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2

Restatement Third, Employment Law

3

Chapter 5: Employee Privacy

4

§ 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.

8

Comment on § 5.01:

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

14

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

19

REPORTER’S NOTE

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22 Comment a. On the four subparts of the general common law right to privacy, see
23 Restatement (Second) of Torts § 652A. In addition to intrusion upon seclusion, the four
24 subparts include protection against appropriation of another’s name or likeness,
25 protection against unreasonable publicity given to another’s private life, and protection

1 against publicity that unreasonably places another in a false light before the public. See
2 id.

3 For illustrative cases recognizing the availability of the claim of unlawful
4 intrusion upon seclusion in the employment context, and showing how such claims by
5 employees or applicants for employment are resolved, see *Muick v. Glenayre Electronics*,
6 280 F.3d 741 (7th Cir. 2002) (applying Illinois law) (recognizing the likely availability of
7 the claim and denying employer's motion to dismiss the claim); *Rushing v. Hershey*
8 *Chocolate-Memphis*, 2000 WL 1597849 (6th Cir.) (applying Tennessee law)
9 (recognizing the availability of the claim but ruling against it on the merits); *Baggs v.*
10 *Eagle-Pitcher Industries, Inc.*, 957 F.2d 268 (6th Cir. 1992) (applying Michigan law)
11 (recognizing the availability of the claim but ruling against it on the merits); *Salazar v.*
12 *Golden State Warriors*, 2000 WL 246589 (N.D. Cal.) (recognizing the availability of the
13 claim but ruling against it on the merits); *Acuff v. IBP, Inc.*, 77 F. Supp. 2d 914 (C.D.Ill.
14 1999) (recognizing the availability of the claim and denying employer's motion for
15 summary judgment on the claim); *Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032 (D.Kan.1998)
16 (recognizing the availability of the claim but ruling against it on the merits); *Ali v.*
17 *Douglas Cable Communications*, 929 F. Supp. 1362 (D.Kan. 1996) (recognizing the
18 availability of the claim and ruling in part in favor of employees); *Mulligan v. United*
19 *Postal Service*, 1995 WL 695097 (E.D. Pa.) (recognizing the availability of the claim but
20 ruling against it on the merits); *Opal v. Cencom E 911*, 1994 WL 97723 (N.D. Ill.)
21 (recognizing the availability of the claim and denying employer's motion to dismiss the
22 claim); *Marrs v. Marriot Corp.*, 830 F. Supp. 274 (D.Md. 1992) (recognizing the
23 availability of the claim but ruling against it on the merits); *Jevic v. Coca-Cola Bottling*
24 *Co.*, 1990 WL 109851 (D.N.J) (recognizing the availability of the claim but ruling
25 against it on the merits); *Fayard v. Guardsmark*, 1989 WL 145958 (E.D. La.)
26 (recognizing the availability of the claim but ruling against it on the merits); *Moffett v.*
27 *Gene B. Glick Co., Inc.*, 621 F. Supp. 244 (D.Ind. 1985) (recognizing the availability of
28 the claim but ruling against it on the merits); *Luedtke v. Nabors Alaska Drilling, Inc.*, 768
29 P.2d 1123 (Alaska 1989) (recognizing the availability of the claim but ruling against it on
30 the merits); *Ellenberg v. Pinkerton's, Inc.*, 130 Ga.App. 254 (1973) (recognizing the
31 availability of the claim but ruling against it on the merits); *Saldana v. Kelsey-Hayes Co.*,
32 178 Mich.App. 230 (1989) (recognizing the availability of the claim but ruling against it
33 on the merits); *Speer v. Dept. of Rehabilitation & Correction*, 89 Ohio.App.3d 276
34 (1993), on remand, 68 Ohio.Misc.2d 13 (Ohio Ct.Cl. 1994) (recognizing the availability
35 of the claim and ruling in favor of the employee); *Groves v. Goodyear Tire & Rubber*
36 *Co.*, 70 Ohio.App.3d 656 (1991) (recognizing the availability of the claim but ruling
37 against it on the merits); *McLain v. Boise Corp.*, 271 Or. 549 (1975) (recognizing the
38 availability of the claim but ruling against it on the merits); *Stein v. Davidson Hotel Co.*,
39 1996 WL 230196 (Tenn.Ct.App.) (recognizing the availability of the claim but ruling
40 against it on the merits); and *Farrington v. Sysco Food Services, Inc.*, 865 S.W.2d 247
41 (Tex.Ct.App. 1993) (recognizing the availability of the claim but ruling against it on the
42 merits).

