronin v. Superior Court, Supreme Court No. CV 98-0495-SA without oral argument.

B. Welfare Recipients

SB 1297 encourages employers to hire welfare recipients by allowing employers who hire welfare recipients six months to determine if these workers are fit for a job and, if not, to terminate them without any effect on their unemployment compensation experience ratings.

C. Mining Employees

HB 2571 amends prior law to provide that mining employees working underground may work longer than eight hours per day if their collective bargaining agreement permits this practice.

V. ARKANSAS

The Arkansas legislature meets biannually. The legislature did not meet in 1998 but will reconvene in January 1999.

VI. CALIFORNIA

A. Change in Overtime Law

Effective in 1998, California's overtime requirements will essentially conform to federal standards and the laws of the majority of other states, as a result of the Industrial Welfare Commission's vote to eliminate the daily overtime requirement contained within a large number of the state's wage orders. Significantly, employers in the majority of industries will now no longer be required to pay overtime to employees who work more than eight hours in a single day. The salient features of the revised wage order are as follows:

1. Employers are only required to pay overtime to employees that work more than 40 hours in a work week.
2. The requirement that workers be paid double time after 12 hours has been eliminated.
3. Employers are no longer required to pay overtime for the "seventh day of work" (unless the employee has also worked more than 40 hours in the same work week); however, this does not effect a provision of the California Labor Code which requires that employees be provided with one day of rest in seven.
4. Employers desirous of implementing alternative work schedules are no longer required to provide formal disclosures to workers, conduct a secret ballot vote and obtain a written agreement from the effected workers.

The aforementioned changes affect the following five wage orders: the Manufacturing Industry (Order 1-98); Professional, Technical, Clerical, Mechanical and Similar Occupations (Order 4-98); Public Housekeeping (Order 5-98); the Mercantile Industry (Order 7-89); and the Transportation Industry (Order 9-98).

B. Workplace Violence Statute

A new law effective in 1998 requires employers to notify workplace violence victims that they may be able to collect workers' compensation benefits for their injuries. The actual text of the law provides that employers subject to the state's workers' compensation law must "give any employee who is a victim of a crime that occurred at the employee's place of employment written notice that the employee is eligible for workers' compensation for injuries, including psychiatric injuries, that may have resulted from the place of employment crime . . . within one working day of the date the employer reasonably believes the employer should have known of the crime."

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C. Expansion of the Requirements for Continuation Health Insurance Coverage Imposed by the Federal Consolidated Budget Reconciliation Act ("COBRA")

Effective January 1, a new California law expands the requirements for continuation health insurance coverage imposed by COBRA. Under the statute, known as CAL-COBRA, employees of businesses with less than 20 employees that provide group health benefits to workers are entitled to elect continuation coverage upon a "qualifying event." Such qualifying events include the employee's death, termination, divorce, or the loss of an individual's status as a dependent. Furthermore, the statute provides that continuation coverage can last for up to 18 months if a worker is terminated or his or her hours are reduced, and up to 36 months for most other qualifying events.

D. Minimum Wage Increase

Effective March 1, 1998, the state minimum wage in California increased from \$5.15 an hour to \$5.75 an hour.

E. Los Angeles County: Bidding Requirements for Contractors with the County

The Los Angeles Board of Supervisors recently approved a measure that requires companies bidding for contracts with the County to disclose the wages and benefits of their lowest paid workers. Moreover, the new regulations indicate that provision of child care is one of the benefits that will be favorably considered by the County when selecting contractors.

F. New Hire Reporting Requirements

Effective July 1, California employers must begin reporting new hire information to the Employment Development Department.

G. Prohibition on Discrimination Based on Genetic Information

Effective January 1, 1999 the California Fair Employment and Housing Act will prohibit employers from discriminating against workers based on their "genetic characteristics." This term is defined by the Legislature to include "any scientifically or medically identifiable gene or chromosome . . . that is known to be a cause of a disease or disorder . . . or is determined to be associated with a statistically increased risk of development of a disease or disorder or inherited characteristics that may derive from the individual or family member, that is presently not associated with any symptoms of any disease or disorder."

H. Executive Order

Governor Wilson issued an executive order on September 10, 1998 directing state agencies and school districts to inform their workers that they can object to their unions' use of dues for political activities.

VII. COLORADO

A. State Employee Compensation

HB 98-1312 repealed and reenacted Colo. Rev. Stat. § 24-50-104 to overhaul the state employee

compensation system. To provide compensation to employees in the State Personnel System comparable to that available in the private market, the statute directs the State Personnel Director to develop a performance evaluation system permitting increases based on performance and withholding of increases for less than satisfactory performance. The statute thereby replaces the system of anniversary-based merit increases with a performance-based pay plan.

VIII. CONNECTICUT

A. Increase in State Minimum Wage

S.S.B. No. 311 increases the state minimum wage from \$4.25 per hour to \$5.65, effective January 1, 1999, and not less than \$6.15, effective January 1, 2000. P.A. No. 98-44.

B. Child Labor Statutes

S.H.B. 5481 institutes minor changes in Connecticut's child labor laws.

IX. DELAWARE

A. Adult Abuse Registry

HB385 amends Chapter 85, Title 11 relating to employment practices, quality in hiring, an adult abuse registry, and child care and health care facilities. This act requires all employers who operate a health care or child care facility to obtain any reports of adult abuse or neglect by a job applicant from the Adult Abuse Registry.

B. Discrimination - Retaliation

HB600 amends Title 19 of the Delaware Code relating to discharging or discriminating against an employee. This act fines an employer not less than \$1,000 nor more than \$5,000 for discriminating against an employee who made a complaint or gave information to the Department about the employer, or who has testified or has promised to testify to any matter pursuant to Title 19.

C. Child Abuse Registry

SB132 provides a thorough and comprehensive law establishing requirements for employers and prospective employees in the health care and/or day care industry. Applicants for positions in this industry must obtain service letters from past employers. And employers must perform a Child Abuse Registry check as well as an Adult Abuse Registry check for all job applicants.

D. Public Employees - Bargaining Units

SB184 amends Title 19 of the Delaware Code relating to the Public Employment Relations Act by adding a new provision to the Act creating a procedure for the transfer of public employees among existing bargaining units, where the exclusive representatives and the affected employees all agree that the transfer will have a positive effect on the representation of the employees.

E. Discrimination - Genetic Testing

SB337 amends Title 19 of the Delaware Code relating to employment and genetic information. The law makes it unlawful for employers to intentionally collect, directly or indirectly, any genetic information concerning any employee or applicant for employment, or any member of their family, unless it can be shown that: 1) the information is job related and consistent with business necessity, or 2) the information is sought in connection with the employer's retirement policy, or for the underwriting or administration of a bona fide employee welfare or benefit plan.

X. **DISTRICT OF COLUMBIA**

A. Police Officers, Fire Fighters, and Teachers Retirement Benefit Replacement Plan Temporary Act of 1997

The Council of District of Columbia enacted the "Police Officers, Fire Fighters, and Teachers Retirement Benefit Replacement Plan Temporary Act of 1997" (Act) to establish, on a temporary basis, an actuarially sound retirement replacement plan for pension benefits accrued after June 30, 1998 by police officers, fire fighters, and teachers. D.C. LAW 12-58. (The federal government, pursuant to the Retirement Protection Act (RPA), had relieved the D.C. government of responsibility for unfunded pension liabilities, which totaled over \$4,800,000.00 at the time RPA was enacted, and assumed legal responsibility for payment of retirement benefits accrued by police officers, fire fighters, and teachers prior to July 1, 1997. The purpose of the instant Act was to establish a replacement retirement plan for pension benefits accrued after June 30, 1997, with full funding and management by the D.C. government.)

Section 201 of the Act allowed for civil enforcement by a participant or beneficiary to recover benefits under the terms of his/her retirement program, to enforce rights under the terms of the retirement program, to clarify rights to future benefits under terms of retirement program, and/or to force the administrating Fund to turn over requested information pertaining to the program. The Act has a six year statute of limitations pursuant to Section 202.

Please note that this Act, by its express terms, was to expire 225 days from 3/20/98, its effective date.

B. Comprehensive Merit Personnel Employee Viatical Settlement Amendment Act of 1997

The District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code §1623.1 et seq., was amended as follows:

Pursuant to this Act, terminally ill employees and/or former employees enrolled in the District of Columbia group life insurance program were able to make a viatical settlement, i.e., an irrevocable assignment of all of the employee's incidents of ownership in the policy. Any such assignment would automatically cancel any beneficiary designation that might have been made and the insured employee would no longer have the right to designate a beneficiary. The assignee would assume the right to convert the insurance when the insured employee's employment circumstances would have provided this option to the insured employee. Accidental dismemberment insurance and family optional insurance were not assignable.

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Please note that this Act, by its express terms, was to expire 225 days from 3/20/98, the day it took effect.

C. District of Columbia Unemployment Compensation Federal Conformity Temporary Amendment Act of 1997

Section 13(f) of the District of Columbia Unemployment Compensation Act, D.C. Code §46-114(f), was amended, on a temporary basis, to include provisions permitting the sharing of information with the National Directory of New Hires in order to comply with the requirements of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

Please note that this Act, by its express terms, was to expire 225 days from 3/20/98, the date it took effect.

D. Child Support and Welfare Reform Compliance Temporary Amendment Act of 1998

Section 3 of the Medicaid Benefits Protection Act of 1994, D.C. Code §1-359.2, was amended by the "Child Support and Welfare Reform Compliance Temporary Amendment Act of 1998" (Act) in pertinent part as follows:

The Act amended the District of Columbia Unemployment Compensation Act to permit disclosure of unemployment information. The Act also amended Title 47 of the D.C. Code to permit disclosure of tax information.

Of significance, Section 27 of the Act also allowed for civil penalties against employers that did not comply with reporting requirements pertaining to establishment and maintenance of a District of Columbia "Directory of New Hires." Section 27 mandated that the mayor of D.C. establish and maintain a "Directory of New Hires" and required employers to supply certain specified information to the Directory within twenty days of the date that an employee began employment or re-employment in the District of Columbia. An employer who failed to comply with the reporting requirements would be subject to a civil penalty of \$25 for each non-reported employee, or a civil penalty of \$500 for each non-reported employee if the non-compliance was the result of a conspiracy between the employer and the employee not to supply the required report or to supply a false or incomplete report. The penalty was to be assessed each calendar month until the employer was in compliance and enforcement would be in the Superior Court by the corporation counsel of the District of Columbia.

The information collected by the Directory could be used by any federal agency, state or district agency, or private entity under contract with the governmental authority to: establish paternity, establish, modify, and enforce a child or spousal support order; administer workers' compensation and unemployment insurance programs; and verify eligibility for public assistance programs.

Please note that this Act, by its terms, was to expire 225 days from 1/30/98, the date it took effect.

XI. FLORIDA

A. Confidentiality of Employee Assistance Programs Communications

S112 provides that communication regarding state employees' participation in employee assistance programs are confidential and provides public record exemption for records relating thereto.

B. Adoption of Rules Regarding Ability to Work

S1708 allows Unemployment Compensation Division to adopt rules to determine claimant's ability to work and availability for work; authorized rulemaking for Vocational Rehab Programs and Jobs and Benefits Division.

C. Affirmative Action

H755 deletes requirement that Board of Regents for State University system comply with recordkeeping and reporting requirements for OPS employment; requires that each community college maintain a plan to increase representation of women and minorities in faculty and administrative positions.

D. School to Work Program

H1901 creates school to work program.

XII. GEORGIA

No legislative developments outside of workers' compensation were passed in Georgia during this last legislative session.

XIII. HAWAII

A. Employment Discrimination Based on Arrest Records

HB3528 makes it unlawful for an employer to discriminate based on the arrest record of an individual, although convictions rationally related to job duties may be considered in hiring, promoting, and other employment decisions.

XIV. IDAHO

A. Human Rights Commission – Revising Complaint Procedures

Chapter 155, SB1360. A complaint must be filed with the Human Rights Commission ("Commission") within one (1) year of any alleged discrimination. Filing a complaint is a condition precedent to litigation. A complainant may file a civil action in district court within ninety (90) days after receiving notice that the Commission dismissed the complainant's case.

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A complainant may request dismissal of a complaint filed with the Commission. Dismissal requests made within 365 days from the date of filing may be granted after the staff director contacts and considers the interest of all parties who have appeared in the matter. If after 365 days no settlement agreement has occurred and the complainant requests a dismissal, the commissioner shall dismiss the complaint and notify the parties.

B. Employment Security Law

Chapter 1, HB426. Idaho revised many sections of its Employment Security Law. Under Section 72-1349, money owed by an employer for unemployment is deemed immediately due and payable to the state. The employer shall hold or be deemed to hold the money due separately from other funds for the state of Idaho.

