§ 5.01. General Principle

An employer whose conduct constitutes an unlawful intrusion upon employee seclusion is subject to liability in tort for the resulting harm.

Comment on § 5.01:

a. The classic formulation of common law privacy rights focuses on four distinct types of invasions, the first of which is traditionally termed “intrusion upon seclusion.” Claims of unlawful intrusion upon seclusion have played an important role in the common law of employee privacy and are the focus of this chapter.

b. Remedies. Section 5.01 provides that an employer whose behavior constitutes an unlawful intrusion upon employee seclusion is subject to liability in tort for the resulting harm. A separate chapter of the Restatement Third, Employment Law provides principles for determining remedies.

REPORTER’S NOTE

Comment a. On the four subparts of the general common law right to privacy, see Restatement (Second) of Torts § 652A. In addition to intrusion upon seclusion, the four subparts include protection against appropriation of another’s name or likeness, protection against unreasonable publicity given to another’s private life, and protection
against publicity that unreasonably places another in a false light before the public. See id.

For illustrative cases recognizing the availability of the claim of unlawful intrusion upon seclusion in the employment context, and showing how such claims by employees or applicants for employment are resolved, see Muick v. Glenayre Electronics, 280 F.3d 741 (7th Cir. 2002) (applying Illinois law) (recognizing the likely availability of the claim and denying employer’s motion to dismiss the claim); Rushing v. Hershey Chocolate-Memphis, 2000 WL 1597849 (6th Cir.) (applying Tennessee law) (recognizing the availability of the claim but ruling against it on the merits); Baggs v. Eagle-Pitcher Industries, Inc., 957 F.2d 268 (6th Cir. 1992) (applying Michigan law) (recognizing the availability of the claim but ruling against it on the merits); Salazar v. Golden State Warriors, 2000 WL 246589 (N.D. Cal.) (recognizing the availability of the claim but ruling against it on the merits); Acuff v. IBP, Inc., 77 F. Supp. 2d 914 (C.D.Ill. 1999) (recognizing the availability of the claim and denying employer’s motion for summary judgment on the claim); Frye v. IBP, Inc., 15 F. Supp. 2d 1032 (D.Kan.1998) (recognizing the availability of the claim but ruling against it on the merits); Ali v. Douglas Cable Communications, 929 F. Supp. 1362 (D.Kan. 1996) (recognizing the availability of the claim and ruling in part in favor of employees); Mulligan v. United Postal Service, 1995 WL 695097 (E.D. Pa.) (recognizing the availability of the claim but ruling against it on the merits); Opal v. Cencom E 911, 1994 WL 97723 (N.D. Ill.) (recognizing the availability of the claim and denying employer’s motion to dismiss the claim); Marrs v. Marriott Corp., 830 F. Supp. 274 (D.Md. 1992) (recognizing the availability of the claim but ruling against it on the merits); Jevic v. Coca-Cola Bottling Co., 1990 WL 109851 (D.N.J) (recognizing the availability of the claim but ruling against it on the merits); Fayard v. Guardsmark, 1989 WL 145958 (E.D. La.) (recognizing the availability of the claim but ruling against it on the merits); Moffett v. Gene B. Glick Co., Inc., 621 F. Supp. 244 (D.Ind. 1985) (recognizing the availability of the claim but ruling against it on the merits); Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (Alaska 1989) (recognizing the availability of the claim but ruling against it on the merits); Ellenberg v. Pinkerton’s, Inc., 130 Ga.App. 254 (1973) (recognizing the availability of the claim but ruling against it on the merits); Saldana v. Kelsey-Hayes Co., 178 Mich.App. 230 (1989) (recognizing the availability of the claim but ruling against it on the merits); Speer v. Dept. of Rehabilitation & Correction, 89 Ohio.App.3d 276 (1993), on remand, 68 Ohio.Misc.2d 13 (Ohio Ct.Cl. 1994) (recognizing the availability of the claim and ruling in favor of the employee); Groves v. Goodyear Tire & Rubber Co., 70 Ohio.App.3d 656 (1991) (recognizing the availability of the claim but ruling against it on the merits); McLain v. Boise Corp., 271 Or. 549 (1975) (recognizing the availability of the claim but ruling against it on the merits); Stein v. Davidson Hotel Co., 1996 WL 230196 (Tenn.Ct.App.) (recognizing the availability of the claim but ruling against it on the merits); and Farrington v. Sysco Food Services, Inc., 865 S.W.2d 247 (Tex.Ct.App. 1993) (recognizing the availability of the claim but ruling against it on the merits).

A few states either do not recognize common law claims of intrusion upon seclusion at all or recognize them only under quite narrow circumstances. As to non-

§ 5.02. Unlawful Intrusion Upon Employee Seclusion

Employer conduct constitutes an unlawful intrusion upon employee seclusion if the conduct

(1) intrudes upon employee privacy interests, and

(2) is highly offensive to a reasonable person in the employment context.