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

1 recognition of common law claims of unlawful invasion of privacy, including claims of
2 unlawful intrusion upon seclusion, see, e.g., *Stephano v. News Group Publications, Inc.*,
3 64 N.Y.2d 174 (1984). As to limited recognition of such claims, see, e.g., *Nelson v. J.C.*
4 *Penney Co*, 75 F.3d 343 (8th Cir. 1996) (applying North Dakota law).
5

6

7 **§ 5.02. Unlawful Intrusion Upon Employee Seclusion**

8 **Employer conduct constitutes an unlawful intrusion upon employee seclusion**

9 **if the conduct**

10 **(1) intrudes upon employee privacy interests, and**

11 **(2) is highly offensive to a reasonable person in the employment**

12 **context.**

13

14 **Comment on § 5.02:**

15 a. Section 5.02 provides the general rule for determining when an unlawful intrusion
16 upon employee seclusion has occurred. The threshold requirement for such an unlawful
17 intrusion is that the employer conduct intrudes upon employee privacy interests. See §
18 5.03 for the types of conduct that intrude upon employee privacy interests, and § 5.04 for
19 the effect of an employee's or applicant's agreement to submit to these types of conduct
20 on the determination whether these types of conduct intrude upon employee privacy
21 interests. If employer conduct intrudes upon employee privacy interests and,
22 additionally, the conduct is highly offensive to a reasonable person in the employment
23 context, then the conduct constitutes an unlawful intrusion upon employee seclusion. See
24 § 5.05 for the effect of an employee's or applicant's agreement to submit to employer

1 conduct on whether the conduct is highly offensive to a reasonable person in the
2 employment context.

3

4 b. *Highly offensive to a reasonable person in the employment context.* Section
5 5.02's requirement that employer conduct be highly offensive to a reasonable person in
6 the employment context particularizes the general test for an unlawful intrusion upon
7 seclusion under § 652B of the Restatement (Second) of Torts. Both of these tests are
8 objective ones. In general, whether employer conduct is highly offensive to a reasonable
9 person in the employment context will depend upon a balancing of the degree of
10 invasiveness of the employer conduct and the weight of the employer's business-related
11 reasons for engaging in the conduct. See comment c below for discussion of the degree
12 of invasiveness of employer conduct, and comment d below for discussion of the
13 business-related reasons for employer conduct.

14

15 c. *Degree of invasiveness of the employer conduct.* A higher degree of invasiveness
16 of the employer conduct makes it more likely that the conduct is highly offensive to a
17 reasonable person in the employment context. The degree of invasiveness of the conduct
18 turns in part on the character of the conduct. Video-recording of employee or applicant
19 behavior that is usually done out of the public eye, for instance, is more invasive than
20 video-recording of employee or applicant behavior that is generally observed by others.
21 The degree of invasiveness of employer conduct also turns on background societal
22 norms, but the degree of invasiveness is not lessened by the fact that the employer has

1 previously or habitually engaged in similar conduct. See §5.06, comment c for further
2 discussion.

3

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

13

14 **Illustrations:**

15 1. A is a customer service representative whose responsibilities
16 include regular phone contact with customers. A's employer, E, audio-
17 records all phone calls to and from customer service representatives' desks.
18 Audio-recording of business calls to and from A's desk is directly related to
19 monitoring A's performance of the duties of a customer service
20 representative. Such audio-recording is not highly offensive to a reasonable
21 person in the employment context.

22

1 2. Same facts as illustration 1. E has not forbidden or discouraged A
2 from making personal calls from A's desk and does not initially inform A of
3 the commencement of audio-recording of all calls to and from A's desk. In
4 these circumstances, E's business-related reasons for audio-recording personal
5 phone calls made by A may be outweighed by the invasiveness of such
6 audio-recording. If so, then E's audio-recording of personal calls is highly
7 offensive to a reasonable person in the employment context.

8
9 3. B, who works on an offshore drilling rig, is covered by his
10 employer's drug testing program. That program requires all employees in B's
11 position to produce urine samples for testing under the direct visual
12 observation of an employer monitor. The drug testing procedure is especially
13 invasive. B's employer's drug testing program may constitute an unlawful
14 intrusion upon employee seclusion.

15

16

REPORTER'S NOTE

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

25

26 For cases in the employment context balancing, in the course of determining
27 whether an unlawful intrusion upon seclusion has occurred, the degree of invasiveness of
28 the employer conduct and the weight of the employer's business-related reasons for
29 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

1 WL 159505 (D. Kan.); Frye v. IBP, Inc., 15 F. Supp. 3d 1032 (D. Kan. 1998); Ali v.
2 Douglas Cable Communications, 929 F. Supp. 1362 (D. Kan. 1996); McLain v. Boise
3 Cascade Corp. 271 Or. 549 (1975); see also Borse v. Piece Goods Shop, 963 F.2d 611
4 (3rd Cir. 1992) (applying Pennsylvania law) (in the course of addressing a claim of
5 wrongful discharge in violation of public policy, including the public policy against
6 unlawful intrusion upon seclusion, balancing the degree of invasiveness of the employer
7 conduct and the weight of the employer's business-related reasons for engaging in the
8 conduct); Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81 (1992) (same); Gilmore
9 v. Enogex, Inc. 878 P.2d 360 (Okl. 1994) (same).