Under 72-1368, an employer who receives a request from the Department of Labor ("Department") for separation information after an unemployment claim has been filed must respond to the request within ten (10) days. The time limit may be extended upon the discretion of the Department. An employer who fails to comply with the request without good cause will be precluded from participating in the hearing and contesting any determinations regarding the claim.

XV. ILLINOIS

A. Income Withholding Act

1. Under HB 3048, "income" for purposes of withholding pursuant to a support order includes commissions, compensation as an independent contractor, workers' compensation, disability, annuity, pension and retirement benefits, insurance proceeds, vacation pay, bonuses, profit-sharing payments, and any other payments. "Income" does not include amounts required by law to be withheld, other than creditors' claims. State or local laws limiting or exempting income or the amount or percentage that can be withheld are not applicable. Sec. 15(d).

2. Orders for withholding shall direct the employer to withhold the amount specified and may direct the employer or union to enroll dependent children as beneficiaries of health insurance plans and to withhold or cause to be withheld any premiums. Sec. 20(c) and (e).

3. The employer must deduct the amount to be withheld no later than the next payment of income occurring 14 days following the date the notice for withholding was mailed. The amount withheld must be submitted to the obligee or public office, as designated in the notice, within 7 business days of the date it would have been paid to the employee and provide that date to the obligee or public office at the time the payment is transmitted. Sec. 35.

4. An employer or union is required to mail to the obligee, within 15 days of enrollment of a child as a beneficiary in a health insurance plan, notice of enrollment, plan information, and all necessary forms as would be made available to a new employee. When an order for dependent coverage is in effect and coverage is terminated or changed for any reason, the employer or union must notify the obligee within 10 days of the termination or change date and provide notice of conversion privileges. Sec. 35(a).

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5. The employer is entitled to a fee of no more than \$5.00 per month for withholding income, taken from the amount withheld. Sec. 35(a).

6. Discharging, disciplining, refusing to hire or otherwise penalizing a support obligor because of a duty to withhold is prohibited. If the employer wilfully fails to comply with any duties under the Act, a complaint can be filed by the obligee, public office or the obligor. If the employer is found to have wilfully failed to withhold, an order shall be entered for enforcement of the entire amount willfully withheld. Where the obligor was discharged, disciplined, denied employment or otherwise penalized, the court may order restitution, reinstatement, or both. A fine of not more than \$200.00 may also be imposed. Sec. 50. Effective January 1, 1999.

XVI. INDIANA

A. Minimum Wage

1. P.L.39-1998 provides that for employers of two or more employees, beginning October 1, 1998, the minimum wage is \$4.25 an hour and will increase to \$5.15 an hour on March 1, 1998. The minimum wage rates do not apply to employees providing companionship services to the aged or infirm when employed by an employer or agency other than a family or household using companionship services. Sec. 22-2-2-4(i).

2. P.L.39-1998 provides that employers may apply a "tip credit" for tipped employees equal to a cash wage of \$2.13 an hour as required by the Fair Labor Standards Act and the difference between the cash wage and the current minimum wage. The employer is responsible for supporting the tip credit amount through reported tips by the employee. Sec. 22-2-2-4(c)

B. Overtime Rate

1. An overtime rate of not less than one and one-half times the regular rate for hours worked in excess of 40 hours weekly. The overtime rate is not applicable to motion picture theater employees. Sec. 22-2-2-4(j) and (u).

2. The "regular rate" does not include sums paid as gifts, payments for occasional periods when no work is performed due to vacation, holiday, illness, or similar causes, payments for travel and other expenses, employer contributions to benefit plans, overtime pay for hours worked in excess of eight hours daily or 40 weekly, overtime pay for work on Saturday, Sunday, holidays or the sixth and seventh day of the work week, overtime pay for work outside the employee's regular working hours, pursuant to an applicable employment contract or collective bargaining agreement. The regular rate also does not include amounts paid for services performed in a given period if the amount to be paid is at the employer's sole discretion at or near the end of the period and not pursuant to a prior contract, promise or agreement. Nor does the rate apply to payments for talent fees to performers including announcers on radio or television programs. Sec. 22-2-2-4(k)(3).

3. An employer is not required to pay the overtime premium for hours worked in excess of the maximum work week if the employee is employed under a collective bargaining agreement certified by the National Labor Relations Board, which provides that no employee shall be permitted to work more than 1,040 hours during any 26 consecutive weeks; or during a period of 52 consecutive weeks, not

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more than 2,240 hours and is guaranteed not less than 1,840 hours (or not less than 46 weeks at the normal hours worked per week, but not less than 30 hours per week) and not more than 2,080 hours for which the employee is paid for guarantee hours at the rate specified in the agreement. The overtime rate is applicable to hours worked in excess of the guaranty. Sec. 22-2-2-4(l).

4. An employer is not required to pay overtime for hours worked in excess of the applicable maximum work week if the employee is employed pursuant to an individual contract or collective bargaining agreement, if the employee's regular duties necessitate irregular hours and the contract or agreement provides for a regular rate not less than the applicable statutory minimum and for overtime pay at not less than one and one-half times the regular rate as a weekly guaranty pay for not more than 60 hours based on the specified rates. Sec. 22-2-2-4(m).

5. An employer is not required to pay overtime for hours worked in excess of the maximum work week if pursuant to an agreement before performance of the work, the amount paid for hours in excess of the maximum work week: for employees employed at piece rates, is computed at not less than one and one-half times bona fide piece rates, applicable to the same work week when performed during nonovertime hours; or for an employee performing two or more works for which different hourly or piece rates have been established, is computed at not less than one and one-half times the bona fide rates, applicable to the same work when performed during nonovertime hours; or at not less than one and one-half times the rate established by agreement, provided the established rate is substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in particular work over a representative period of time; and the employee's average hourly earnings, exclusive of other amounts are not less than the statutory minimum hourly rate, and extra overtime compensation is paid on other forms of additional pay required to be included in computing the regular rate. Sec. 22-2-2-4(n).

6. An overtime premium is not required for retail or service establishments employees for hours worked in excess of the maximum work week if the employee's regular rate of pay exceeds one and one-half times the statutory minimum hourly rate and more than half of the employee's compensation for a representative period of not less than one month represents commissions on goods or services. In determining compensation representing commissions, all earnings resulting from application of the bona fide commission rate shall be considered commissions on goods or services regardless of whether computed commissions exceed draw or a guaranty. Sec. 22-2-2-4(p).

7. Hospitals or institutions engaged in the care of the sick, aged, or the mentally ill or defective residing on the premises are not required to pay an overtime premium if, pursuant to an agreement before performance of work, a work period of 14 consecutive days is accepted in lieu of a seven day work week for purposes of overtime computation and if, for employment in excess of 80 hours in the 14-day period, the employee is paid one and one-half times the regular rate. 22-2-2-4(q).

8. Employees in domestic service in one or more households must be paid one and one-half times the regular rate for hours worked in excess of 40 hours weekly. 22-2-2-4(r).

9. Overtime premium computation for an employee of an operator of street, suburban or interurban electric railway, local trolley or motorbus carrier (regardless of whether the railway or carrier is public or private, profit or nonprofit), hours worked in charter activities are excluded if the charter activities were pursuant to an agreement with the employer before employment, and the charter activities are not part of the employee's regular employment. 22-2-2-4(s).

10. An overtime premium is not required for periods of not more than 10 hours in the aggregate in any work week in excess of the statutory work week if during that period the employee is receiving remedial education that: is provided to employees lacking a high school diploma or eighth grade level education; is designed to provide reading and other basic skills at the eighth grade level or below; and does not include specific job training. 22-2-2-4(t).

XVII. IOWA

A. Providing Work-Related Employee Information to Potential Employers

SB 280 provides immunity from civil liability to an employer who provides work-related information about a current or former employee upon request of the employee or a prospective employer if the employer does not act unreasonably in providing the information. Under the Act, an employer acts unreasonably if the information disclosed violates a civil right of the employee, if the information is knowingly provided to one with no legitimate interest in the information, or if the information provided is not relevant and is disclosed with malice or with no good faith belief that the information is true.

B. Unemployment Compensation - Employees of Temporary Employment Firms

HB 236 provides that a temporary employee through a temporary employment firm who fails to notify the firm within three working days of the completion of an employment assignment is deemed to have voluntarily quit employment for purposes of denying that temporary employee unemployment benefits. The three-day requirement can be extended for good cause.

The temporary employee is denied benefits only if the temporary employee is advised by the temporary employment firm in writing that the employee is required to notify the temporary employment firm upon completion of the assignment. To satisfy the advise-in-writing requirement, the Act provides that the temporary employment firm shall advise the temporary employee through a separate document at the time of hire that provides an explanation of the notification requirements which also must be signed by the employee.

XVIII. KANSAS

No legislative developments were passed in Kansas during the 1998 legislative session.

XIX. KENTUCKY

A. Labor Cabinet Reorganization

Kentucky Senate Bill 177 relates to reorganization of the Commonwealth's Departments, cabinets and respective major administrative bodies. Name changes in the Labor Cabinet include the Office of Labor-Management Relations being renamed the Office of Labor-Management Relations and Mediation, and the Division of Employment Standards and Mediation being renamed the Division of Employment Standards, Apprenticeship and Training. Administrative body transfers include transferring the Mediation Branch of the Division of Employment Standards to the renamed Office of Labor-Management Relations and Mediation, and transferring the Division of Special Fund from the Department of Workers' Claims to the Department of

Workplace Standards. Newly created divisions in the Labor Cabinet include the Division of Information and Research, and the Division of Security and Compliance in the Department of Workers' Claims.

B. Collective Bargaining for Public Employees

Amendments to Senate Bill 177 also provide for a Task Force on Collective Bargaining for Public Employees and allow for the implementation of a pilot project on collective bargaining for state government employees. Senate Bill 177 was signed by Governor Paul E. Patton on April 14, 1998.

XX. LOUISIANA

A. Unemployment Compensation

H.B. 103 provides that payments received under the Worker Adjustment Retaining and Notification Act (WARN Act) are considered "wages" for purposes of unemployment compensation. During any week that an individual receives wages, he is ineligible for unemployment compensation. However, no one receiving WARN Act payments will be disqualified for benefits for refusing to leave employment in order to return to work for the employer that issued the payments.

B. Selection of Teachers and Certified School Personnel

H.B. 118 authorizes each city and parish school board to select teachers and all other certified personnel from recommendations made by the city or parish superintendent. The school board may reject the superintendent's recommendations and require him to submit additional recommendations. Teachers and principals may recommend candidates of the superintendent. The superintendent must consider these recommendations, but he is not required to accept them. H.B. 118 also authorizes the school boards to employ teachers by the month or by the year and to fix their salaries, provided no sex discrimination is involved.

C. Merit Pay in Department of Transportation

S.B. 16 provides that construction and maintenance employees of the Department of Transportation are required to participate in a structured training program. If an employee refuses to participate, the department may not reduce his pay. The department may, however, withhold merit pay if the employee does not participate in the training programs.

D. Implied Consent to Chemical Testing for Locomotive Engineers

S.B. 26 provides that, under certain circumstances, any person who operates a locomotive engine on the railroad tracks of Louisiana gives his implied consent to a chemical test of his blood, breath, urine or other bodily substance. This chemical test will be used to determine if he is under the influence of alcohol or illegal substances. The test will be administered only if he is involved in a collision at a railroad when he is both (a) driving or in actual physical control of the locomotive and (b) believed to be under the influence of alcohol or illegal drugs. If a person refuses to submit to the test, the test will not be given without a court order.

E. Enforcement of Child Support by Income Assignment

S.B. 74 provides that a notice to withhold income will operate as an assignment and will be binding on any employers of the person ordered to pay support if the notice to withhold is served. An employer may deduct a five-dollar processing fee from the person's income for each pay period that the income assignment order is in effect. An employer who complies with the notice to withhold is not subject to civil liability from any person or agency because of their compliance.

XXI. MAINE

A. Minors

26 MRSA § 774, sub-§ 1, ¶ B, was amended to clarify part-time school week for the purpose of enforcing child labor laws in the state. The amended version provides the maximum weekly hours that a minor may work; 50 hours during any week that the approved school calendar is less than 3 days or during the first or last week of the school calendar, regardless of how many days school is in session for the week.

B. Legislative Employees

H.P. 1497 gives collective bargaining rights to legislative employees.

C. Minimum Wage-Amendment

H.P. 1037 amends the minimum wage law to include benefits in the minimum wage. "Benefits" means health and welfare benefits.

D. An Act to Improve Public Sector Labor Relations

H.P. 1503 provides that if contracts between public employers and a bargaining agent expire prior to the parties agreeing on a new contract, the grievance arbitration provisions of the expired contract regarding disciplinary action remain in effect until the parties execute a new contract.

E. Act to Permit the Creation of Municipal Fire Districts

S.P. 598 provides that any municipality, in cooperation with one or more municipalities, may form a district to furnish fire protection.