Comment on § 5.02:

a. Section 5.02 provides the general rule for determining when an unlawful intrusion upon employee seclusion has occurred. The threshold requirement for such an unlawful intrusion is that the employer conduct intrudes upon employee privacy interests. See § 5.03 for the types of conduct that intrude upon employee privacy interests, and § 5.04 for the effect of an employee’s or applicant’s agreement to submit to these types of conduct on the determination whether these types of conduct intrude upon employee privacy interests. If employer conduct intrudes upon employee privacy interests and, additionally, the conduct is highly offensive to a reasonable person in the employment context, then the conduct constitutes an unlawful intrusion upon employee seclusion. See § 5.05 for the effect of an employee’s or applicant’s agreement to submit to employer
b. **Highly offensive to a reasonable person in the employment context.** Section 5.02’s requirement that employer conduct be highly offensive to a reasonable person in the employment context particularizes the general test for an unlawful intrusion upon seclusion under § 652B of the Restatement (Second) of Torts. Both of these tests are objective ones. In general, whether employer conduct is highly offensive to a reasonable person in the employment context will depend upon a balancing of the degree of invasiveness of the employer conduct and the weight of the employer’s business-related reasons for engaging in the conduct. See comment c below for discussion of the degree of invasiveness of employer conduct, and comment d below for discussion of the business-related reasons for employer conduct.

c. **Degree of invasiveness of the employer conduct.** A higher degree of invasiveness of the employer conduct makes it more likely that the conduct is highly offensive to a reasonable person in the employment context. The degree of invasiveness of the conduct turns in part on the character of the conduct. Video-recording of employee or applicant behavior that is usually done out of the public eye, for instance, is more invasive than video-recording of employee or applicant behavior that is generally observed by others. The degree of invasiveness of employer conduct also turns on background societal norms, but the degree of invasiveness is not lessened by the fact that the employer has
previously or habitually engaged in similar conduct. See §5.06, comment c for further
discussion.

d. Business-related reasons for the employer conduct. Whether employer conduct is
highly offensive to a reasonable person in the employment context depends in part on the
employer’s business-related reasons for the conduct. Weightier business-related reasons
make it less likely that employer conduct constitutes an unlawful intrusion upon
employee seclusion. For detailed discussions of business-related reasons for employer
conduct in various contexts, see §§ 5.06-5.08. Business-related reasons may often be
weightier with respect to applicants for employment than with respect to current
employees. But even conduct based on important business-related reasons may constitute
an unlawful intrusion upon employee seclusion if the behavior is highly invasive.

Illustrations:

1. A is a customer service representative whose responsibilities
include regular phone contact with customers. A’s employer, E, audio-
records all phone calls to and from customer service representatives’ desks.
Audio-recording of business calls to and from A’s desk is directly related to
monitoring A’s performance of the duties of a customer service
representative. Such audio-recording is not highly offensive to a reasonable
person in the employment context.
2. Same facts as illustration 1. E has not forbidden or discouraged A from making personal calls from A’s desk and does not initially inform A of the commencement of audio-recording of all calls to and from A’s desk. In these circumstances, E’s business-related reasons for audio-recording personal phone calls made by A may be outweighed by the invasiveness of such audio-recording. If so, then E’s audio-recording of personal calls is highly offensive to a reasonable person in the employment context.

3. B, who works on an offshore drilling rig, is covered by his employer’s drug testing program. That program requires all employees in B’s position to produce urine samples for testing under the direct visual observation of an employer monitor. The drug testing procedure is especially invasive. B’s employer’s drug testing program may constitute an unlawful intrusion upon employee seclusion.

REPORTER’S NOTE

Comment b. The general test for liability for intrusion upon seclusion under the Restatement (Second) of Torts is as follows: “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” Restatement (Second) of Torts § 652B. Section 5.02(2) carries over the “highly offensive to a reasonable person” formulation from § 652B.

For cases in the employment context balancing, in the course of determining whether an unlawful intrusion upon seclusion has occurred, the degree of invasiveness of the employer conduct and the weight of the employer’s business-related reasons for engaging in the conduct, see Rushing v. Hershey Chocolate-Memphis, 2000 WL 1597849 (6th Cir.) (applying Tennessee law); Jones v. HCA Health Services of Kansas, Inc., 1998
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§ 5.03. Intrusion upon Employee Privacy Interests – Definition

The following forms of employer conduct intrude upon employee privacy interests:

(1) Examining an employee’s or applicant’s bodily products.

(2) Monitoring an employee or applicant while the employee or applicant performs an excretory function typically performed outside of the presence of others.

(3) Observing an employee’s or applicant’s body in a state of undress.
(4) Viewing the contents of a locked receptacle, such as a locker, containing an employee's or applicant’s possessions.

(5) Secretly observing or video-recording an employee or applicant in a place to which visual access is limited and at which the employee’s or applicant’s presence is authorized.

(6) Secretly listening to, audio-recording, or video-recording with audio capability an employee or applicant in a place to which audio access is limited and at which the employee’s or applicant’s presence is authorized.

(7) Secretly intercepting an employee’s or applicant’s telephonic conversation.

(8) In any manner other than those listed in (1) through (7) above, intruding upon an employee’s or applicant’s reasonable expectation of privacy.

For purposes of this section, an “applicant” is an individual applying for employment with the employer.