10
11 Comment d. Illustrations 1 and 2 are based on Ali v. Douglas Cable Communications,
12 929 F. Supp. 1362 (D. Kan. 1996). Illustration 3 is based on Kelley v. Schlumberger
13 Technology Corp., 849 F.2d 41 (1st Cir. 1988) (applying Louisiana law), in which a jury
14 ruled in favor of an oil rig employee's common law privacy claims.
15

16 17 **§ 5.03. Intrusion upon Employee Privacy Interests – Definition**

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

20
21 **(1) Examining an employee's or applicant's bodily products.**

22
23 **(2) Monitoring an employee or applicant while the employee or applicant**
24 **performs an excretory function typically performed outside of the presence**
25 **of others.**

26
27 **(3) Observing an employee's or applicant's body in a state of undress.**
28

1 **(4) Viewing the contents of a locked receptacle, such as a locker, containing**
2 **an employee's or applicant's possessions.**

3
4 **(5) Secretly observing or video-recording an employee or applicant in a place**
5 **to which visual access is limited and at which the employee's or applicant's**
6 **presence is authorized.**

7
8 **(6) Secretly listening to, audio-recording, or video-recording with audio**
9 **capability an employee or applicant in a place to which audio access is**
10 **limited and at which the employee's or applicant's presence is authorized.**

11
12 **(7) Secretly intercepting an employee's or applicant's telephonic**
13 **conversation.**

14
15 **(8) In any manner other than those listed in (1) through (7) above, intruding**
16 **upon an employee's or applicant's reasonable expectation of privacy.**

17
18 **For purposes of this section, an "applicant" is an individual applying for**
19 **employment with the employer.**

20

21 **Comment on § 5.03:**

1 a. Section 5.03 sets forth the forms of employer conduct that intrude upon employee
2 privacy interests. The section attempts to limit the widely-recognized concerns with
3 circularity, subjectivity and unpredictability under the federal constitutional “reasonable
4 expectation of privacy” test by identifying areas in which there is widespread agreement
5 that employee privacy interests exist. Like the federal constitutional “reasonable
6 expectation of privacy” test, however, the test for an intrusion upon employee privacy
7 interests is only a threshold requirement for establishing a privacy violation; under §
8 5.02(2), an unlawful intrusion upon employee seclusion additionally requires that the
9 employer conduct is highly offensive to a reasonable person in the employment context.

10

11 b. *Examining an employee’s or applicant’s bodily products; monitoring an*
12 *employee or applicant engaged in an excretory function typically performed outside*
13 *of the presence of others..* Bodily products and functions have traditionally been
14 regarded as areas in which individuals, including employees and applicants for
15 employment, enjoy substantial protection of their privacy. The most frequent
16 situation in which employers monitor employees’ or applicants’ bodily products or
17 functions is in testing urine or other bodily substances for evidence of drug use. In
18 drug testing of urine, for instance, employers examine employees’ or applicants’
19 urine for evidence of drug use and typically also monitor employees or applicants as
20 they engage in the act of urination to protect the integrity of urine samples. Under §§
21 5.03(1) and 5.03(2), such employer conduct intrudes upon employee privacy interests.
22 Whether monitoring an employee’s or applicants’ bodily products or functions

1 ultimately constitutes an unlawful intrusion upon employee seclusion, however,
2 depends upon whether the employer conduct is highly offensive to a reasonable
3 person in the employment context. See § 5.02. In most settings, neither the testing of
4 urine or other bodily substances for evidence of drug use nor the monitoring of
5 employees or applicants while they produce urine samples for such testing will
6 constitute an unlawful intrusion upon employee seclusion. See § 5.06.

7

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

18

19 d. *Viewing the contents of a locked receptacle containing an employee's or*
20 *applicant's possessions.* Section 5.03(4) provides that viewing the contents of a locked
21 receptacle, such as a locker, that contains an employee's or applicant's possessions
22 intrudes upon employee privacy interests. Receptacles (such as purses) that do not lock

1 are not covered by § 5.03(4), but viewing the contents of such receptacles may intrude
2 upon an employee's or applicant's reasonable expectation of privacy under § 5.03(8).
3 With respect to receptacles that lock, a receptacle is less likely to count as "locked" for
4 purposes of § 5.03(4) if the employer retains a copy of the key or other means of access
5 to the lock and so informs the employee or applicant than if the employer does not retain
6 such a copy. Whether viewing the contexts of a locked receptacle containing an
7 employee's or applicant's possessions ultimately constitutes an unlawful intrusion upon
8 employee seclusion depends upon whether the employer conduct is highly offensive to a
9 reasonable person in the employment context. See § 5.02.

10

11 Illustration:

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

20

21 e. *Observing or video-recording an employee or applicant in a place to which visual*
22 *access is limited and at which the employee's or applicant's presence is authorized. For*

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

20

21 **Illustrations:**

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

5
6 3. C is employed by E as a security guard. In the course of
7 investigating C's possible violation of E's policy prohibiting "fraternization"
8 with employees of companies to which E is providing security services, E
9 secretly observes C's house and the cars coming to and going from the house.
10 Because all of the activities observed by E were in plain view and readily
11 observable by any member of the public using the naked eye, E has not
12 observed C in a place to which visual access is limited. E's activities do not
13 intrude upon C's employee privacy interests.