F. Migrant and Immigrant Workers Assistance Office

H.P. 1430 provides that this office will educate, facilitate translations, assist, and advocate for migrant and immigrant workers.

XXII. MARYLAND

A. Drug Testing

An amendment to Section 17-214 permits Maryland employers to use hair samples to test job applicants for drug use. The prior law limited drug tests to blood or urine specimens.

XXIII. MASSACHUSETTS

A. An Act Relating to Personnel Records

Chapter 23 mandates that employers who receive a written request from an employee shall provide the employee opportunity to review their personnel record within five business days.

B. Freedom of Employment in the Broadcast Industry

Broadcast industry employers cannot restrict, by contract, the right to gain employment in a specific geographic area. Chapter 237

C. Workforce Training Fund

Chapter 175 establishes a fund to provide grants to employers, labor organizations, and training providers for projects to provide education and training to existing employees and newly hired workers. Employers liable to pay under GL 151A §14(I) shall pay a workforce training contribution of 0.075 per cent of so much of its payroll that is subject to the chapter.

D. Employee Leave for Certain Family Obligations

Chapter 109 entitles employees to 24 hours of leave during any 12 month period, in addition to leave available under the Family and Medical Leave Act of 1993. This leave is for certain proscribed family obligations (e.g., taking a child to the dentist).

XXIV. MICHIGAN

A. P.A 20: Persons With Disabilities Civil Rights Act.

1. Amended the Michigan Handicapper's Civil Rights Act, effective March 12, 1998, changing the title of the HCRA to Persons With Disabilities Civil Rights Act and replacing references to "handicap" with "disability" throughout. MCL 37.1101, *et seq*: MSA 3.550(101), *et seq*.

XXV. MINNESOTA

A. Nursing Mothers

Employers are required to make a "reasonable effort" to provide adequate private space and unpaid breaks for new mothers to pump breast milk, under a new law. Effective Aug. 1, 1998, employers must

provide “a room or other location, in close proximity to the work area, other than a toilet stall,” where a woman can privately pump breast milk. But employers will not be held liable if they have made a “reasonable effort” to comply, and the law does not contain penalties. The law stipulates that break times can run concurrently with any other provided breaks. Employers will not have to provide the breaks if doing so would “unduly disrupt the operations of the employer.” HF3459/SF2751*/CH369

XXVI. MISSISSIPPI

A. Service on State Grand Jury

H.B.507 allows a court to excuse a juror from service if his attendance would cause serious financial loss to the juror or to the juror’s business. However, an employer may not threaten or attempt to persuade a juror to avoid jury service. If he does so, he may be charged with interference with the administration of justice and contempt of court.

B. Notice after Exposure to Infectious Disease

H.B. 1029 requires that a person who is directly exposed to an infectious disease while performing emergency rescue services must be notified of the exposure. This bill applies to emergency medical technicians, firefighter, bystanding caregivers, or others providing emergency services to any person later transported to a hospital and diagnosed with an infectious disease. When the emergency provider is exposed to blood or other bodily fluids, he or his employer must notify the emergency provider or his employer if the patient is diagnosed as having an infectious disease.

C. Age Qualification for Highway Patrol Officers

H.B. 1555 deletes the maximum age qualifications for newly employed highway patrol officers. Officers must, however, be at least 21 years old. An officer may be less than 21 if he holds a degree from an accredited four-year college or university.

D. Fair Treatment of Applicants and Employees

S.B. 2037 provides that the State Personnel Board shall administer a state personnel system that handles all aspects of personnel administration without regard to political affiliation, race, national origin, sex, religious creed, age or disability.

E. Employment in Child Residential Facilities

S.B. 2244 provides that any child residential facility must complete sex offense criminal history information checks and felony conviction information checks for any employee, prospective employee, volunteer or prospective volunteer. The facility must ensure that local law enforcement will fingerprint the applicant and will forward the results to the Department of Public Safety and the FBI. The facility may not employ a person, or allow any person to serve as a volunteer, who has a felony conviction for crime against a person, controlled substances, child abuse or neglect, or a sex offense of any kind.

F. Crime Victims' Bill of Rights

S.B. 2352 provides that a victim of a crime may respond to a subpoena to testify in a criminal trial proceeding or participate in the reasonable preparation of a criminal proceeding without loss of employment, intimidation or threat or fear of the loss of employment.

G. Leased and Temporary Employees/Unemployment Compensation

S.B. 2522 provides for unemployment compensation when dealing with an "employee leasing firm" and a "temporary help firm." Employee leasing firms perform specified duties for a client company and the client's employees; the employees are directed and controlled by the client. Temporary help firms hire their own employees and provide these employees to other organizations with the expectation that the worker's position will be terminated upon the completion of the specified task. For the purpose of unemployment compensation, all entities using the services of an employee leasing firm are considered the employer of the individuals leased from the firm. Temporary help firms are considered the employers of individuals they provide to perform services for other organizations.

H. Unused Accumulated Personal or Sick Leave

S.B. 2572 authorizes any school district employee to donate a portion of his or her unused accumulated personal or sick leave to another employee. The donor employee may only give leave to another employee who is suffering from a catastrophic illness or who has an immediate member of his family suffering from the same. The donor employee must retain at least 50% of unused sick leave and at least 7 days of personal leave. If the recipient does not use the total donated leave, it will be returned to donor employees on a pro rata basis.

XXVII. MISSOURI

A. HB 1907 - Employee Background Checks

Specifies that a health care provider's duty to conduct employee criminal background checks under §660.317 is satisfied if the Highway Patrol completes an inquiry of criminal records that are available for disclosure to a provider for that purpose. Also clarifies that completing the background check under §660.317 does not exempt an employer from common law requirements of exercising due diligence in hiring decisions. In addition, the bill:

1. Provides for a class A misdemeanor of failing to disclose criminal history when a person applies for a position requiring contact with patients or residents and knowingly fails to disclose his or her criminal history;
2. Clarifies that a provider is guilty of a class A misdemeanor if the provider knowingly hires a person who has been found guilty of certain crimes;
3. Requires the Department of Social Services to issue rules permitting the hiring restrictions of §660.317 to be waived for good cause.

B. HB 1095 - Open Meetings and Records

Requires, among other things, that votes taken during closed meetings be by roll call vote unless excepted as provided by Article III of the Missouri Constitution (allows for exception by rule of the House or Senate). Any vote taken during closed meetings of a public governmental body involving legal actions or settlement agreements, real estate leases within 72 hours after execution of the lease, or personnel matters must also be recorded as a roll call vote, unless ordered closed by a court of law.

XXVIII. MONTANA

The Montana legislature did not meet in 1998.

XXIX. NEBRASKA

No employment legislation was passed in Nebraska during the 1998 legislative session.

XXX. NEVADA

A. Executive Orders in Response to Workplace Explosions

The following requirements were imposed by Governor Miller's signing of four executive orders.

1. The Nevada Division of Industrial Relations must inspect businesses that manufacture or store explosives twice a year;
2. The State Land Use Planning Agency must assist local governments in developing appropriate ordinances to regulate such businesses;
3. The Nevada Fire Marshal's Office must evaluate local enforcement of fire codes relating to hazardous materials; and
4. The State Division of Emergency Management (in conjunction with local governments) must develop an emergency plan to deal with the victims of such explosions.

B. Tax Exemption for Employers That Provide Childcare

Effective January 1, 1998, a new measure will allow Nevada employers that assist certain workers with childcare costs to exclude the number of hours participating employees work from the calculation of the company's business tax. This covers all employers that provide free on-site childcare or vouchers for workers to use in covering childcare costs. The new law also provides employers with immunity from simple negligence for the actions of an independent licensed child-care facility if the employer pays for, provides vouchers, or negotiates a discount or other benefits for a worker at such a facility.

XXXI. NEW HAMPSHIRE

A. Employee Rights/Responsibilities

House Bill 421 amends the law on discrimination to prohibit the denial of the benefits of the rights afforded under the employment, public accommodations, and housing accommodations law on account of a person's sexual orientation. Chapter 108.

B. Criminal Background Checks

H.B. 1516 requires criminal background investigations for new, existing, or transferred employees of the department of health and human services who are required by their job description to have direct contact with children.

C. Dental Insurance

H.B. 1551-FN adds dental insurance to the continuing coverage for employees who become ineligible to continue in a group insurance plan.

XXXII. NEW JERSEY

A. Criminal History Checks of School Employees

1998 N. J. Laws 31 amended Chapter 6 of Title 18A of the Revised Statutes. Under the amended section, an applicant for employment or service in any of the positions covered by the Act shall submit to the Commissioner of Education his or her name, address and fingerprints. The commissioner is then authorized to exchange the fingerprint data with and to receive information from the F.B.I. and the state police. 1998 N. J. Laws 31 amended Section 4 of the Act so that the commissioner may now maintain the criminal record and application documents on a candidate for no longer than three years from the date of the decision of the candidate's qualification or disqualification with an employer. Previously, there was a one year limitation on the retention of these records. See 1998 N. J. Laws 31.

B. Workers' Compensation Fraud

Under Chapter 15 of Title 34 of the Revised Statutes, a person shall be guilty of a crime of the fourth degree if the person's action meet one of three enumerated conditions which suggest workers' compensation fraud. Before the recent legislation, a person needed to "willfully and knowingly" take action which would meet one of the three conditions. The new legislation requires only that actions are taken "purposely or knowingly." See 1998 N. J. Laws 74.

C. Horse Racing Injury Compensation

Section 3 of P. L. 1995, c. 329 (C.34:15-131) was recently amended by 1998 N. J. Laws 11. Previously, the term "horse racing industry employee" only included a jockey, jockey apprentice, exercise rider, driver and driver-trainer. 1998 N. J. Laws 11 expanded the definition of "horse racing industry employee" to include an "assistant trainer, stable employee, or any other person licensed by the commission,

who is an employee of an owner or a trainer and engaged in performing services for an owner or a trainer in connection with the exercising or racing of a horse in New Jersey."

XXXIII. NEW MEXICO

A. Public School Employees

SB 15 requires public schools to obtain background checks on all applicants who have been offered employment or contractors' employees with unsupervised access to students.

B. Health Insurance Portability

SB 171 amended New Mexico's Health Insurance Portability Act and Insurance Code to conform with federal law requirements in the Health Insurance Portability and Accountability Act of 1996.

XXXIV. NEW YORK

A. Income Tax Withholding

An individual may elect to allow the Department of Labor to voluntarily withhold federal income taxes from unemployment insurance benefits. Ch. 29, Governor's Program Bill, S.1793, A.3847.

B. Public Works and Prevailing Wage

1. To ensure compliance with prevailing wage laws, all contractors and subcontractors on public works contracts who are currently required to keep payroll records are required to submit such records every thirty days. Ch. 565, S.3550-B, A.6394-B.

2. The size of deposits into the Public Work Enforcement Fund are enlarged by an increase in the assessment on public works projects from .0167 to .0334 of one percent of the total contract cost. The Public Work Enforcement Fund is used for the enforcement of the prevailing wage. Ch. 513, S.3003-A, A.4797-A.

C. Unpaid Wages Prohibition Act

Under Senate Bill 5071-C, an employee or collective bargaining agent may file a complaint with the Commissioner of Labor for a violation of wage laws. The bill provides more protections for employees by: 1) increasing the violations and penalties given to the employer for failure to pay wages to employees; 2) giving the employer the burden of proof to show that the employee was paid; 3) ensuring a worker's right to recover unpaid wages for 6 years prior to filing a claim; and 4) giving notification of processing, conferences, awards to an employee who has filed such a complaint, as well as information on the collection of back wages and civil penalties and the outcome of the prosecution in writing. Chapter 605.

D. Minors

Minors 12 years and older may be employed as bridge caddies at bridge tournaments. Ch. 123, S.2585, A.4280.

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E. Department of Social Services / Funding

Assembly Bill 8450, which provides funds to the Department of Social Services, was signed by the Governor on July 22, 1997. The funds relate to the Welfare Management System for implementation of the Personal Responsibility and Work Opportunities Reconciliation Act of 1996 and costs associated with implementation of Welfare-to-Work Caseload Management System computer system design, database, programming, telecommunications network design, site preparation and year 2000 corrective action.

F. Applicant Fingerprinting

Senate Bill 2593 makes employment applicants who are already required to provide fingerprints for a state criminal record search, and are applying for child care employment and certain positions, licenses or permits in New York City, pay any extra cost incurred for their fingerprints to undergo a nationwide criminal record search through the Federal Bureau of Investigation. Approved by the Governor on May 23, 1997.

G. Labor Law Enforcement / Funding

Senate Bill 3003 dedicates the funds that have accumulated in the Public Work Enforcement Fund to the Labor Law Enforcement Fund. Approved by the Governor on September 3, 1997.