Comment on § 5.03:
Section 5.03 sets forth the forms of employer conduct that intrude upon employee privacy interests. The section attempts to limit the widely-recognized concerns with circularity, subjectivity and unpredictability under the federal constitutional “reasonable expectation of privacy” test by identifying areas in which there is widespread agreement that employee privacy interests exist. Like the federal constitutional “reasonable expectation of privacy” test, however, the test for an intrusion upon employee privacy interests is only a threshold requirement for establishing a privacy violation; under §5.02(2), an unlawful intrusion upon employee seclusion additionally requires that the employer conduct is highly offensive to a reasonable person in the employment context.

b. **Examining an employee’s or applicant’s bodily products; monitoring an employee or applicant engaged in an excretory function typically performed outside of the presence of others.** Bodily products and functions have traditionally been regarded as areas in which individuals, including employees and applicants for employment, enjoy substantial protection of their privacy. The most frequent situation in which employers monitor employees’ or applicants’ bodily products or functions is in testing urine or other bodily substances for evidence of drug use. In drug testing of urine, for instance, employers examine employees’ or applicants’ urine for evidence of drug use and typically also monitor employees or applicants as they engage in the act of urination to protect the integrity of urine samples. Under §§5.03(1) and 5.03(2), such employer conduct intrudes upon employee privacy interests. Whether monitoring an employee’s or applicants’ bodily products or functions...
ultimately constitutes an unlawful intrusion upon employee seclusion, however,
depends upon whether the employer conduct is highly offensive to a reasonable
person in the employment context. See § 5.02. In most settings, neither the testing of
urine or other bodily substances for evidence of drug use nor the monitoring of
employees or applicants while they produce urine samples for such testing will
constitute an unlawful intrusion upon employee seclusion. See § 5.06.

c. **Observing an employee’s or applicant’s body in a state of undress.** Observing an
employee’s or applicant’s body in a state of undress (relative to prevailing societal
standards) unquestionably constitutes an intrusion upon employee privacy interests.
Perhaps the most familiar situation in which employees or applicants are observed in a
state of undress is during “direct observation” drug testing, in which a monitor directly
watches the act of urination rather than, for example, monitoring the employee or
applicant from outside a private stall. Whether observing an employee’s or applicant’s
body in a state of undress ultimately constitutes an unlawful intrusion upon employee
seclusion, however, depends upon whether the employer conduct is highly offensive to a
reasonable person in the employment context. See § 5.02.

d. **Viewing the contents of a locked receptacle containing an employee’s or
applicant’s possessions.** Section 5.03(4) provides that viewing the contents of a locked
receptacle, such as a locker, that contains an employee’s or applicant’s possessions
intrudes upon employee privacy interests. Receptacles (such as purses) that do not lock
are not covered by § 5.03(4), but viewing the contents of such receptacles may intrude
upon an employee’s or applicant’s reasonable expectation of privacy under § 5.03(8).
With respect to receptacles that lock, a receptacle is less likely to count as “locked” for
purposes of § 5.03(4) if the employer retains a copy of the key or other means of access
to the lock and so informs the employee or applicant than if the employer does not retain
such a copy. Whether viewing the contexts of a locked receptacle containing an
employee’s or applicant’s possessions ultimately constitutes an unlawful intrusion upon
employee seclusion depends upon whether the employer conduct is highly offensive to a
reasonable person in the employment context. See § 5.02.

Illustration:
1. A, an employee of a major national retailer, places belongings in a
workplace locker. A’s employer does not retain a copy of the key or
combination for the locker. A returns to her locker one day to find the lock
hanging open and her personal items within the locker in a state of disorder.
A’s employer’s search of the locker intrudes upon A’s employee privacy
interests. Whether or not the search ultimately constitutes an unlawful
intrusion upon A’s employee seclusion depends upon whether the employer
conduct is highly offensive to a reasonable person in the employment context.

e. Observing or video-recording an employee or applicant in a place to which visual
access is limited and at which the employee’s or applicant’s presence is authorized. For
both monitoring and investigative purposes, employers sometimes choose to engage in
secret observation or video-recording of employees or, more unusually, applicants. If an
employee or applicant is secretly observed or video-recorded while the employee or
applicant is engaged in activities that are visible to the public eye, then the observation or
video-recording does not intrude upon employee privacy interests. Under § 5.03(5), the
result is the same if an employee or applicant is secretly observed or video-recorded in an
area in which the employee’s or applicant’s presence is not authorized, such as a private
office that the employee or applicant has no right to enter. By contrast, secret
observation or video-recording of an employee in the employee’s own private or semi-
private office or of an employee or applicant in any other place to which visual access is
limited and at which the employee’s or applicant’s presence is authorized intrudes upon
employee privacy interests. For purposes of this section, visual access to a place is
limited if the activities undertaken at that place cannot be observed by a member of the
public using either the naked eye or technology that is generally available to members of
the public. Whether secretly observing or video-recording an employee or applicant in a
place to which visual access is limited and at which the employee’s or applicant’s
presence is authorized ultimately constitutes an unlawful intrusion upon employee
seclusion, however, depends upon whether the employer conduct is highly offensive to a
reasonable person in the employment context. See § 5.02(2).

Illustrations:
2. B is a sales employee of a major national retailer. The retailer uses video monitoring in its stores. The store floor is not a place to which visual access is limited. The retailer’s use of video monitoring does not intrude upon B’s employee privacy interests.