14
15 4. D is an employee at a large industrial company. In the course of
16 investigating a report of stolen property, D's employer commences secret
17 video-recording of employees' activities in the office of the nurse manager at
18 the company. D is not authorized to enter the nurse manager's office. Secret
19 video-recording of D in the nurse manager's office does not intrude upon D's
20 employee privacy interests.

21

1 5. F is a nurse at the company described in Illustration 4. F's job
2 responsibilities sometimes call for F to work in the office of the nurse
3 manager. The nurse manager's office is a place to which visual access is
4 limited. Secret video-recording of F performing job responsibilities in the
5 nurse manager's office intrudes upon F's employee privacy interests.
6 Whether or not such video-recording ultimately constitutes an unlawful
7 intrusion upon F's employee seclusion depends upon whether the employer
8 conduct is highly offensive to a reasonable person in the employment context.

9

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

19

20 g. *Intercepting an employee's or applicant's telephonic conversation. Secretly*
21 *using an electronic or other device to hear, audio-record, or otherwise intercept an*
22 *employee's or applicant's telephonic conversation intrudes upon employee privacy*

1 interests for much the same reasons as secret visual or audio surveillance constitutes such
2 an intrusion. See comments e and f and illustrations 2 through 5 above. Under the rule
3 stated in § 5.03(7), the telephonic conversation need not occur on an employer's phone
4 for secret interception to intrude upon employee privacy interests.

5

6 **Illustration:**

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

8 Without knowledge of the wiretaps, G, an employee, uses an office phone.

9 The secret wiretapping of the phone used by G intrudes upon G's employee
10 privacy interests. Whether or not such wiretapping ultimately constitutes an
11 unlawful intrusion upon G's employee seclusion depends upon whether the
12 employer conduct is highly offensive to a reasonable person in the
13 employment context.

14

15 h. *The role of secrecy in the intrusiveness of observing, video-recording, listening to,*
16 *or audio-recording employee or applicants, or intercepting their telephonic*
17 *conversations.* Under §§ 5.03(5), 5.03(6), and 5.03(7), observing, video-recording,
18 listening to, or audio-recording employees or applicants, or intercepting their telephonic
19 conversations. may intrude upon employee privacy interests only if it is done in secret.
20 The rationale for the secrecy requirement in these sections is that observing, video-
21 recording, listening to, or audio-recording employees or applicants, or intercepting their
22 telephonic conversations, lacks some of the inherent invasiveness of monitoring

1 employees' or applicants' bodily products or functions (covered in §§ 5.03(1) and
2 5.03(2)), observing employees' or applicants' bodies in a state of undress (covered in §
3 5.03(3)), and viewing the contents of a locked receptacle containing an employee's or
4 applicant's possessions (covered in § 5.03(4)). In the latter situations (to which no
5 secrecy requirement applies under this section), the employer conduct retains most, if not
6 all, of its intrusiveness even when the employee or applicant knows of the conduct. By
7 contrast, if employees or applicants are aware that they are being observed, video-
8 recorded, listened to, or audio-recorded (outside the context of engaging in traditionally
9 private excretory functions or being in a state of undress), or are aware that their
10 telephonic conversations are being intercepted, then they have the opportunity to alter
11 their behavior in response to the employer conduct, and ordinarily this opportunity will
12 significantly reduce the degree of intrusiveness of this conduct.

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

18

19 **Illustrations:**

20 7. H is an administrative employee of a large employer. H's
21 supervisor has video cameras installed in the open in the supervisor's private
22 office and certain other areas. The staff, including H, are informed of the

1 installation. Video-recording of H in H's supervisor's office is not secret,
2 and, thus, such video-recording does not intrude upon H's employee privacy
3 interests.

4
5 8. Same facts as in illustration 7 except that the video camera in H's
6 supervisor's private office is hidden and not specifically known to H, although
7 H's supervisor has generally notified the staff that they may be video-recorded
8 at the workplace at any time. Video-recording of H in H's supervisor's office
9 is secret, and, thus, if H's presence in the office is authorized, video-recording
10 of H intrudes upon H's employee privacy interests. Whether or not such
11 video-recording ultimately constitutes an unlawful intrusion upon H's
12 employee seclusion depends upon whether the employer conduct is highly
13 offensive to a reasonable person in the employment context.

14
15 i. *Intruding upon an employee's or applicant's reasonable expectation of privacy.*
16 Section 5.03(8) provides that employer conduct not embraced by §§ 5.03(1) through
17 5.03(7) nonetheless intrudes upon employee privacy interests if it constitutes an intrusion
18 upon an employee's or applicant's reasonable expectation of privacy. The concept of an
19 employee's or applicant's reasonable expectation of privacy is familiar from cases arising
20 under the federal Constitution. Apart from express or implied agreement by an employee
21 or applicant (covered in § 5.04 below), whether an employee or applicant has a
22 reasonable expectation of privacy will typically turn on background societal norms.