H. Federal Work Opportunity Tax Credit

Signed by the Governor on June 25, 1997, Senate Bill 4372 pertains to the amount of tax credit available to an employer. If a federal work opportunity tax credit was available in the first year of employment then the employer may take a 35% tax credit on the first \$ 6,000 paid in wages. If the tax credit was not available in the first year, then the employer may take the tax credit for that first year. Under Senate Bill 4372, the educational department or the state agency responsible for providing vocational services to the blind or visually handicapped must certify the disability.

I. Employee Domestic Violence Policy

Senate Bill 4853 allows for creation, approval and dissemination of a model domestic violence employee awareness and assistance policy. As signed by the Governor on August 5, 1997, the bill calls on the Office for the Prevention of Domestic Violence, with the assistance of the Commissioner of Labor, for the task.

J. Power For Jobs Program

Senate Bill 5706, signed by the Governor on July 29, 1997, creates the Power For Jobs Program. The program will make low cost electric power available to businesses, small businesses, and not-for-profit corporations. The purpose behind the program is to promote new job creation and to give an incentive for businesses that are at risk of relocating to an out of state location to stay in New York, thereby keeping those jobs within New York. Under the program, utilities that provide the low cost electric power will be granted a utility tax credit.

K. Executive Order #49: Project Labor Agreements

In 1997 Governor Pataki issued Executive Order #49, which deals with project labor agreements (PLA) for public construction projects done by state agencies. Under Executive Order #49 it is necessary to establish procedures for the utilization of a PLA on public construction projects "only where the standards set by the Court of Appeals can reasonably be expected to be met." Prior to implementation, a state agency proposed PLA: 1) would be subject to approval by the Executive and the Counsel to the Governor; 2) will not be approved unless the PLA has "both as its purpose and likely effect, the advancement of the interests of the State's competitive bidding statutes."; 3) utilization must meet the interests underlying New York's competitive bidding laws, for instance, preventing any favoritism, improvidence, fraud and corruption regarding the awarding of a contract; and 4) must ensure that the best possible work is obtained at the lowest possible cost.

L. Child Support Orders

New York has adopted the Uniform Interstate Family Support Act. The Act provides for enforcement of income-withholding orders from another state. The Act includes rules for employer compliance, as well as immunity from civil liability for employers who comply and a penalty provision for those who do not. Chapter 398 (eff. September 1, 1997).

M. Municipal Employees--Insurance

The general municipal law is amended to extend insurance coverage available to volunteer members of specialized teams to municipal employees. Specialized teams shall mean: any emergency team or squad composed of volunteer firefighters, volunteer ambulance workers or municipal employees, who shall have attained the minimum level of training or experience to meet qualifying standards established by the office of fire prevention and control, and which is administered by the state, a county, city or town for the purposes of training for or responding to a man made or natural disaster by carrying out any activities which are within the relevant training and expertise of such municipal employees or are authorized pursuant to the volunteer firefighters' benefit law or the volunteer ambulance workers' benefit law but which are not normally provided by such entities.

General Municipal Law § 209-bb(4) (eff. August 26, 1997) (emphasis added to show the change in statute).

N. Reasonable Accommodations for Persons with Disabilities

The Human Rights Law is amended to require reasonable accommodations by employers for persons with disabilities. "Reasonable accommodations" are defined as:

actions taken which permit an employee, prospective employee or member with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested.

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Executive Law § 292(21-e) (eff. January 1, 1998).

O. Teachers' Retirement System

1. Members of the New York state teachers' retirement system, who meet the requirements, may elect an optional lump sum payment in lieu of future payments. Included in the requirements is the stipulation that the retiree must not be entitled to more than one thousand dollars per annum to qualify. Chapter 4901 (eff. August 5, 1997).

2. To promote compliance of the New York state teacher's retirement system with the Internal Revenue Code, Chapter 370 was enacted as follows:

In accordance with paragraph two of subsection (a) of section 401 of the Internal Revenue Code, it shall be impossible at any time prior to the satisfaction of the retirement system's liabilities to its members and their beneficiaries under law, for any part of the assets of the retirement system, or income thereon, to be (within any taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of the members of the retirement system or their beneficiaries.

(Effective August 5, 1997).

XXXV. NORTH CAROLINA (1997-98 Biennium)

A. SB886 amends Chapter 126 to provide for open, fair nonpolitical selection of the most qualified persons for state government employment by limiting political hirings, extending broader protections to state employees who report gross mismanagement and improper governmental activities, and requiring reporting of settlements of State Personnel matters to State Personnel Commission and to Joint Legislative Commission on Governmental Operations.

B. SB254 prohibits discrimination in health insurance and employment based on genetics.

C. SB264 provides immunity to employers who disclose information about an employee when the employer is providing a reference.

D. SB876 amends the law pertaining to criminal background checks required to be obtained by nursing homes, adult care homes, and home care agencies.

E. SB924 authorizes record checks of employees and applicants of employment with the Department of Human Resources.

XXXVI. NORTH DAKOTA

No laws or amendments relating to labor and employment were enacted in 1998. The legislature will meet again in January, 1999.

XXXVII. OHIO

No laws or amendments relating to labor and employment were enacted in 1998.

XXXVIII. OKLAHOMA

No laws or amendments relating to labor and employment were enacted in 1998.

XXXIX. OREGON

The Oregon legislature did not meet in 1998.

XL. PENNSYLVANIA

A. Self-Employment Assistance Program Act

H.B. No. 1475 (Act No. 1997-54) establishes a limited pilot program to provide continued eligibility for unemployment benefits for individuals seeking to establish a business and become self-employed. See 43 P.S. 920.1 et seq. Self-employment assistance allowances paid under this act shall be charged to employers as regular benefits are charged under the Unemployment Compensation Law.

B. Domestic Relations

For purposes of enforcing child support obligations, H.B. 1412 (Act 1997-58) requires employers to provide information regarding newly hired employees to the Department of Labor and Industry ("Department") no later than 20 days from the date of hire. See 23 Pa. C.S.A. § 4391 et seq. In addition to child support enforcement, the information received by the Department may be utilized for purposes of administering the workers' compensation and unemployment compensation programs, including fraud detection.

C. Employees Failure to Report to Work During a State of Emergency

Under S.B. No. 307 (Act No. 1998-4), an employer may not terminate or discipline an employee for failing to report to work due to a closure of the roads in the county of the employer's place of business or the county of the employee's residence resulting from a state of emergency declared by the Governor. This act (See 43 P.S. § 1481 et seq.) shall not affect drivers of emergency vehicles, essential corrections personnel, police, emergency service personnel, hospital and nursing home staff, pharmacists, essential health care professionals, public utility personnel, employees of radio or television stations engaged in the gathering and dissemination of news, road crews and oil and milk truck delivery personnel.

D. Managed Care Reform/Children's Health Care

The Quality Health Care Accountability and Protection Amendments (S.B. No. 91; Act No. 1998-68) establish a core set of standards and duties which all managed care organizations must meet or perform. These amendments level the regulatory playing field between HMOs and all other managed care organizations, address current trouble spots in managed care organization relationships with providers and provide consumer protections for weak spots in many current managed care organization practices. See 40 P.S. § 991.2101 et seq.

Act No. 1998-68 also added the "Children's Health Care Act" (See 40 P.S. § 991.2301 et seq.) which provides a mechanism for providers, employers, the public sector and patients to share in financing indigent children's health care.

E. Health Insurance – Diabetic Supplies, Hearing Aids

Act No. 1998-98 (H.B. No. 656) provides that any individual or group health insurance plan providing hospital or medical coverage shall provide coverage of the equipment and supplies for the treatment of diabetes if prescribed by a health care professional. See 40 P.S. 764d. The Act also provides that any insurer that underwrites Medicare or Medicaid insurance shall provide coverage in such insurance for a hearing aid. See 40 P.S. 764e.

XLI. RHODE ISLAND

A. Arbitration Act: School Teacher Disputes—Amended

S 2591A establishes the right to organize and bargain collectively for non-administrative professional employees.

B. Temporary Employee Protection Act

H 8283B prohibits discrimination against temporary employees, mandates a job description notification, and establishes a commission to recommend improvements to temporary employment practices.

XLII. SOUTH CAROLINA

A. Child Labor

Penalties for child labor violations increased effective June 9, 1998; § 41-13-40 of the 1976 code is repealed; § 41-13-25 of the 1976 Code is amended so as to provide an optional fine for a first offense, to increase the fines for a subsequent offense and to repeal § 41-13-40 relating to liability of employers of minors to parents or guardians.

XLIII. SOUTH DAKOTA

A. Criminal Background Checks

SB134 permits the Division of Criminal Investigation to process national criminal history checks on

applicants for employment for various positions for the Sisseton-Wahpeton Sioux Tribe. The information obtained by the Tribe may be used to determine an applicant's eligibility for employment.

B. Health Benefits

HB1214 gives employees the right to continue to have health care coverage for themselves and their eligible dependents for a period of eighteen months after an employer terminates a policy or contract. The employee shall be financially responsible for the extended coverage but will not be subjected to additional underwriting restrictions.

XLIV. TENNESSEE

A. Discharge or termination of employees.

HB1788 amends Tennessee Code Annotated § 50-1-304 to make the section applicable to all employees who receive compensation from the Federal Government for services for the Federal Government and redefines employees to include employees of employers such as the state, any municipality, county department, board, commission, agency, instrumentality, political subdivision or any other entity thereof.

XLV. TEXAS

The Texas legislature did not meet in 1998. The legislature will convene in January, 1999.

XLVI. UTAH

A. Respiratory Protection Rule

The State adopted the respiratory protection standard promulgated by the federal Occupational Safety and Health Administration ("OSHA"). The new standard, which took effect on April 8, requires Utah employers to establish or maintain a respiratory protection program in workplaces where toxic substances are used.

XLVII. VERMONT

A. Workers' Compensation

1. Section 618, of title 21, was amended to allow an employee to commence a civil action against their employer instead of claiming compensation under the chapter if the employer failed to comply with section 687, title 21. In such an action, the burden is upon the employer to show that the employer's negligence was not the proximate cause of the employee's injury. The employer may not plead any of the following defenses: (1) the injury was caused by the negligence of a fellow employee; (2) comparative negligence, unless the negligence was willful and with the intent of causing injury; and (3) that the employee assumed any risk in the employment. The employee has a three-year statute of limitation. Acceptance of payment by employee will not constitute a bar on a future civil action unless the employee, with knowledge of his or her rights, signs a written agreement waiving the right to pursue a civil action. Such agreement must be filed, and may be void if the employer does not pay any amount due and owing under the Workers' Compensation Act. (Eff. June 30, 1997).

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2. With regard to workers' compensation insurance, subsection 692(c) was added to title 21. Under subsection (c), if the employer does not acquire insurance within 2 years after receiving an order to retain workers' compensation insurance or after the employer receives notice that the commissioner shall order the premises closed, then the commissioner shall order the such premises closed and all business operation shall cease until such time as the employer obtains workers' compensation insurance. (Approved May 8, 1997).

B. Employee Break Act

S 220 requires employers to provide employees with reasonable opportunities during work periods for breaks.

C. State Labor Relations Act

H 220 amends the State Employers Labor Relations Act to extend its coverage (ie., collective bargaining) to include employees of the courts, states attorneys, sheriffs, and defender generals offices, and to make related changes in statutes governing state's attorneys and the defender general.

XLVIII. VIRGINIA

A. Reporting of New Hires

HB1374 requires reporting of newly hired employees to State Directory of New Hires to aid child support enforcement collection efforts. Effective July 1, 1998.

B. Prohibition of Lie Detector Tests for Jail Employees

HB101 prohibits regional jails from requiring employees to submit to lie detector tests and prohibits discrimination against employees who refuse to take such tests, except when related to internal administrative investigations. Effective July 1, 1998.

C. Access to Criminal History Records for Colleges and Universities

HB333 and SB291 provide that nonprofit public and private colleges and universities may access criminal history record information for the purpose of screening individuals who are offered or accept employment.

IL. WASHINGTON

A. Airline Employees – Trading Shifts Without Creating Overtime Liability

Chapter 239, SB6220. Airline workers are now exempt from overtime wage statute for overtime worked when voluntarily trading shifts among themselves.

B. Employer Obligation to Furnish Wearing Apparel

Chapter 334, SB6536. This amendment determines when an employer must supply or compensate

employees for uniforms. An employer is not required to furnish or compensate employees for apparel, unless the apparel is a "uniform." A uniform is, (a) distinctive in style and quality, which clearly identifies the person as an employee of a specific employer; (b) marked with an employer's logo; (c) unique apparel representing an historical time period or an ethnic tradition; or (d) formal apparel.

Requiring employees to wear the same color scheme, i.e., tan bottom and blue top, is not considered a uniform unless the employer changes the color scheme within two years of instituting it. Required protective personal equipment is not considered a uniform.