3. C is employed by E as a security guard. In the course of investigating C’s possible violation of E’s policy prohibiting “fraternization” with employees of companies to which E is providing security services, E secretly observes C’s house and the cars coming to and going from the house. Because all of the activities observed by E were in plain view and readily observable by any member of the public using the naked eye, E has not observed C in a place to which visual access is limited. E’s activities do not intrude upon C’s employee privacy interests.

4. D is an employee at a large industrial company. In the course of investigating a report of stolen property, D’s employer commences secret video-recording of employees’ activities in the office of the nurse manager at the company. D is not authorized to enter the nurse manager’s office. Secret video-recording of D in the nurse manager’s office does not intrude upon D’s employee privacy interests.
5. F is a nurse at the company described in Illustration 4. F’s job responsibilities sometimes call for F to work in the office of the nurse manager. The nurse manager’s office is a place to which visual access is limited. Secret video-recording of F performing job responsibilities in the nurse manager’s office intrudes upon F’s employee privacy interests. Whether or not such video-recording ultimately constitutes an unlawful intrusion upon F’s employee seclusion depends upon whether the employer conduct is highly offensive to a reasonable person in the employment context.

f. Listening to, audio-recording, or video-recording with audio capability an employee or applicant in a place to which audio access is limited and at which the employee’s or applicant’s presence is authorized. As with visual observation or video-recording, employers sometimes choose to engage in secret audio surveillance of their employees or, more unusually, applicants for monitoring or investigative purposes. The rules governing the circumstances in which such employer conduct intrudes upon employee privacy interests are parallel to the rules governing the circumstances in which secretly observing or video-recording an employee or applicant intrudes upon employee privacy interests. See comment e and illustrations 2 through 5 above.

g. Intercepting an employee’s or applicant’s telephonic conversation. Secretly using an electronic or other device to hear, audio-record, or otherwise intercept an employee’s or applicant’s telephonic conversation intrudes upon employee privacy
interests for much the same reasons as secret visual or audio surveillance constitutes such
an intrusion. See comments e and f and illustrations 2 through 5 above. Under the rule
stated in § 5.03(7), the telephonic conversation need not occur on an employer’s phone
for secret interception to intrude upon employee privacy interests.

Illustration:

6. An employer secretly installs wiretaps on its office phones.

Without knowledge of the wiretaps, G, an employee, uses an office phone.
The secret wiretapping of the phone used by G intrudes upon G’s employee
privacy interests. Whether or not such wiretapping ultimately constitutes an
unlawful intrusion upon G’s employee seclusion depends upon whether the
employer conduct is highly offensive to a reasonable person in the
employment context.

h. The role of secrecy in the intrusiveness of observing, video-recording, listening to,
or audio-recording employee or applicants, or intercepting their telephonic
conversations. Under §§ 5.03(5), 5.03(6), and 5.03(7), observing, video-recording,
listening to, or audio-recording employees or applicants, or intercepting their telephonic
conversations, may intrude upon employee privacy interests only if it is done in secret.
The rationale for the secrecy requirement in these sections is that observing, video-
recording, listening to, or audio-recording employees or applicants, or intercepting their
telephonic conversations, lacks some of the inherent invasiveness of monitoring
employees’ or applicants’ bodily products or functions (covered in §§ 5.03(1) and 5.03(2)), observing employees’ or applicants’ bodies in a state of undress (covered in § 5.03(3)), and viewing the contents of a locked receptacle containing an employee’s or applicant’s possessions (covered in § 5.03(4)). In the latter situations (to which no secrecy requirement applies under this section), the employer conduct retains most, if not all, of its intrusiveness even when the employee or applicant knows of the conduct. By contrast, if employees or applicants are aware that they are being observed, video-recorded, listened to, or audio-recorded (outside the context of engaging in traditionally private excretory functions or being in a state of undress), or are aware that their telephonic conversations are being intercepted, then they have the opportunity to alter their behavior in response to the employer conduct, and ordinarily this opportunity will significantly reduce the degree of intrusiveness of this conduct.

For purposes of §§ 5.03(5), 5.03(6), and 5.03(7), employer conduct is “secret” if the employee or applicant does not know that conduct is occurring at the specific time at which it is occurring. General notice that employer conduct may occur at some future point does not take such conduct outside the category of secret observation, video-recording, listening, audio-recording, or intercepting.

Illustrations:

7. H is an administrative employee of a large employer. H’s supervisor has video cameras installed in the open in the supervisor’s private office and certain other areas. The staff, including H, are informed of the
installation. Video-recording of H in H’s supervisor’s office is not secret, and, thus, such video-recording does not intrude upon H’s employee privacy interests.

8. Same facts as in illustration 7 except that the video camera in H’s supervisor’s private office is hidden and not specifically known to H, although H’s supervisor has generally notified the staff that they may be video-recorded at the workplace at any time. Video-recording of H in H’s supervisor’s office is secret, and, thus, if H’s presence in the office is authorized, video-recording of H intrudes upon H’s employee privacy interests. Whether or not such video-recording ultimately constitutes an unlawful intrusion upon H’s employee seclusion depends upon whether the employer conduct is highly offensive to a reasonable person in the employment context.

i. Intruding upon an employee’s or applicant’s reasonable expectation of privacy.