1

2 **Illustration:**

3 9. A letter marked “personal” and addressed to I, an employee, arrives
4 at I’s workplace. I’s employer opens the letter. Under background societal
5 norms, I has a reasonable expectation of privacy in the contents of the letter.
6 The opening of the letter intrudes upon I’s employee privacy interests.
7 Whether or not the opening of the letter ultimately constitutes an unlawful
8 intrusion upon I’s employee seclusion depends upon whether the employer
9 conduct is highly offensive to a reasonable person in the employment context.

10

11

12

13

REPORTER’S NOTE

14 Comment a. On the general circularity, subjectivity and unpredictability of the
15 “reasonable expectation of privacy” test, see *Kyllo v. United States*, 533 U.S. 27 (2001).

16

17 Comment b. Cases concluding that monitoring employees’ or applicants’ bodily products
18 or functions in the course of drug testing implicates common law employee privacy
19 interests include *Rushing v. Hershey Chocolate-Memphis*, 2000 WL 1597849 (6th Cir.)
20 (applying Tennessee law); *Borse v. Piece Goods Shop*, 963 F.2d 611 (3rd Cir. 1992)
21 (applying Pennsylvania law); *Baggs v. Eagle-Pitcher Industries*, 957 F.2d 268 (6th Cir.
22 1992); *Jones v. HCA Health Services of Kansas*, 1998 WL 159505 (D.Kan.); *Frye v. IBP,*
23 *Inc.*, 15 F. Supp. 2d 1032 (D.Kan. 1998); *Luedtke v. Nabors Alaska Drilling Co.*, 768
24 P.2d 1123 (Alaska 1989); *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81, 97
25 (1992); *Seta v. Reading Rock*, 100 Ohio.App.3d 731 (1995); *Gilmore v. Enogex*, 878
26 P.2d 360 (Okl. 1994); and *Twigg v. Hercules Corp.* 185 W.Va. 155 (1990).

27

28 Comment c. Cases involving direct observation drug testing include *Kelley v.*
29 *Schlumberger Technology Corp.*, 849 F.2d 41 (1st Cir. 1988) (applying Louisiana law);
30 *Wilcher v. City of Wilmington*, 60 F. Supp. 2d 298 (D. Del. 1999); and *Hennesey v.*
31 *Coastal Eagle Point Oil Co.*, 129 N.J. 81 (1992).

32

33 Comment d. Illustration 1 is based on *K-Mart Corp. v. Trotti*, 677 S.W.2d 632 (Tex.
34 App. 1 Dist. 1984).

1
2 Comment e. United States Supreme Court precedent reflects the principle that visual
3 access to a place is limited if the activities undertaken at that place cannot be observed by
4 a member of the public using either the naked eye or technology that is generally
5 available to members of the public. Compare *Kyllo v. United States*, 533 U.S. 27 (2001)
6 (in which heat patterns were observed from a public street using thermal imaging, a
7 technique not available to members of the public), with *California v. Ciraolo*, 476 U.S.
8 207 (1986) (in which marijuana plants were observed with the naked eye at an altitude of
9 1000 feet from public airspace, a technique available to members of the public). The
10 facts of illustration 2 are based on *Melder v. Sears, Roebuck & Co.*, 731 So.2d 991
11 (La.Ct.App. 1991). Illustration 3 is based on *Fayard v. Guardsmark, Inc.*, 1989 WL
12 145958 (E.D. La. 1989). The facts of illustrations 4 and 5 come from *Acuff v. IBP, Inc.*,
13 77 F. Supp. 2d 914 (C.D. Ill. 1999).

14
15 Comment g. Illustration 6 is based on *Awbrey v. Great Atlantic & Pac. Tea Co.*, 505 F.
16 Supp. 604 (D.C. Ga. 1980). Intercepting an employee's telephonic conversation is
17 regulated not only by common law but also by the Electronic Communications Privacy
18 Act of 1986, see 18 U.S.C. §2511(1)(b); see also 18 U.S.C. §2510(5)(a) (business
19 extension provision); and also by various state statutes, see, e.g., 720 Ill. Comp. Stat.
20 5/14-1 to -9; Mass. Gen. Laws ch. 272, § 99.

21
22 Comment h. Illustration 7 is based on *Price v. City of Terrell*, 2000 WL 1872081 (N.D.
23 Tex.), at *6 n.10, *8 (addressing intrusion upon seclusion claim). Illustration 8 is a
24 variation of illustration 7.

25
26 Comment i. As to an employee's or applicant's reasonable expectation of privacy under
27 the Fourth Amendment, U.S. Const. Am. IV, see *O'Conner v. Ortega*, 480 U.S. 709
28 (1987); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National*
29 *Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); and *Chandler v. Miller*,
30 520 U.S. 305 (1997). Illustration 9 is based on *Vernars v. Young*, 539 F.2d 966 (3d Cir.
31 1976).