C. Wage Assignment Orders for Child Support or Spousal Maintenance Payments – Delivery of Withheld Earnings

Chapter 77, HB2732. An employer now has five working days from each regular pay interval to remit the proper withholding amounts to the specified address.

L. WEST VIRGINIA

A. H.B. 4314 Grievance Procedure for Public Employees

1. Effective July 1, 1998, Section 29-6A-3 was amended adding paragraph (a)(2) which requires employers asserting that grievance was filed late to do so at level one of the procedure. Additionally, the amendment provides that a grievant prevails by default if a grievance evaluator fails to make a response at any level. An employer may request a hearing within five days of receipt of a written notice of default, to show that the remedy received by the grievant is contrary to law or clearly wrong. A hearing examiner may modify the remedy.

2. Grievance involving suspension without pay, demotion or dismissal or loss of wages may be initiated at level two. 29-6A-5(e)(1).

B. H.B. 4545 Human Rights Act

1. Disability

The West Virginia Human Rights Act, Section 5.11-1, *et. seq.*, was amended by replacing references to "handicap" with "disability" and added disability to the information an employer may not request, keep record of, or include in employment application questions or blanks.

2. Action By Attorney General

Section 5-11-20 allows the attorney general to bring a civil action for violation of human rights by physical force, violence or damage, trespass or destruction of property. The attorney general may seek injunctive relief, a civil penalty up to \$5000.00, or both.

LI. WISCONSIN

A. Health Care

Wisconsin law was amended pursuant to Wisconsin Act 51 to require the Office of the Commissioner of Insurance to provide the employees and former employees who lose health care coverage under a group health insurance plan or self-insured health plan, both information and technical assistance regarding any rights those individuals may have under either state or federal laws affecting such plans, including any law that relates to portability or continuation coverage. The Commissioner is also required to provide such assistance concerning the availability of individual health benefit plans in the area in which any affected individuals reside.

LII. WYOMING

A. Personal Responsibility and Work Opportunity Reconciliation of 1996

1998 WY S. B. 66 was enacted to comply with the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 which requires a 20-day reporting period for new hires to be used as a director for child support.

B. Union Dues

1998 WY S.B. 33 requires labor organizations to annually obtain written permission from their members to use union dues for political activities.

Both bills were signed by the governor in March, 1998.

LIII. ELECTRONIC MONITORING

ALABAMA

A. Prohibited Activities

Alabama Code § 13A-11-31. A person commits the crime of criminal eavesdropping if he intentionally uses any device to eavesdrop, whether he is present at the time or not. Such a violation shall be a Class A misdemeanor.

Similarly, any person who engages in surveillance while trespassing in a private place is guilty of criminal surveillance, which is a Class B misdemeanor. § 13A-11-32.

Installation of a device used to eavesdrop without the permission of the owner of a private place violates § 13A-11-33. Installation of such a device in a private place is prima facie evidence that the device is to be used for eavesdropping. Violation of this section is a Class C felony.

A person commits the crime of divulging illegally-obtained information if he knowingly divulges information obtained through criminal eavesdropping or criminal surveillance. Divulgence of this type of information is a Class B misdemeanor.

B. Exceptions

Exceptions to these prohibitions include eavesdropping by peace officers engaged in the lawful performance of their duties, employees of communication carriers acting in the normal course of their employment, or by persons relying in good faith on a lawful court order of legislative authorization. § 13A-11-36.

ALASKA

The Alaska wire tapping statute sets out the process and standard for authorizing law enforcement interception of private communications. Alaska Stat. § 12.37 (Michie 1996). The statute is essentially a general prohibition on intercepting private communications without court authorization, although the statute does not specifically state this.

The ambiguous statute does not directly address employer monitoring of employees. The Alaska Constitution's Bill of Rights explicitly includes a right to privacy from state action, but it does not appear applicable to actions by private parties. See Alaska Const. Art. I § 22. But, unlike many other states, there is no statutory cause of action for employees.

ARIZONA

Arizona has not enacted any statutes directly pertaining to employer surveillance or monitoring of employees. House Bill 2669, which would have prohibited an employer from requiring an applicant for employment or an employee to take a polygraph test, died in committee during the 1998 legislative session.

Arizona criminal law prohibits any person from knowingly opening or reading a sealed letter not addressed to himself or herself without being authorized to do so by the writer of the letter or the person to whom it is addressed. Ariz. Rev. Stat. § 13-3003. It also prohibits knowing disclosure of the contents of a telegraph or telephone message addressed to another person without the permission of such person. Ariz. Rev. Stat. § 13-2913. No reported Arizona cases have been decided discussing these provisions.

Arizona also has enacted a wiretapping statute prohibiting any person from intentionally intercepting a wire or electronic communication or oral conversation to which he or she is not a party without the consent of one party to the communication. Ariz. Rev. Stat. §§ 13-3004(A). The statute exempts interception of wire or electronic communications by "a provider of a wire or electronic communication service" relating to the operation, maintenance and testing of that service, the protection of the rights or property of the provider or the protection of users of that service from fraudulent, abusive or unlawful use of that service. Ariz. Rev. Stat. § 13-3012(5). No reported Arizona cases have been decided applying these provisions in the employment context.

ARKANSAS

Arkansas has no specific statute on an employer's monitoring of an employee's mode of communication. Arkansas does have a statute which makes it unlawful for a person to intercept wire, oral or telephonic communications. Ark. Code Ann. 5-60-120.

CALIFORNIA

A. Prohibition on Wiretapping, Eavesdropping, and Recording Electronic “Confidential Communications”

California Penal Code § 631 prohibits any person from eavesdropping on a telephonic or electronic communication while it is in progress, without the consent of all parties thereto.¹

B. Prohibition On The Use Of Electronic Equipment To Make A Recording Of Communications

California Penal Code § 632 prohibits any person from using electronic equipment to make a recording of (or eavesdrop on) communications, under certain circumstances.²

1. The statute applies to both face-to-face and telephonic communications.
2. The statute applies only to “intentional” conduct; inadvertent eavesdropping is not prohibited.
3. The statute permits recording of a conversation if all parties to the conversation consent.
4. The statute applies only to “confidential communications.” Section 632 © defines a communication as “confidential” if the circumstances are such that the parties may

¹ The relevant portion of this statute provides:“(a) Any person who, by means of any machine, instrument, or contrivance, or in any other manner intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system, or who willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place in this state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained, or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things mentioned in the above section, is punishable by a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in state prison, or by both a fine and imprisonment in the county jail or in the state prison.”

² The text of § 632(a) provides:

“Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.”

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reasonably expect that the communication cannot be overheard or recorded. Thus, this statute applies a standard very similar to the “reasonable expectation of privacy” standard used by the courts in constitutional privacy cases.

C. Prohibition On Disclosure Of Telephonic Communications, Or Messages, By Third Parties

California Penal Code § 637 states that “Every person not a party to a telegraphic or telephonic communication who willfully discloses the contents of a telegraphic or telephonic message, or any part thereof, addressed to another person, without the permission of such person, unless directed so to do by the lawful order of a court, is punishable by imprisonment in the state prison, or in the county jail not exceeding one year, or by fine not exceeding five thousand dollars (\$5,000), or by both fine and imprisonment.”

D. Civil Remedies

1. California Penal Code § 637.2 provides that a person may either seek an injunction and/or damages against the person who committed the violation. Damages for a violation shall be the greater of the following amounts:
 - (1) Five thousand dollars (\$5,000)
 - (2) Three times the amount of actual damages, if any, sustained by the plaintiff.
2. Coulter v. Bank of America National Trust & Savings System, 28 Cal. App.4th 923 (1994). In this case, the Court of Appeal affirmed a judgment awarding to an employer \$132,000 after an employee was caught recording over 160 private conversations with supervisors and co-workers. In so doing, the Court held that (I) conversations with a supervisor and co-workers were “confidential” within the meaning of the Act; (ii) the employee violated the Act even though he did not disclose recordings to any third party; and (iii) the employer had standing to bring the claim under the Act based on the recording of the employee’s conversations with its officer.

COLORADO

Colorado law requires the State and any agency, institution or political subdivision of the State that operates or maintains an electronic mail communications system to have adopted by July 1, 1997, a written policy on any monitoring of e-mail communications and the circumstances under which such monitoring will be conducted, including a statement that e-mail correspondence of employees may be a public record under the public records law and may be subject to public inspection. Colo. Rev. Stat. § 24-72-204.5.

Colorado's wiretapping statute prohibits a person not the sender or intended receiver of a telephone or telegraph communication from knowingly overhearing or recording a telephone, telegraph or electronic communication without the consent of one party to the communication. Colo. Rev. Stat. § 18-9-303. The statute provides an affirmative defense for any person using wiretapping or eavesdropping devices "on his own premises for security or business purposes" if reasonable notice of the use of such devices is given to the public, as well as for persons engaged in the business of providing wire or electronic communication service who perform an otherwise prohibited act if such act is necessary to provide, construct, maintain, repair or

operate the service. Colo. Rev. Stat. § 18-9-305. In People v. McCauley, 561 P.2d 335 (Colo. 1977), the president of a company hired the defendant to place wiretaps on the phone lines of the company for "business security purposes." The wiretaps purposefully were installed at night so no employees would be aware of the surreptitious eavesdropping devices. Under these circumstances, the court held that the defendant could not invoke the affirmative defense permitting a person to use wiretapping or eavesdropping devices on his own premises for security or business purposes because no reasonable notice of the use of such devices had been given.

Colorado criminal law also prohibits "eavesdropping," which is defined as knowingly overhearing or recording a conversation or discussion without the consent of at least one of the principal parties to the conversation. Colo. Rev. Stat. § 18-9-304. No reported Colorado cases have been decided applying this provision in the employment context.

CONNECTICUT

S.H.B. 5398; Electronic Monitoring of Employees – Notice to Employees

This Act requires notice to employees of employer's electronic monitoring.

DELAWARE

Title 11, Chapter 5, Section 1336 addresses interception of wire or oral communication in the Delaware Code. Section 1336 of the Delaware Code is similar to the federal law concerning wiretapping and electronic surveillance in Title 18, Sections 2510-2511 of the United States Code. The law provides a civil remedy for any violation, including an award of punitive damages and attorneys' fees.

DISTRICT OF COLUMBIA

A. Prohibited Activity.

The District of Columbia (D.C. Code § 23-542) provides that it is a crime to:

1. intercept, attempt to intercept or procure another to intercept a wire or oral communication;
2. disclose or attempt to disclose the contents of any wire or oral communication, knowing same to have been obtained through an improper interception; or
3. use or attempt to use the contents of any wire or oral communication, knowing that same was obtained through an illegal interception of a wire or oral communication.

B. Exceptions.

The District of Columbia provides exceptions to its general prohibition for operators of switchboards or officers of communication carriers. However, none of these exceptions apply to the employer-employee relationship.

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The District of Columbia provides that it is not illegal to intercept a wire or oral communication where one party to the communication has given consent.

FLORIDA

A. Prohibited Activities

Florida Statute, § 934.03 prohibits the, 1) intentional interception of any wire, oral or electronic communication. 2) intentional uses of any electronic device to intercept communication when such a device is affixed to a wire or other like connection used in wire communication or such device transmits communications by radio or interferes with the transmission of such communication, 3) intentional disclosure of intercepted information, or 4) intentional use of the contents of intercepted information. Any person violating this section is guilty of a felony of the third degree.

B. Exceptions

It is lawful, however, for a switchboard operator or other employee of a communications service to intercept communication if done during the normal course of his or her employment. In addition, it is not a crime to intercept or access electronic transmission made through a communication system configured so that such transmission is readily accessible to the public. Nor is it a crime to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating system of consumer electronic equipment.

GEORGIA

Georgia Code § 16-11-62.

It is a crime for any person to, 1) intentionally overhear, transmit, or record the private conversation of another which originates in a private place, 2) use any instrument, without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place, 3) go on or about the premises of another for the purpose of invading the privacy of others, 4) intentionally intercept by the use of any device the contents of a message sent by telephone, telegraph, letter or by other means of private communications, or 5) divulge to any unauthorized person the content of any private message intercepted lawfully provided for in Code § 16-11-65.

HAWAII

Hawaii has two statutes protecting individual privacy. First, Hawaii Rev. Stat. Ann. § 711-1111 (Michie 1994) states, "A person commits the offense of violation of privacy if, except in the execution of a public duty or as authorized as law, he intentionally:

...

(b) Installs in any private place, without consent to the person or persons entitled to privacy therein, any device for observing, photographing, recording, amplifying, or broadcasting sounds or events in that place, or uses any such unauthorized installation; or

...

(d) Intercepts, without the consent of the sender or receiver, a message by telephone, telegraph, letter, or other means of communicating privately . . ."

The statute does not define "persons." A "private place" is "where one may reasonably expect to be safe from casual or hostile intrusion or surveillance, but does not include a place to which the public or a substantial group thereof has access." H.R.S. § 711-1100. Hawaii only requires permission of the party where the device is installed, if the other party is not "entitled to privacy therein." H.R.S. § 711-1116.