Section 5.03(8) provides that employer conduct not embraced by §§ 5.03(1) through 5.03(7) nonetheless intrudes upon employee privacy interests if it constitutes an intrusion upon an employee’s or applicant’s reasonable expectation of privacy. The concept of an employee’s or applicant’s reasonable expectation of privacy is familiar from cases arising under the federal Constitution. Apart from express or implied agreement by an employee or applicant (covered in § 5.04 below), whether an employee or applicant has a reasonable expectation of privacy will typically turn on background societal norms.
Illustration:

9. A letter marked “personal” and addressed to I, an employee, arrives at I’s workplace. I’s employer opens the letter. Under background societal norms, I has a reasonable expectation of privacy in the contents of the letter.

The opening of the letter intrudes upon I’s employee privacy interests.

Whether or not the opening of the letter ultimately constitutes an unlawful intrusion upon I’s employee seclusion depends upon whether the employer conduct is highly offensive to a reasonable person in the employment context.

REPORTER’S NOTE


Comment d. Illustration 1 is based on K-Mart Corp. v. Trotti, 677 S.W.2d 632 (Tex. App. 1 Dist. 1984).
Comment e. United States Supreme Court precedent reflects the principle that visual access to a place is limited if the activities undertaken at that place cannot be observed by a member of the public using either the naked eye or technology that is generally available to members of the public. Compare Kyllo v. United States, 533 U.S. 27 (2001) (in which heat patterns were observed from a public street using thermal imaging, a technique not available to members of the public), with California v. Ciraolo, 476 U.S. 207 (1986) (in which marijuana plants were observed with the naked eye at an altitude of 1000 feet from public airspace, a technique available to members of the public). The facts of illustration 2 are based on Melder v. Sears, Roebuck & Co., 731 So.2d 991 (La.Ct.App. 1991). Illustration 3 is based on Fayard v. Guardsmark, Inc., 1989 WL 145958 (E.D. La. 1989). The facts of illustrations 4 and 5 come from Acuff v. IBP, Inc., 77 F. Supp. 2d 914 (C.D. Ill. 1999).


Comment h. Illustration 7 is based on Price v. City of Terrell, 2000 WL 1872081 (N.D. Tex.), at *6 n.10, *8 (addressing intrusion upon seclusion claim). Illustration 8 is a variation of illustration 7.


§ 5.04. Intrusion upon Employee Privacy Interests – The Role of Employee or Applicant Agreement

(1) Notwithstanding an employee’s or applicant’s express or implied agreement to submit to a particular form of employer conduct, the employer
conduct intrudes upon employee privacy interests if it falls within §§ 5.03(1)-
5.03(7).

(2) With respect to employer conduct that does not fall within §§ 5.03(1)-
5.03(7), an employee’s or applicant’s express or implied agreement to submit
to the employer conduct:

(a) does not necessarily negate the employee’s or applicant’s reasonable
expectation of privacy in the area covered by the employer conduct;

(b) may, together with other factors, support the conclusion that the
employee or applicant lacks a reasonable expectation of privacy in the area
covered by the employer conduct.

Comment on § 5.04:

a. This section addresses the relationship between an employee’s or applicant’s
agreement to submit to a particular form of employer conduct and the determination
whether that conduct intrudes upon employee privacy interests. In general, this section
rejects a controlling role for employee or applicant “consent” in determining whether an
employer conduct intrudes upon employee privacy interests. In the context of employer
conduct falling within §§ 5.03(1)-5.03(7), § 5.04(1) provides that the conduct intrudes
upon employee privacy interests notwithstanding the employee’s or applicant’s
agreement (including through a collective bargaining agreement) to submit to the conduct. Whether the conduct ultimately constitutes an unlawful intrusion upon employee seclusion, however, depends upon whether the employer conduct is highly offensive to a reasonable person in the employment context.

b. **Employee or applicant agreement and secrecy.** A limit on the principle reflected in § 5.04(1) is that in some circumstances employee or applicant agreement will mean that an employer behavior no longer meets the secrecy requirement of §§ 5.03(5)-5.03(7). In such cases, the employer behavior does not intrude upon employee privacy interests under §§ 5.03(5)-5.03(7). See Illustration 7 to § 5.03. However, §§ 5.03(1)-5.03(4) do not contain a secrecy requirement. See comment h to § 5.03.

c. **Employee or applicant agreement and searching of locked receptacles.** A further limit on the principle reflected in § 5.04(1) involves employer searching of locked receptacles (covered in § 5.03(4)). While § 5.04(1) rejects a controlling role for employee or applicant agreement in that context, an employer wishing to be able to search or otherwise view locked receptacles without intruding upon employee privacy interests may be able to do so simply by retaining its own copy of the key or other means of access to the receptacle and so informing the employee or applicant. See comment d to § 5.03.
d. **Employee or applicant agreement as a factor in an employee’s or applicant’s reasonable expectation of privacy.** Under the rule stated in § 5.04(2), an employee’s or applicant’s express or implied agreement does not necessarily eliminate the employee’s or applicant’s reasonable expectation of privacy in the area of the employer conduct, but such agreement is a factor supporting the conclusion that the employee or applicant lacks such a reasonable expectation of privacy. This approach simply reflects the common-sense idea that, in some circumstances, what an employee or applicant may reasonably expect will be shaped in part by the agreement that the employee or applicant is asked to give either expressly or impliedly. By the same token, what an employee or applicant may reasonably expect will also be shaped in part by any employer-side representations or acts suggesting affirmative protections of privacy; such representations or acts, as much as representations or acts suggesting the absence of privacy protections, are relevant to the employee’s or applicant’s reasonable expectation of privacy.