32
33
34 **§ 5.04. Intrusion upon Employee Privacy Interests – The Role of Employee or**
35 **Applicant Agreement**

36
37 **(1) Notwithstanding an employee's or applicant's express or implied**
38 **agreement to submit to a particular form of employer conduct, the employer**

1 **conduct intrudes upon employee privacy interests if it falls within §§ 5.03(1)-**
2 **5.03(7).**

3

4 **(2) With respect to employer conduct that does not fall within §§ 5.03(1)-**
5 **5.03(7), an employee’s or applicant’s express or implied agreement to submit**
6 **to the employer conduct:**

7

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

10

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

14

15 **Comment on § 5.04:**

16 a. This section addresses the relationship between an employee’s or applicant’s
17 agreement to submit to a particular form of employer conduct and the determination
18 whether that conduct intrudes upon employee privacy interests. In general, this section
19 rejects a controlling role for employee or applicant “consent” in determining whether an
20 employer conduct intrudes upon employee privacy interests. In the context of employer
21 conduct falling within §§ 5.03(1)-5.03(7), § 5.04(1) provides that the conduct intrudes
22 upon employee privacy interests notwithstanding the employee’s or applicant’s

1 agreement (including through a collective bargaining agreement) to submit to the
2 conduct. Whether the conduct ultimately constitutes an unlawful intrusion upon
3 employee seclusion, however, depends upon whether the employer conduct is highly
4 offensive to a reasonable person in the employment context.

5

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

12

13 c. *Employee or applicant agreement and searching of locked receptacles.* A further
14 limit on the principle reflected in § 5.04(1) involves employer searching of locked
15 receptacles (covered in § 5.03(4)). While § 5.04(1) rejects a controlling role for
16 employee or applicant agreement in that context, an employer wishing to be able to
17 search or otherwise view locked receptacles without intruding upon employee privacy
18 interests may be able to do so simply by retaining its own copy of the key or other means
19 of access to the receptacle and so informing the employee or applicant. See comment d
20 to § 5.03.

21

1 d. *Employee or applicant agreement as a factor in an employee's or applicant's*
2 *reasonable expectation of privacy.* Under the rule stated in § 5.04(2), an employee's or
3 applicant's express or implied agreement does not necessarily eliminate the employee's
4 or applicant's reasonable expectation of privacy in the area of the employer conduct, but
5 such agreement is a factor supporting the conclusion that the employee or applicant lacks
6 such a reasonable expectation of privacy. This approach simply reflects the common-
7 sense idea that, in some circumstances, what an employee or applicant may reasonably
8 expect will be shaped in part by the agreement that the employee or applicant is asked to
9 give either expressly or impliedly. By the same token, what an employee or applicant
10 may reasonably expect will also be shaped in part by any employer-side representations
11 or acts suggesting affirmative protections of privacy; such representations or acts, as
12 much as representations or acts suggesting the absence of privacy protections, are
13 relevant to the employee's or applicant's reasonable expectation of privacy.

14

15

REPORTER'S NOTE

16

17 Comment a. A number of courts faced with claims that employer drug testing constitutes
18 an unlawful intrusion upon seclusion have given controlling weight to an employee's or
19 applicant's agreement to submit to the testing in rejecting the claims of unlawful
20 intrusion upon seclusion. See *Jevic v. Coca-Cola Bottling Co. of New York*, 1990 WL
21 109851 (D.N.J.); *Farrington v. Sysco Food Services*, 865 S.W.2d 247 (Ct.App.Tex.
22 1993); *Stein v. Davidson Hotel Co.*, 1996 WL 230196 (Tenn. Ct. App.); see also *Frye v.*
23 *IBP, Inc.*, 15 F.Supp.2d 1032 (D.Kan 1998) (employee agreement would have been
24 dispositive against claim that drug testing constituted an unlawful intrusion upon
25 seclusion had the drug testing been within the scope of the employee's agreement);
26 *Jennings v. Minco Technology Labs, Inc.*, 765 S.W.2d 497 (Tex. App. 1989) (discharge
27 of employee based on positive drug test result was not wrongful discharge in violation of
28 public policy, including the public policy against unlawful intrusion upon seclusion,
29 because employee's agreement to submit to drug testing negated any possible
30 unlawfulness of drug testing). Section 5.04(1) rejects the idea that an employer's

1 monitoring of an employee’s or applicant’s bodily products or functions does not intrude
2 upon employee privacy interests if the employee or applicant agrees to submit to the
3 monitoring. Whether monitoring an employee’s or applicant’s bodily products or
4 functions ultimately constitutes an unlawful intrusion upon employee seclusion, however,
5 depends upon whether the particular conduct is highly offensive to a reasonable person in
6 the employment context (§ 5.02(2)), and, in most settings, employer drug testing does not
7 constitute an unlawful intrusion upon employee seclusion (§ 5.06).