Under the second statute, Hawaii's wire tapping statute makes it a class C felony for a person to intentionally intercept any "wire, oral, or electronic communications." H.R.S. § 803-42. "Person" includes "any individual, partnership, association, joint stock company, trust, or corporation." H.R.S. § 803-41. "Electronic communications" must affect intrastate, interstate, or foreign commerce. Id. The prohibition has many exceptions. Subsection (3) allows interception by a person if the person is a party to the communication or where one party to the communication gave the intercepting person permission. Id. See also Hawaii v. Okubo, 651 P.2d 494, 505 (Hawaii App. 1982).

Hawaii's wire tapping statute provides a civil remedy to persons injured by unlawful interceptions. "Any person whose wire, oral, or electronic communications is accessed, intercepted, disclosed, or used in violation of [the statute] shall,

- (1) have a civil cause of action against the person who [violates the statute] or the person who procures any other person to [violate the statute], and
- (2) be entitled to recover from such person:
 - (a) The greater of (i) the sum of the actual damages suffered by the plaintiff . . . or (ii) statutory damages of which ever is greater of \$100 day for each day of violation or \$10,000;
 - (b) Punitive damages, where appropriate; and
 - (c) A reasonable attorney's fee and other litigation costs reasonably incurred."

H.R.S. § 803-48.

IDAHO

The Idaho wire tapping statute criminalizes the willful interception of any wire or oral communications. Idaho Code § 18-6702 (Michie 1997). "Wire communications" means any communication made in whole or in part through the use of facilities for the transmission of communication by the aid of wire, cable or other like connection between the point of origin and the point of reception, furnished or operated by any person engaged as a common carrier. . . ." I.C. § 18-6701. Oral communications only fall within the statute if the circumstances "justify an expectation that [the] communications is not subject to interception." I.C. § 18-6701. "Person" liable under the statute includes individuals, partnerships, associations, and corporations. I.C. § 18-6701.

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Idaho provides a civil action for "Any person whose wire or oral communication is intercepted, disclosed, or used in violation of [the statute]." I.C. § 186709. Damages include:

- (a) actual damages, at minimum equal to liquidated damages of \$100 dollars a day for each day of violation up to \$ 1000 maximum;
- (b) Punitive damages; and
- (c) Reasonable attorney's fees and cost of litigation.

I.C. § 18-6702. Violation of the statute is a felony punishable by imprisonment up to five years or a \$5,000 fine, or both. Id. In addition, Idaho prohibits the use of evidence intercepted by wire or oral communications in violation of the statute in a criminal or civil trial. I.C. § 18-6705.

At a minimum, the Idaho statute appears applicable to employee's monitoring of oral communications. Interception of oral communications is clearly covered by the statute. Intercepting electronic information would probably also fall within the statute. Although there is no case law, the definition of wire communications appears broad enough to cover electronic mail because it is transmitted by a common carrier (i.e., a service provider) through wire. Idaho requires only one person to consent to intercepting the conversation. I.C. § 18-6702(d).

ILLINOIS

A. Ill. Comp. Stats. Ann. Section 5/14 -1 Eavesdropping.

1. Prohibits the use of an eavesdropping device without consent of all of the parties to the communication. An eavesdropping device under this article is any device used to hear or record oral conversation, whether conducted in person, by telephone, or any other means. "Conversation" is any communication between 2 or more persons regardless of whether any of the parties intended the communication to be private.

A prerequisite for criminal liability or exclusion of evidence is use of a device which can hear or record conversations but not transmit them. People v. Bennet, 120 Ill. App. 3d 144, 457 N.E. 2d 986 (1983).

B. Exemptions.

1. Activities exempted include the use of a telephone monitoring device by a business entity engaged in marketing or opinion research or solicitation, to record or listen to oral telephone solicitation or marketing conversation of the business entity when:
 - a. the monitoring is used for service quality control, education or training of employees or contractors, or for internal research related to marketing, opinion research, or solicitation; and;
 - b. is used with the consent of at least one party to the conversation.
2. No communication or any part under this section may be directly or indirectly furnished to any law enforcement officer, agency, or official for any purpose of used

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in any inquiry or investigation, or any administrative, judicial, or other proceeding, or be divulged to a third person.

3. When monitoring results in recording or listening to a conversation unrelated to this section, the person recording or listening must terminate the recording or monitoring and destroy any such recording as soon as practicable.
4. Current and prospective employees must be provided with notice that monitoring or recording may occur, including notification signs in the workplace.
5. Access to pay telephones or other private only telephone lines must be provided to employees and agents.

C. Civil Remedies.

1. A party to a conversation upon which an eavesdropping violation occurred may seek against the eavesdropper and/or his principal, an injunction prohibiting further eavesdropping, actual damages against either or both, and punitive damages.

Employer not liable for taping of conversation at which a supervisor fired an employee, even if the supervisor violated the Act, where no other supervisor knew of the recording or directed that the meeting be taped. Cebula v. General Elec. Co., 614 F. Supp. 260 (1985).

INDIANA

A. Indiana Stats. Ann. Article 33.5: Interception of Telephonic or Telegraphic Communications.

1. For purposes of this Article, "interception" means intentional recording of or acquisition of the contents of a telephonic or telegraphic communication by a person other than the sender or receiver, without consent of either, by means of any instrument, device or equipment. This includes the intentional recording of communication through the use of a computer or facsimile machine. Sec. 35-33.5-1-5.

B. Indiana Stats. Ann. Section 33.5-5-4: Civil Remedies

1. A person whose communication was intercepted, disclosed, or used in violation of this article may bring a civil action against the violator for 1) actual damages, 2) liquidated damages at \$100.00 for each day of violation, or \$1000.00, 3) punitive damages if deemed appropriate by the court, 4) court costs, and 5) attorney fees.
 - a. Unknowing violation is an affirmative defense if the person has not intercepted the communication and has not procured another person to intercept or disclose the communication, and has used a communication to assist the person to independently confirm its contents.

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- b. A civil action must be brought within 2 years after the date of the interception, disclosure or use, whichever is later.
- C. Indiana Stats. Ann. Section 33.5-5-5.
 1. Knowing or intentional intercepting a communication is a felony. This section is not applicable to an interception authorized by federal law.

IOWA

It appears that Iowa has not enacted any statutes directly pertaining to employer surveillance or monitoring of employees.

However, Iowa Code Ann. § 727.8 states that any person, having no right or authority to do so, who taps into or connects a listening or recording device to any telephone or other communication wire, or who by any electronic or mechanical means listens to, records, or otherwise intercepts a conversation or communication of any kind, commits a serious misdemeanor; provided, that the sender or recipient of a message or one who is openly present and participating in or listening to a communication shall not be prohibited hereby from recording such message or communication; and further provided, that nothing herein shall restrict the use of any radio or television receiver to receive any communication transmitted by radio or wireless signal.

KANSAS

- A. Kan. Stat. Ann. § 21-4001: Criminal Eavesdropping.
 1. Prohibits knowingly and unlawfully entering a private place with intent to listen surreptitiously to private conversations or to observe the personal conduct of others.
 2. Prohibits knowingly and unlawfully installing or using outside a private place any device for hearing, recording, amplifying or broadcasting sounds originating in such place without the consent of the person or persons entitled to privacy therein.
 3. Prohibits knowingly and unlawfully installing or using any device or equipment for the interception of any telephone, telegraph or other wire communication without the consent of the person in possession or control of the facilities for such wire communication.
 4. “Private place” is any place where one may reasonably expect to be safe from uninvited intrusion or surveillance. It does not include a place to which the public has lawful access.
 5. Consent refers to the owner, not the user. State v. Bowman Nat’l Sec. Agency, Inc., 647 P.2d 1288 (1982). Any party to a private conversation may waive his right of privacy and the nonconsenting party cannot challenge the waiver. State v. Rondybush, 686 P.2d 100 (1984).

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B. Kan. Stat. Ann. § 21-4002: Criminal Breach of Privacy.

1. Prohibits knowingly and unlawfully intercepting, without the consent of the sender or receiver, a message by telephone, telegraph, letter or other means of private communication.
2. Prohibits divulging, without the consent of the sender or receiver, the existence or contents of such message if such person knows that the message was illegally intercepted, or if such person learned of the message in the course of employment with an agency in transmitting it.
3. Consent refers to the owner, not the user. Bowman, 647 P.2d at 1288. Any party may waive his right of privacy and the nonconsenting party cannot challenge the waiver. Rondybush, 686 P.2d at 100.

KENTUCKY

A. Prohibited Activity.

Kentucky (KRS § 526.20) provides that it is a crime to overhear, record, amplify or transmit any part of a wire or oral communication by means of any electronic, mechanical or other device.

Kentucky also provides that it is a crime to install an eavesdropping device or to possess any electronic, mechanical or other device designed to eavesdrop.

Kentucky also provides that it is a crime to divulge illegally obtained information.

B. Exceptions.

Kentucky provides exceptions to its general prohibitions for employees of communications common carrier in the normal course of their business and individuals who inadvertently overhear the communication through a regularly installed party line or telephone extension but do not divulge same. There is no exception specifically applying to the employer-employee relationship.

Kentucky also provides that it is not illegal to intercept a wire or oral communication when one party to the communication has given consent.

LOUISIANA

Louisiana has no statute specifically dealing with an employer's ability to monitor or intercept an employee's mode of communication. Louisiana does have a statute which strictly prohibits anyone other than law enforcement officers from wiretapping. La. Civ. Code Ann. art. 14 §322. Louisiana also has a statute entitled the "Electronic Surveillance Act." La. Rev. Stat. Ann. 15 § 1301. This statute deals generally with the interception and disclosure of wire, electronic, and oral communications. Under § 1303(C)(4) of the Act, it is not unlawful for a person to intercept a wire communication where that person is a party to the communication or where one of the parties has previously consented to such interception.

MAINE

A. Prohibited Activity.

Maine Rev. Stat. Ann. T15 § 709 prohibits the interception, or attempted interception, of any electronic or oral communication of another person, absent prior consent one of the parties.

This statute also prohibits the intentional or willful use or disclosure of information obtained through a prohibited interception of communication. Violations of this section are categorized as Class C felonies. Any party who violates this section shall also be liable to the aggrieved party for damages, computed at the rate of \$100 a day for each day of the violation, and attorney's fees.

B. Exceptions.

Exceptions to this prohibition include uses by an operator of a switchboard, or an officer, employee, or agent of any communication common carrier in the normal course of his or her employment while engaged in any activity which is necessary to the rendition of service.

Maine Rev. Stat. Ann. T17-A § 511. A person is guilty of violation of privacy if he intentionally installs or uses in a private place without consent of a person entitled to privacy therein, any device for observing, photographing, recording or broadcasting sounds or events in that place, or if he engages in visual surveillance in a public place by means of mechanical or electronic equipment any portion of the body of another person present in that place when that portion of the body is concealed from public view under clothing.

MARYLAND

Title 10, Code Ann. § 10-402 makes it a felony to disclose any wire, oral or electronic communication. Maryland's wiretapping statute is different from federal law in that consent of all participants to a communication is required. The law allows for a civil cause of action, including the recovery of actual damages up to \$1000, punitive damages and attorneys' fees.

MASSACHUSETTS

A. Prohibited Activity.

Massachusetts law, Ch. 214 § 1B provides that a person shall have a right against unreasonable, substantial or serious interference with his privacy. Enforcement of this right, and the award of any damages, shall be under the jurisdiction of the superior court.

Massachusetts also has a criminal law regarding the interception of wire and oral communications. Mass. Law, Ch. 272 § 99. Any person who willfully commits an interception, attempts to intercept, or procures another person to commit an interception of any wire or oral communication shall be fined not more than \$10,000, or imprisoned for not more than 5 years. Proof of the installation of any intercepting device is considered prima facie evidence of a violation of this section.

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In addition, any person who willfully uses, or attempts to use the contents of any wire or oral communication, knowing that the information was obtained through a prohibited interception shall be guilty of a misdemeanor.

B. Exceptions.

Exceptions to this prohibition include uses by an operator of a switchboard, or an officer, employee, or agent of any communication common carrier in the normal course of his or her employment while engaged in any activity which is necessary to the rendition of service. It is also not a violation of this section for investigative and law enforcement officers acting pursuant to their authority, or for any person duly authorized to make specified interceptions by a warrant issued pursuant to this section, or for a financial institution to record telephone communications with its corporate or institutional trading partners in the ordinary course of business, provided notice is given to such trading partners.