**REPORTER’S NOTE**

Comment a. A number of courts faced with claims that employer drug testing constitutes an unlawful intrusion upon seclusion have given controlling weight to an employee’s or applicant’s agreement to submit to the testing in rejecting the claims of unlawful intrusion upon seclusion. See Jevic v. Coca-Cola Bottling Co. of New York, 1990 WL 109851 (D.N.J.); Farrington v. Sysco Food Services, 865 S.W.2d 247 (Ct.App.Tex. 1993); Stein v. Davidson Hotel Co., 1996 WL 230196 (Tenn. Ct. App.); see also Frye v. IBP, Inc., 15 F.Supp.2d 1032 (D.Kan 1998) (employee agreement would have been dispositive against claim that drug testing constituted an unlawful intrusion upon seclusion had the drug testing been within the scope of the employee’s agreement); Jennings v. Minco Technology Labs, Inc., 765 S.W.2d 497 (Tex. App. 1989) (discharge of employee based on positive drug test result was not wrongful discharge in violation of public policy, including the public policy against unlawful intrusion upon seclusion, because employee’s agreement to submit to drug testing negated any possible unlawfulness of drug testing). Section 5.04(1) rejects the idea that an employer’s
monitoring of an employee’s or applicant’s bodily products or functions does not intrude
upon employee privacy interests if the employee or applicant agrees to submit to the
monitoring. Whether monitoring an employee’s or applicant’s bodily products or
functions ultimately constitutes an unlawful intrusion upon employee seclusion, however,
depends upon whether the particular conduct is highly offensive to a reasonable person in
the employment context (§ 5.02(2)), and, in most settings, employer drug testing does not
constitute an unlawful intrusion upon employee seclusion (§ 5.06).

§ 5.05 Offensiveness to a Reasonable Person in the Employment Context – The Role
of Employee or Applicant Agreement

Whether employer conduct is highly offensive to a reasonable person in the
employment context is not affected by an employee’s or applicant’s express
or implied agreement to submit to the employer conduct.

Comment on § 5.05:
a. This section rejects a role for employee or applicant “consent” in determining
whether employer conduct is highly offensive to a reasonable person in the employment
context. In so rejecting such a role, it parallels § 5.04(1) above.

REPORTER’S NOTE

Comment a. As stated just above, a number of courts faced with claims that employer
drug testing constitutes an unlawful intrusion upon seclusion have given controlling
weight to an employee’s or applicant’s agreement to submit to the testing in rejecting the
claims of unlawful intrusion upon seclusion. See cases cited in Reporter’s Note to § 5.04.
While § 5.05 rejects a role for employee or applicant agreement in determining whether
employer conduct is highly offensive to a reasonable person in the employment context, §
5.06 provides that, in most settings, employer drug testing does not constitute an unlawful intrusion upon employee seclusion.

§ 5.06 Employer Drug Testing

Employer drug testing constitutes an unlawful intrusion upon employee seclusion under the following circumstances only:

(1) the testing procedure used is especially invasive; and

(2) the degree of invasiveness is unreasonable in light of the employer’s business-related reasons for drug testing.

Comment on § 5.06:

a. Employer drug testing programs have been a major site of litigation over employee privacy rights. Section 5.06 applies the general rules set forth in §§ 5.02-5.04 to the context of employer drug testing. Under the definition of intrusion upon employee privacy interests in §§ 5.03(1) and 5.03(2), employer drug testing constitutes such an intrusion whenever it involves monitoring of an employee’s or applicant’s bodily products or functions. However, under the balancing test stated in § 5.02(2) for determining an unlawful intrusion upon employee seclusion, employer drug testing does not constitute such an unlawful intrusion unless the degree of invasiveness of the drug testing outweighs the employer’s business-related reasons for engaging in the drug testing.
testing. Across a broad range of employment contexts and types of drug testing (including random, periodic, and suspicion-based), courts addressing common law privacy claims have found that employers’ business-related reasons for drug testing suffice to justify such testing. Accordingly, under the rule stated in this section, employer drug testing that does not involve an especially invasive testing procedure does not constitute an unlawful intrusion upon employee seclusion; no particularized inquiry into the employer’s business-related reasons for drug testing is required in these cases. Where the specific testing procedure used is especially invasive, however, employer drug testing constitutes an unlawful intrusion upon employee seclusion if the degree of invasiveness is unreasonable in light of the employer’s business-related reasons for drug testing. Apart from the general rule stated in § 5.06, employer drug testing may violate a constitutional provision or state statute, as discussed in comments b and f below.