8
9
10 **§ 5.05 Offensiveness to a Reasonable Person in the Employment Context – The Role**
11 **of Employee or Applicant Agreement**

12
13 **Whether employer conduct is highly offensive to a reasonable person in the**
14 **employment context is not affected by an employee’s or applicant’s express**
15 **or implied agreement to submit to the employer conduct.**

16
17 **Comment on § 5.05:**

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

21
22 **REPORTER’S NOTE**

23
24 Comment a. As stated just above, a number of courts faced with claims that employer
25 drug testing constitutes an unlawful intrusion upon seclusion have given controlling
26 weight to an employee’s or applicant’s agreement to submit to the testing in rejecting the
27 claims of unlawful intrusion upon seclusion. See cases cited in Reporter’s Note to § 5.04.
28 While § 5.05 rejects a role for employee or applicant agreement in determining whether
29 employer conduct is highly offensive to a reasonable person in the employment context, §

1 5.06 provides that, in most settings, employer drug testing does not constitute an unlawful
2 intrusion upon employee seclusion.
3

4 **§ 5.06 Employer Drug Testing**

5

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

8
9 **(1) the testing procedure used is especially invasive; and**

10
11 **(2) the degree of invasiveness is unreasonable in light of the employer's**
12 **business-related reasons for drug testing.**

13 14 **Comment on § 5.06:**

15 a. Employer drug testing programs have been a major site of litigation over
16 employee privacy rights. Section 5.06 applies the general rules set forth in §§ 5.02-5.04
17 to the context of employer drug testing. Under the definition of intrusion upon employee
18 privacy interests in §§ 5.03(1) and 5.03(2), employer drug testing constitutes such an
19 intrusion whenever it involves monitoring of an employee's or applicant's bodily
20 products or functions. However, under the balancing test stated in § 5.02(2) for
21 determining an unlawful intrusion upon employee seclusion, employer drug testing does
22 not constitute such an unlawful intrusion unless the degree of invasiveness of the drug
23 testing outweighs the employer's business-related reasons for engaging in the drug

1 testing. Across a broad range of employment contexts and types of drug testing
2 (including random, periodic, and suspicion-based), courts addressing common law
3 privacy claims have found that employers' business-related reasons for drug testing
4 suffice to justify such testing. Accordingly, under the rule stated in this section,
5 employer drug testing that does not involve an especially invasive testing procedure does
6 not constitute an unlawful intrusion upon employee seclusion; no particularized inquiry
7 into the employer's business-related reasons for drug testing is required in these cases.
8 Where the specific testing procedure used is especially invasive, however, employer drug
9 testing constitutes an unlawful intrusion upon employee seclusion if the degree of
10 invasiveness is unreasonable in light of the employer's business-related reasons for drug
11 testing. Apart from the general rule stated in § 5.06, employer drug testing may violate a
12 constitutional provision or state statute, as discussed in comments b and f below.

13

14 b. *No requirement of safety-related or other similar employer interest in drug testing*
15 *– in general.* The rule stated in § 5.06 does not require that an employer wishing to
16 engage in drug testing advance a specific safety-related or other similar interest in
17 detecting and deterring drug use in order to avoid liability for an unlawful intrusion upon
18 employee seclusion. This is true whether the employer's testing program calls for
19 random testing, periodic testing, or suspicion-based testing and whether it is employees
20 or applicants who are tested. Such a specific employer interest is required, however, for
21 drug testing by public employers under the federal Constitution and may also be required
22 by state constitutional provisions or state statutes.

1

2 *c. Degree of invasiveness in administering a drug testing program.* While all forms
3 of monitoring an employee's or applicant's bodily products or functions constitute
4 intrusions upon employee privacy interests under §§ 5.03(1) and 5.03(2), some forms of
5 such monitoring are substantially more invasive than others. Employer drug testing
6 programs that involve direct visual observation of the employee's or applicant's
7 production of urine are generally viewed as especially invasive. In some circumstances
8 such direct observation drug testing may constitute an unlawful intrusion upon employee
9 seclusion (and may also be actionable under state statutes or in tort as intentional or
10 negligent infliction of emotional distress); this may be especially likely to be so if the
11 direct observation drug testing is random or periodic, rather than suspicion-based, testing.
12 See § 5.02, illustration 3.

13

14 *d. The role of employee or applicant agreement.* Under §§ 5.03(1) and 5.04(1),
15 employer drug testing constitutes an intrusion upon employee privacy interests whenever
16 it involves monitoring or examination of an employee's or applicant's bodily products or
17 functions, regardless of an employee's or applicant's agreement to submit to the testing
18 procedure. Likewise, § 5.05, whether employer drug testing is highly offensive to a
19 reasonable person in the employment context is not affected by employees' or applicants'
20 agreement to submit to the testing procedure. Thus, if the procedure used in an employer
21 drug testing program is especially invasive and the invasiveness is unreasonable in light
22 of the employer's business-related reasons for drug testing, then the drug testing program

1 is an unlawful intrusion upon employee seclusion regardless of an employee's or
2 applicant's express or implied agreement to submit to the program. The limit on the role
3 of employee or applicant agreement under §§ 5.04(1) and 5.05, however, will generally
4 have little effect in the drug testing context because, under the present section, drug
5 testing does not constitute an unlawful intrusion upon employee seclusion as long as
6 either the procedure used in employer drug testing is not especially invasive or, if the
7 procedure is especially invasive, the invasiveness is reasonable in light of the employer's
8 business-related reasons for drug testing. Thus, most employer drug testing is clearly not
9 an unlawful intrusion upon employee seclusion under this section, wholly apart from the
10 issue of express or implied employee or applicant agreement.