MICHIGAN

A. Mich. Comp. Laws Ann. Sec. 750.539, *et. seq.*: Eavesdropping Statute

1. This statute prohibits the willful use of any device to eavesdrop on a private conversation without the consent of all parties to the conversation, or knowingly aiding, employing, or procuring another person to do the same. Violation of the statute is a felony. Sec. 539c.
2. An eavesdropping device is any device installed in a private place for the purpose of observing, photographing, or eavesdropping. A “private place” is a place where one may reasonably expect to be safe from intrusion or surveillance, but excludes a place where the public has access. Sec. 539a.
3. Anyone who uses or divulges any information which he knew or should have known was obtained in violation of the statute is guilty of a felony. Sec. 539e.
4. Civil Remedies.
 - a. A party to a conversation upon which illegal eavesdropping occurred is entitled to an injunction prohibiting further eavesdropping, b) actual damages, and c) punitive damages. Sec. 339h.

The Michigan eavesdropping statute contemplates that an eavesdropper is a third party, not involved in the conversation, thus, a participant in the conversation is not prohibited from recording the conversation without the other participants’ permission. Sullivan v. Gray, 117 Mich. App. 476, 324 N.W. 2d 58 (1982).

MINNESOTA

A. Minn. Stat. Ann. § 626A.02: Criminal and Civil Interception and Disclosure of Wire or Oral Communications.

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1. Provides civil and criminal penalties for any person who intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, electronic, or oral communication.
2. Provides civil and criminal penalties for any person who intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication.
3. Provides civil and criminal penalties for any person who uses or intentionally discloses to any other person the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic, or oral communication.
4. Not unlawful when person is party or one of the parties has given prior consent unless purpose is criminal or tortious.
5. Aggrieved person may recover in civil suit actual damages (not less than \$50, not more than \$1,000), punitives three times actuals, and any profits, or \$100 per day up to \$10,000.

MISSISSIPPI

Mississippi has no statute specifically dealing with an employer's ability to monitor or intercept an employee's mode of communication. Mississippi does have a statute entitled "Interception of Wire or Oral Communication" (Article 7 § 41-29-501-537 of the Miss. Code); however, it is primarily tailored to criminal/drug activity and evidence.

MISSOURI

- A. Mo. Ann. Stat. § 524.402: Criminal Penalty for Illegal Wiretapping, Permitted Activities.
 1. Provides felony penalty for any person who knowingly intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire communication.
 2. Provides felony penalty for any person who knowingly uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when such device transmits communications by radio or interferes with the transmission of such communication.
 3. Provides felony penalty for any person who knowingly discloses, or endeavors to disclose, to any other person the contents of any wire communication, when he knows or has reason to know that the information was obtained through the interception of a wire communication in violation of this subsection.
 4. Permits interceptions when person is party to communication or one of the parties has given prior consent unless it is done for criminal or tortious purposes.

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- B. Mo. Ann. Stat. § 542.418: Civil Action for Wiretap.
1. Any person whose wire communication is intercepted, disclosed, or used in violation of Section shall have a civil cause of action.
 2. An aggrieved person shall be entitled to recover actual damages (but not less than liquidated damages of \$100 per day of violation or \$10,000 total, whichever is greater), punitive damages for willful or intentional violations, and reasonable attorneys' fees and costs.

MONTANA

Individual privacy rights in Montana are covered under Mont. Code Ann. § 45-8-213 (1997). The statute makes it criminal to record any conversation with a hidden electronic or mechanical device, to read telegraph messages, and to open another's mail. A person convicted of violating privacy under the statute can face a fine of \$500 or six months in the county jail.

On its face, the Montana statute would not cover an employer's monitoring of electronic mail. Video surveillance that included sound may come within the prohibition on recording conversations, although the statutory language is ambiguous. Montana does not have a separate wire tapping statute.

NEBRASKA

- A. Neb. Rev. Stat Ann. § 86-701, et seq.: Criminal and Civil Intercepted Communications.
1. Neb. Rev. Stat. Ann. § 86-702 makes it unlawful to intentionally intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept any wire, electronic, or oral communication.
 2. It makes it unlawful to intentionally use, endeavor to use, or procure any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication.
 3. It makes it unlawful to intentionally use or disclose to any other person the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic, or oral communication.
 4. Not unlawful if party intercepts or records or one of the parties has given prior consent.
 5. Aggrieved person can recover actual damages (\$50 to \$1,000), profits, or penalty of \$100-\$10,000.

NEVADA

A. Prohibition on the Interception and Attempted Interception of Wire and Radio Communications

N.R.S.. § 200.620 makes it unlawful for any person to intercept or attempt to intercept any wire communication unless (a) the interception is made with the prior consent of one of the parties to the communication; and (b) an emergency situation exists and it is impractical to obtain a court order.

B. Prohibition on the Unauthorized, Surreptitious Intrusion of Privacy by Listening Device

N.R.S.. § 200.650 provides that except as provided in N.R.S. 179.410 to 179.515, which essentially detail the use of such listening devices by law enforcement authorities, “a person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversations engaged in by other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.”

NEW HAMPSHIRE

A. Prohibited Activity.

New Hampshire R.S.A. § 570-A. It is a Class B felony for any person to wilfully intercept, or attempt to intercept the telecommunication or oral communication of another, without consent of all parties.

It is also a crime if a person willfully uses any electronic device to intercept any oral communication when 1) such device is affixed to a wire, cable, or other like connection used in telecommunication, or 2) such device transmits communications by radio, or interferes with the transmission of such communication, or 3) such use takes place on the premise of any business or is for the purpose of obtaining information relating to the operations of any business. A person must not willfully disclose or use any information obtained through the interception of any oral communication.

B. Exceptions.

It is not a violation of this section for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier in the normal course of his or her employment to engage in any activity which is necessary to the rendition of service.

NEW JERSEY

A. Prohibited Activity.

New Jersey (N.J. Stat. § 2A:156A-2) provides that it is a crime to:

1. intercept, attempt to intercept or procure another to intercept any wire, electronic or oral communication;

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2. disclose or endeavor to disclose the contents of any wire, electronic or oral communication knowing that it was obtained through the interception of a wire, electronic or oral communication;
3. use or endeavor to use the contents of any wire, electronic or oral communication knowing that it was obtained through the interception of a wire, electronic or oral communication;
4. access without authorization a facility through which electronic communication service is provided or exceed the authorization to access that facility and thereby obtaining, altering or preventing authorized access to a wire or electronic communication when that communication is in electronic storage;
5. possess an electronic, mechanical or other device knowing the design of the device renders it primarily useful to intercept wire, electronic or oral communications.

B. Exceptions.

New Jersey provides exceptions to its general prohibition for switchboard operators and employees of electronic communication services operating in the normal course of their circumstances. However, none of these exceptions apply to the employee relationship.

New Jersey provides that it is not illegal to intercept a wire, electronic or oral communication when one of the parties to the communication has given consent.

NEW MEXICO

New Mexico's criminal law provides penalties for "abuse of privacy," including "interference with communications." N.M. Stat. Ann. §§ 30-12-1 to 30-12-14. A person commits interference with communications by tapping or making any connection with any telephone or telegraph line in the lawful possession or control of another without consent; or reading, interrupting or copying any message intended for another by telephone or telegraph without consent. N.M. Stat. Ann. § 30-12-1. An exception exists for employees of a communications common carrier engaged in any activity which is a necessary incident to the rendition of his services or the protection of rights of the carrier of such communication. Id.

In addition to criminal penalties, a civil cause of action is available to persons whose communications have been intercepted in violation of this provision. N.M. Stat. Ann. § 30-1211. Corporations as well as individuals may be liable under this section if they have "participated in the steps necessary to effectuate an unauthorized interception of communications." Templin v. Mountain Bell Tel. Co., 643 P.2d 263, 269 (N.M. Ct. App. 1982).

NEW YORK

A. Prohibited Activity.

McKinney's N.Y. Labor Laws § 704 on unfair labor practices prohibits an employer from spying upon or keeping under surveillance, whether directly or through agents or any other person, any activities of

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employees or their representatives in the exercise of their rights under § 703, which protects the rights of employees to organize, form, join or assist labor organizations.

McKinney's N.Y. Penal Laws § 250.05 creates a Class E felony for unlawfully engaging in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication of another person.

A person is guilty of a Class A misdemeanor if found in possession of eavesdropping equipment when such a device used, or intended to be used, in violation of § 250.05.

NORTH CAROLINA

A. Prohibited Activities

North Carolina Law, § 15A-287 creates a Class H felony if a person commits any of the following acts without the consent of at least one party to the communication:

- 1) Willfully intercepts any wire, oral or electronic communication;
- 2) Willfully uses any electronic device to intercept any oral communication when such device is affixed to a wire, cable or other like connection used in wire communications or such device transmits communications by radio, or interferes with the transmission of such communications;
- 3) Willfully discloses the contents of any electronic communication knowing that the information was obtained illegally; or
- 4) Willfully uses the contents of any wire or oral communication, knowing that the information obtained was illegally intercepted.

B. Exceptions

It is not unlawful to intercept or access an electronic communication made through an electronic communication system that is configured so that the electronic communication is readily accessible to the general public, or for an operator or other employee of an electronic communication service to intercept communications in the normal course of their employment.

NORTH DAKOTA

Title 12.1, Chapter 12.1-02 of the North Dakota Code makes it a felony to intentionally intercept any wire or oral communication by use of any electronic, mechanical or other device. The same statute makes it a misdemeanor to "secretly loiter[] about any building with the intent to overhear discourse or conversation therein and to repeat or publish the same with intent to vex, annoy, or injure others."

OHIO

A. Ohio Rev. Code Ann. Section 2933.51, et seq.; Wiretapping, Electronic Surveillance.

1. This statute prohibits knowingly intercepting or attempting to intercept a wire, oral, or electronic communication, or procuring another person to do so, if not party to the communication and without consent of the other parties to the communication. Sec. 2933.52.

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2. Civil Remedies.
 - a. A person whose communication was intercepted, disclosed, or used in violation of this statute may bring a civil action for relief, including, but not limited to:
 1. Declaratory or other equitable relief.
 2. Whichever is the greater of a) liquidated damages at \$200.00 per each day of violation or \$10,000.00, whichever is greater, or, b) actual damages and any profits made resulting from the violation.
 3. Punitive damages, if appropriate.
 4. Attorney fees and costs.
 - b. A civil action must be brought within two years of the claimant first discovering the violation. Sec. 2933.65

OKLAHOMA

- A. Okla. Stat. Ann. § 176: Criminal and Civil Securities of Communications Act.
 1. Okla. Stat. Ann. § 176.3 provides criminal liability for any person who willfully intercepts, endeavors to intercept or procures any other person to intercept any wire, oral, or electronic communication.
 2. Provides civil and criminal penalties for any person who willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication.
 3. Provides civil and criminal penalties for any person who uses or willfully discloses to any other person the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic, or oral communication.
 4. Not unlawful if party intercepts or records or one of the parties gives permission. Pearson v. State, 556 P.2d 1025, cert. denied, 431 O.S. 935 (1976).

OREGON

The Oregon statute regarding interception of conversations, radio communications and telecommunications prohibits any person from taping or monitoring any part of a telecommunication or radio communication unless at least one party to the communication consents. O.R.S. § 165.540. The same statute also prohibits any person from taping or monitoring any part of a conversation (face-to-face discussion) by means of any device, machine, apparatus, etc., unless all participants to the conversation are informed that the conversation is being taped or monitored. Id. O.R.S. § 165.540 states "no person shall:

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(a) obtain or attempt to obtain the whole or any part of a telecommunication . . . to which such persons not a participant . . . unless consent is given by at least one person." Under the Oregon statute, civil damages for willful interception or disclosure of communications provides for recovery of both "actual damages but not less than damages computed at the rate of \$100 a day for each day a violation or \$1,000, whichever is greater; and punitive damages." O.R.S. § 133.739(1).

Under this statute the prevailing party can recover its reasonable attorney fees, although a prevailing defendant cannot recover if the claim is brought as a class action pursuant to Oregon Civil Rule of Procedure 32. O.R.S. § 133.739(5).

PENNSYLVANIA

A. Prohibited Activity.

Pennsylvania (18 Pa C.S.A. §5703) provides that it is a crime to:

1. intercept, attempt to intercept or procure another to intercept wire, electronic or oral communications;
2. disclose or attempt to disclose the contents of any wire, electronic or oral communication, knowing that it was obtained through the interception of wire, electronic or oral communication; or
3. use or attempt to use the contents of any wire, electronic or oral communication, knowing that it was obtained through the interception of wire, electronic or oral communication.

B. Exceptions.

Pennsylvania provides numerous exceptions to its general prohibition. However, none of these specifically apply to the employer-employee relationship. The exceptions relate to switchboard operators, law enforcement officers, emergency systems or telephone companies.

Pennsylvania provides that it is not illegal to intercept a wire, electronic or oral communication where all parties to the communication have given prior consent.