b. **No requirement of safety-related or other similar employer interest in drug testing** – in general. The rule stated in § 5.06 does not require that an employer wishing to engage in drug testing advance a specific safety-related or other similar interest in detecting and deterring drug use in order to avoid liability for an unlawful intrusion upon employee seclusion. This is true whether the employer’s testing program calls for random testing, periodic testing, or suspicion-based testing and whether it is employees or applicants who are tested. Such a specific employer interest is required, however, for drug testing by public employers under the federal Constitution and may also be required by state constitutional provisions or state statutes.
c. Degree of invasiveness in administering a drug testing program. While all forms of monitoring an employee’s or applicant’s bodily products or functions constitute intrusions upon employee privacy interests under §§ 5.03(1) and 5.03(2), some forms of such monitoring are substantially more invasive than others. Employer drug testing programs that involve direct visual observation of the employee’s or applicant’s production of urine are generally viewed as especially invasive. In some circumstances such direct observation drug testing may constitute an unlawful intrusion upon employee seclusion (and may also be actionable under state statutes or in tort as intentional or negligent infliction of emotional distress); this may be especially likely to be so if the direct observation drug testing is random or periodic, rather than suspicion-based, testing. See § 5.02, illustration 3.

d. The role of employee or applicant agreement. Under §§ 5.03(1) and 5.04(1), employer drug testing constitutes an intrusion upon employee privacy interests whenever it involves monitoring or examination of an employee’s or applicant’s bodily products or functions, regardless of an employee’s or applicant’s agreement to submit to the testing procedure. Likewise, § 5.05, whether employer drug testing is highly offensive to a reasonable person in the employment context is not affected by employees’ or applicants’ agreement to submit to the testing procedure. Thus, if the procedure used in an employer drug testing program is especially invasive and the invasiveness is unreasonable in light of the employer’s business-related reasons for drug testing, then the drug testing program
is an unlawful intrusion upon employee seclusion regardless of an employee’s or applicant’s express or implied agreement to submit to the program. The limit on the role of employee or applicant agreement under §§ 5.04(1) and 5.05, however, will generally have little effect in the drug testing context because, under the present section, drug testing does not constitute an unlawful intrusion upon employee seclusion as long as either the procedure used in employer drug testing is not especially invasive or, if the procedure is especially invasive, the invasiveness is reasonable in light of the employer’s business-related reasons for drug testing. Thus, most employer drug testing is clearly not an unlawful intrusion upon employee seclusion under this section, wholly apart from the issue of express or implied employee or applicant agreement.

e. **Employee or applicant refusal to submit to drug testing.** Employees or applicants who refuse to submit to an employer drug testing program cannot claim an unlawful intrusion upon employee seclusion under this section because their refusal to submit means that no intrusion upon employee privacy interests under § 5.03 has occurred. In some jurisdictions, however, such individuals may have a successful claim for wrongful discharge in violation of public policy.

f. **Drug testing statutes.** In some jurisdictions, employer drug testing is statutorily prohibited except in limited circumstances. Restrictions include limiting drug testing to cases of reasonable suspicion or probable cause, limiting drug testing to particular types
of employees or applicants, and regulating the conditions under which drug tests are
administered.

REPORTER’S NOTE

Comment a. For cases that address claims of unlawful intrusion upon seclusion in the
case of drug testing procedures that are not especially invasive and conclude that
employers’ business-related reasons for drug testing suffice to justify the testing, see
Rushing v. Hershey Chocolate-Memphis, 2000 WL 1597849 (6th Cir.) (applying
Tennessee law); Baggs v. Eagle-Pitcher Industries, 957 F.2d 268 (6th Cir. 1992) (applying
Electronic Data Systems, 1988 WL 156317 (E.D. Mich. 1988); Seta v. Reading Rock,
100 Ohio. App.3d 731 (1995); Groves v. Goodyear Tire & Rubber Co., 70 Ohio. App. 3d
656 (1991); see also Gilmore v. Enogex, Inc., 878 P.2d 360 (Okl. 1994) (drug testing
case addressing a claim of wrongful discharge in violation of public policy, including the
public policy against unlawful intrusion upon seclusion, and concluding that employers’
business-related reasons for drug testing sufficed to justify the testing).

A few drug testing cases addressing claims of wrongful discharge in violation of
public policy, including the public policy against unlawful intrusion upon seclusion, have
suggested possible circumstances in which an employer’s business-related reasons for
drug testing may not suffice to justify the testing – even outside the context noted in §
5.06 of especially invasive testing procedures. See Luedtke v. Nabors Alaska Drilling
Co., 768 P.2d 1123 (Alaska 1989) (suggesting that employers’ business-related reasons
for drug testing may not suffice to justify the testing in the case of employees in positions
that are not safety-sensitive); Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3rd Cir.
1992) (applying Pennsylvania law) (remanding for a determination of whether the
particular employer’s business-related reasons for drug testing sufficed to justify the
testing). And one court has squarely held, in addressing a claim of wrongful discharge in
violation of public policy, including the public policy against unlawful intrusion upon
seclusion, that in many circumstances employers’ business-related reasons for drug
testing do not suffice to justify the testing. See Twigg v. Hercules Corp., 185 W.Va. 155
(1990). Section 5.06 departs from the principle of these cases in stating, consistent with
the larger number of cases cited earlier in the preceding paragraph, that under ordinary
circumstances (not involving an especially invasive testing procedure) employer drug
testing is not an unlawful intrusion upon employee seclusion regardless of the employer’s
specific business-related reasons for the drug testing.