RHODE ISLAND

A. Prohibited Activity.

Rhode Island Gen. Laws § 28-7-13 on unfair labor practices prohibits an employer from spying upon or keeping under surveillance, whether directly or through agents or any other person, any activities of employees or their representatives in the exercise of their rights under § 28-7-12, which protects the rights of employees to organize, form, join or assist labor organizations.

Rhode Island Gen. Laws § 9-1-28.1. A right to privacy of every person is defined as 1) the right to be secure from unreasonable intrusion upon one's physical solitude or seclusion; 2) the right to be secure

from an appropriation of one's name or likeness; 3) the right to be secure from unreasonable publicity given to one's private life; and 4) the right to be secure from publicity that reasonably places another in a false light before the public.

A person who violates a right under this section shall be liable to the injured party in an action at law. The court having jurisdiction of an action under this section may award reasonable attorney's fees and court costs to the prevailing party.

During criminal proceedings in Rhode Island, interception of communication or wiretapping may be used, but only under an order issued by a court of jurisdiction. Rhode Island General Laws § 12-5.1-1 et.seq. A person whose oral communication is intercepted in violation of this section shall have a civil cause of action against any person who intercepts, discloses, or uses the communications, and shall be entitled to 1) recover from that person actual damages, computed at the rate of \$100 per each day of violation, or \$1,000, whichever is higher; 2) punitive damages; 3) reasonable attorney's fees.

SOUTH CAROLINA

South Carolina has not enacted any statutes directly pertaining to employer surveillance or monitoring of employees.

SOUTH DAKOTA

Title 23A, Chapter 23A-35A makes it a crime to intercept any wire or oral communication in South Dakota. Title 22, Chapter 22-21 makes it unlawful to trespass with the intent to eavesdrop by installing unauthorized eavesdropping devices.

TENNESSEE

Tennessee has not enacted any statutes directly pertaining to employer surveillance or monitoring of employees.

TEXAS

The Texas Electronics Surveillance Act declares wiretapping unlawful except with the consent of one party or under color of law. Tex. Penal Code § 16.02. Communication common carriers may intercept conversations under limited circumstances. Although no reported Texas cases have been decided applying this provision in the employment context, an employer generally needs the permission of the employee or the other party to the conversation in order to intercept a wire, oral, or electronic communication. An interception made with such permission is not a violation of the Act unless it was done for the purpose of committing a criminal, tortious, or "other injurious" act. *Id.* at § 16.02(c)(4).

Additionally, the Act prohibits a person from knowingly installing or using a pen register or trap and trace device for the purpose of identifying telephone numbers transmitted on a telephone line. Tex. Penal Code § 16.03. An affirmative defense exists for an employee of a lawful enterprise who uses a device while engaged in an activity that is a necessary incident to the rendition of service provided by the enterprise. *Id.* at § 16.03(c)(2). Unauthorized access to a wire or electronic communication in electronic storage is also prohibited. Tex. Penal Code § 16.04.

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A violation of the Act is a Class 2 Felony. Collins v. Collins, 904 S.W.2d (Tex. App. 1995). The Act also authorizes recovery of civil damages in the amount of the higher of actual damages or liquidated damages. In addition, a plaintiff may receive punitive damages and reasonable attorneys' fees and costs. In Parker v. Parker, 897 S.W.2d 918 (Tex. 1995), the court upheld a \$1,000,000 punitive damages award for a husband's interception and use of a telephone conversation between his estranged wife and her lawyer. Furthermore, a person who violates the Act is subject to suit for injunctive relief and a civil penalty of \$500. Tex. Code Crim. Proc. art 18.20 § 16.

UTAH

A. Privacy Violation

Under Utah Code Ann. § 76-9-402, a person is guilty of a privacy violation, a class B misdemeanor, if, except as authorized by law, he:

1. Trespasses on property with intent to subject anyone to eavesdropping or other surveillance in a private place; or
2. Installs in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, recording, amplifying, or broadcasting sounds or events in the place or uses any such unauthorized installation; or
3. Installs or uses outside of a private place any device for hearing, recording, amplifying, or broadcasting sounds originating in the place which would not ordinarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy there.

B. Interception of Communications Act

1. Utah Code Ann. § 77-23a-4(1)(b) provides that a person commits a violation of this subsection who:
 - (a) intentionally or knowingly intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic, or oral communication;
 - (b) intentionally or knowingly uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication, when the device is affixed to, or otherwise transmits a signal through a wire, cable, or other like connection used in wire communication or when the device transmits communications by radio, or interferes with the transmission of the communication;
 - (c) intentionally or knowingly discloses or endeavors to disclose to any other person the contents of any wire, electronic, or oral communication, knowing

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or having reason to know that the information was obtained through the interception of a wire, electronic, or oral communication in violation of this section; or

- (d) intentionally or knowingly uses or endeavors to use the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic, or oral communication in violation of this section.
2. Utah Code Ann. §77-23a-4(7)(a) provides that a person acting under the color of law may intercept a wire, electronic, or oral communication if that person is a party to the communication or one of the parties to the communication has given prior consent to the interception.
 3. Utah Code Ann. §77-23a-4(7)(b) provides that a person not acting under the color of law may intercept a wire, electronic, or oral communication if that person is a party to the communication or one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of state or federal laws.
 4. Utah Code Ann. § 77-23a-7 provides that when any wire, electronic, or oral communication has been intercepted, no part of the contents of the communication and no evidence derived from it may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision of the state, if the disclosure of that information would be in violation of this chapter.
 5. Utah Code Ann. § 77-23a-11: Civil remedy for unlawful interception. This section provides that under section 77-23a-4, a person whose wire, electronic, or oral communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover relief as appropriate from the person or entity that engaged in the violation. Under §77-23a-11(2), appropriate relief includes:
 - (a) preliminary and other equitable or declaratory relief as is appropriate;
 - (b) damages under Subsection (3) and punitive damages in appropriate cases; and
 - (c) a reasonable attorney's fee and reasonably incurred litigation costs.

Under Subsection (3)(b), the court may assess as damages whichever is the greater of:

- (a) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violations; or

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(b) statutory damages of \$100 a day for each day of the violation, or \$10,000, whichever is greater.

6. Utah Code Ann. § 77-23a-12(1) provides that when it appears that a person is engaged or is about to engage in any act that constitutes or will constitute a felony violation of this chapter or is otherwise prohibited by this chapter, the attorney general may initiate a civil action in a district court of the state to enjoin the violation.

C. Access to Electronic Communications Act

1. Utah Code Ann. § 77-23b-2(1) provides that a person who obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage on the system shall be punished under Subsection (2) if he:

(a) intentionally accesses without authorization a facility through which an electronic communications service is provided; or

(b) intentionally exceeds an authorization to access that facility.

2. Utah Code Ann. § 77-23b-2(2) provides that a person who commits a violation of Subsection (1) is:

(a) if the offense is committed for purposes of commercial advantage, malicious destruction, or damage, or private commercial gain, guilty of a:

(i) third degree felony for the first offense under this subsection; and

(ii) second degree felony for any subsequent offense; and

(b) class B misdemeanor in any other case.

D. Revealing Stored Electronic Communications.

Utah Code Ann. § 77-23b-3(2) A person or entity may divulge the contents of a communication:

1. to an addressee or intended recipient of the communication or an agent of the addressee or intended recipient;

2. as otherwise authorized under § 77-23a-4, § 77-23a-8, § 77-23b-4;

3. with the lawful consent of the originator or addressee or intended recipient of the communication, or the subscriber in the case of remote computing service;

4. to a person employed or authorized, or whose facilities are used to forward the communication to its destination;

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5. as may be necessarily incident to the rendition of the service or the protection of the rights or property of the provider of that service; or
6. to a law enforcement agency, if the contents:
 - (a) were inadvertently obtained by the service provider; and
 - (b) appear to pertain to the commission of a criminal offense.

VERMONT

It appears that Vermont has not enacted any electronic monitoring or privacy laws.

VIRGINIA

A. Prohibited Activity.

Virginia Laws, § 18.2-167.1 prohibits the interception or monitoring of telephone calls between an employee or other agent of such person, firm or corporation and a customer of such person, firm or corporation. Violation of this section constitutes a Class 4 misdemeanor. The provisions of this section do not apply if the person, firm or corporation give prior notice that such monitoring may occur at any time during the course of such employment.

Virginia also has a criminal statute regarding interception of communications. § 19-2.62. It states that any person who intentionally intercepts any wire, electronic or oral communication; intentionally uses a device to intercept communication; intentionally discloses the contents of such interception; or intentionally uses the contents of such interception shall be guilty of a Class 6 felony.

B. Exceptions.

Exceptions to this statute include, 1) the interception of communications by switchboard operators or employees of an electronic communications service during the normal course of his or her employment, 2) prior consent of one of the parties, 3) interception made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public, or 4) to intercept any wire or electronic communication the transmission of which is causing harmful interferences to any lawfully operating station or consumer electronic equipment.

WASHINGTON

The Washington "Violating Right of Privacy Act" protects the privacy rights of individuals explicitly, restricts monitoring and recording of oral and certain electronic, and written communications. See RCW § 9.73 et seq. (West 1998). Section 9.73 makes it unlawful for "any individual, partnership, corporation, association, or the state of Washington" to intercept or record any:

"Private communications transmitted by telephone, telegraph, radio or other device between two or more individuals . . . without first obtaining the consent of all the participants . . .;"

or

"Private conversations, by any device electronic or otherwise designed to record or transmit such conversations . . . without first obtaining consent of all the persons engaged in the conversation." RCW § 9.73.030 (West 1998).

Consent can be obtained by one party announcing to all the other parties "in any reasonably effective manner" that the communication is going to be recorded. Id. If the conversation is recorded, the announcement must be recorded too. Id.

Any person who violates the statute is liable for damages to any party claiming his person, business, or reputation was injured. RCW § 9.73.60. The injured party is entitled to actual damages, including mental pain and suffering or liquidated damages computed at the rate of one hundred dollars a day for each day of violation not to exceed one thousand dollars plus reasonable attorneys fees. Id. In addition, violation of the statute is a gross misdemeanor. RCW § 9.73.080. Evidence obtained in violation of the statute is inadmissible in any civil or criminal case except with permission of the person whose rights have been violated. RCW § 9.73.050.

Washington's statute offers broad protection to private parties and is liberally worded. Electronic mail might be considered a "private communication" that is transmitted by telephone (modem) or other device (computer) between two or more individuals. This issue has not been addressed by the Washington courts.

WEST VIRGINIA

- A. West Virginia Stats. Section 62-1D-1, *et. seq.*; Wiretapping and Electronic Surveillance Act.
1. This Act prohibits unauthorized interception, or attempting to intercept any wire, oral or electronic communication or procuring another to do so, through the use of an electronic, mechanical or other device. Violation of the Act is a felony. Sec. 62-1D-3.
 2. A devices used in lawful, consensual monitoring, including tape recorders, are not prohibited devices. Sec. 6; 201D-2.
 3. Evidence obtained directly or indirectly in violation of the act is inadmissable. Sec. 62-1D-6.
 4. A person whose communication is intercepted or used in violation of the Act may bring a civil action for 1) actual damages, but not less than \$100.00 for each day of violation, 2) punitive damages if proper, and 3) attorney fees and costs. Sec. 62-1D-12.

WISCONSIN

A. Prohibited Activity.

Wisconsin (Wis. Stat. § 968.31) provides that it is a crime to:

1. intercept, attempt to intercept or procure another to intercept wire, electronic or oral communications;
2. use, attempt to use or procure another to use any electronic, mechanical or other device to intercept any oral communication;
3. disclose or attempt to disclose the contents of any wire, electronic or oral communication knowing that it was obtained through the interception of a wire, electronic or oral communication;
4. use or attempt to use the contents of any wire, electronic or oral communication knowing that it was obtained through the interception of a wire, electronic or oral communication; or
5. alter any wire, electronic or oral communication intercepted on tape, wire or other device.

B. Exceptions.

Wisconsin provides numerous exceptions to its general prohibition for switchboard operators or employees of electronic communication services operating in the normal course, and law enforcement officials under certain circumstances. However, none of these exceptions apply to the employer-employee relationship.

Wisconsin provides that it is not illegal to intercept a wire, electronic or oral communication when one of the parties to the communication has given consent.

WYOMING

A. Prohibited Activity.

Wyoming (Wyo. Stat. § 7-3-602) provides that it is a crime to:

1. intercept any wire, oral or electronic communication;
2. disclose to another the contents of any wire, oral or electronic communication, knowing same was improperly obtained; or
3. use the contents of any wire, oral or electronic communication, knowing that same was improperly obtained.

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B. Exceptions.

Wyoming provides exceptions to its general prohibition for law enforcement officials, emergency officials and electronic and telephone communication services. However, there are no exceptions that apply to the employer-employee relationship.

Wyoming provides that it is not illegal to intercept a wire, oral or electronic communication where one party to the communication has given consent.