Comment b. Courts have regularly upheld employer drug testing against claims of
unlawful intrusion upon seclusion both when there is no apparent safety-related or similar
employer interest in drug testing and when there is only a limited or generalized safety-
related interest (far less serious or significant than the sort of interest required for public
employers under the Fourth Amendment, see U.S. Const. Amend. IV). For cases in the
former category, see Rushing v. Hershey-Memphis, 2000 WL 1597849 (6th Cir.)
(applying Tennessee law); Frye v. IBP, Inc., 15 F. Supp. 2d 1032 (D. Kan. 1998); Seta v. Reading Rock, 100 Ohio. App.3d 731 (1995); Groves v. Goodyear Tire & Rubber Co., 70 Ohio. App.3d 656 (1991); see also Gilmore v. Enogex, Inc., 878 P.2d 360 (Okl. 1994) (rejecting a claim of wrongful discharge in violation of public policy, including the public policy against unlawful intrusion upon seclusion, in a case involving no apparent safety-related or similar employer interest in drug testing). For cases in the latter category (involving a limited or generalized safety-related interest in drug testing), see Baggs v. Eagle-Pitcher Industries, 957 F.2d 268 (6th Cir. 1992) (applying Michigan Law) (testing of all employees in a manufacturing plant, regardless of their potential involvement in potentially dangerous steps of the manufacturing process). DiTomaso v. Electronic Data Systems, 1988 WL 156317 (E.D. Mich. 1988) (testing of security guards who might carry firearms in other assignments but were not currently assigned to positions involving carrying firearms). A well-known expression of the competing view requiring a specific safety-related or other similar employer interest in the context of a common law privacy claim is Webster v. Motorola, 637 N.E.2d 203 (Mass. 1994), a case under a Massachusetts statute generally understood to codify the common law rules on invasion of privacy. Other cases placing weight on specific safety-related or similar employer interests in adjudicating common law privacy challenges to employer drug testing include Luedtke v. Nabors Alaska Drilling Co., 768 P.2d 1123 (Alaska 1989) (addressing a claim of wrongful discharge in violation of public policy, including the public policy against unlawful intrusion upon seclusion, in a case involving oil rig employees); Twigg v. Hercules Corp. 185 W. Va. 155 (1990) (also addressing a claim of wrongful discharge in violation of public policy, including the public policy against unlawful intrusion upon seclusion, and explicitly limiting employer drug testing to cases in which either a specific safety-related or similar interest, or a suspicion of prior drug use, exists). Section 5.06 by contrast, reflects the view of the larger number of common law employer drug testing cases, which adopt a lower standard than the one prevailing in cases brought against the public employers under the Fourth Amendment. On the requirement of particular types of employer interests under the Fourth Amendment, compare Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602 (1989), and National Treasure Employees Union v. Von Raab, 489 U.S. 656 (1989), with Chandler v. Miller, 520 U.S. 305 (1997).

For application of state constitutional provisions requiring (similar to federal constitutional law) a safety-related or other similar employer interest for drug testing, see, e.g., Landon v. Northwest Airlines, 72 F.3d 620 (8th Cir. 1995) (applying California law); Robinson v. City of Seattle, 10 P.3d 452 (Wash.Ct.App. 2000). For state statutes requiring a safety-related or other similar employer interest, see, e.g., Conn. Gen. Stat. 31-51x (requiring, with limited exceptions, a safety-related interest for random drug testing); Minn. Stat. Ann. Sec. 181.951(4) (requiring a safety-related interest for random drug testing). Empirical evidence of the effects of employer drug testing in improving safety outcomes in safety-sensitive occupations may be found in Mireille Jacobson, Drug Testing in the Trucking Industry: The Effect on Highway Safety, 46 J. Legal Stud. 131 (2003).
Comment c. For state statutes prohibiting direct observation of urination in the course of drug testing, see, e.g., Conn. Gen. Stat. 31-51w(a); Okla. Stat. Ann. Tit. 40. sec. 559(5).

On infliction of emotional distress from direct observation drug testing, see Kelley v. Schlumberger Technology Corp., 849 F.2d 41 (1st Cir. 1988) (applying Louisiana law).

Comment d. As noted in comment a to § 5.04, some courts faced with claims that employer drug testing constitutes an unlawful intrusion upon seclusion have given controlling weight to the employee’s or applicant’s agreement to submit to the testing in rejecting the claims of unlawful intrusion upon seclusion. See Jevic v. Coca-Cola Bottling Co. of New York, 1990 WL 109851 (D.N.J.); Stein v. Davidson Hotel Co., 1996 WL 230196 (Ct.App. Tenn.); Farrington v. Sysco Food Services, 865 S.W.2d 247 (Ct.App.Tex. 1993). While that approach is inconsistent with the approach taken in §§ 5.04 and 5.05, the ultimate outcome of the cases – that regardless of the employer’s particular business-related reasons for drug testing, the testing is not an unlawful intrusion upon employee seclusion – remains the same under the present section because there is no indication that any of these cases involved an especially intrusive drug testing procedure.