11

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

18

19 f. *Drug testing statutes.* In some jurisdictions, employer drug testing is statutorily
20 prohibited except in limited circumstances. Restrictions include limiting drug testing to
21 cases of reasonable suspicion or probable cause, limiting drug testing to particular types

1 of employees or applicants, and regulating the conditions under which drug tests are
2 administered.

3 **REPORTER'S NOTE**

4
5 Comment a. For cases that address claims of unlawful intrusion upon seclusion in the
6 context of drug testing procedures that are not especially invasive and conclude that
7 employers' business-related reasons for drug testing suffice to justify the testing, see
8 *Rushing v. Hershey Chocolate-Memphis*, 2000 WL 1597849 (6th Cir.) (applying
9 Tennessee law); *Baggs v. Eagle-Pitcher Industries*, 957 F.2d 268 (6th Cir. 1992) (applying
10 Michigan Law); *Frye v. IBP, Inc.*, 15 F.Supp.2d 1032 (D. Kan. 1998); *DiTomaso v.*
11 *Electronic Data Systems*, 1988 WL 156317 (E.D. Mich. 1988); *Seta v. Reading Rock*,
12 100 Ohio. App.3d 731 (1995); *Groves v. Goodyear Tire & Rubber Co.*, 70 Ohio. App. 3d
13 656 (1991); see also *Gilmore v. Enogex, Inc.*, 878 P.2d 360 (Okl. 1994) (drug testing
14 case addressing a claim of wrongful discharge in violation of public policy, including the
15 public policy against unlawful intrusion upon seclusion, and concluding that employers'
16 business-related reasons for drug testing sufficed to justify the testing).

17 A few drug testing cases addressing claims of wrongful discharge in violation of
18 public policy, including the public policy against unlawful intrusion upon seclusion, have
19 suggested possible circumstances in which an employer's business-related reasons for
20 drug testing may not suffice to justify the testing – even outside the context noted in §
21 5.06 of especially invasive testing procedures. See *Luedtke v. Nabors Alaska Drilling*
22 *Co.*, 768 P.2d 1123 (Alaska 1989) (suggesting that employers' business-related reasons
23 for drug testing may not suffice to justify the testing in the case of employees in positions
24 that are not safety-sensitive); *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611 (3rd Cir.
25 1992) (applying Pennsylvania law) (remanding for a determination of whether the
26 particular employer's business-related reasons for drug testing sufficed to justify the
27 testing). And one court has squarely held, in addressing a claim of wrongful discharge in
28 violation of public policy, including the public policy against unlawful intrusion upon
29 seclusion, that in many circumstances employers' business-related reasons for drug
30 testing do not suffice to justify the testing. See *Twigg v. Hercules Corp.*, 185 W.Va. 155
31 (1990). Section 5.06 departs from the principle of these cases in stating, consistent with
32 the larger number of cases cited earlier in the preceding paragraph, that under ordinary
33 circumstances (not involving an especially invasive testing procedure) employer drug
34 testing is not an unlawful intrusion upon employee seclusion regardless of the employer's
35 specific business-related reasons for the drug testing.

36
37 Comment b. Courts have regularly upheld employer drug testing against claims of
38 unlawful intrusion upon seclusion both when there is no apparent safety-related or similar
39 employer interest in drug testing and when there is only a limited or generalized safety-
40 related interest (far less serious or significant than the sort of interest required for public
41 employers under the Fourth Amendment, see U.S. Const. Amend. IV). For cases in the
42 former category, see *Rushing v. Hershey-Memphis*, 2000 WL 1597849 (6th Cir.)

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

32 For application of state constitutional provisions requiring (similar to federal
33 constitutional law) a safety-related or other similar employer interest for drug testing, see,
34 e.g., *Landon v. Northwest Airlines*, 72 F.3d 620 (8th Cir. 1995) (applying California law);
35 *Robinson v. City of Seattle*, 10 P.3d 452 (Wash.Ct.App. 2000). For state statutes
36 requiring a safety-related or other similar employer interest, see, e.g., Conn. Gen. Stat.
37 31-51x (requiring, with limited exceptions, a safety-related interest for random drug
38 testing); Minn. Stat. Ann. Sec. 181.951(4) (requiring a safety-related interest for random
39 drug testing). Empirical evidence of the effects of employer drug testing in improving
40 safety outcomes in safety-sensitive occupations may be found in Mireille Jacobson, *Drug*
41 *Testing in the Trucking Industry: The Effect on Highway Safety*, 46 J. Legal Stud. 131
42 (2003).

43

1 Comment c. For state statutes prohibiting direct observation of urination in the course of
2 drug testing, see, e.g., Conn. Gen. Stat. 31-51w(a); Okla. Stat. Ann. Tit. 40. sec. 559(5).
3 On infliction of emotional distress from direct observation drug testing, see Kelley v.
4 Schlumberger Technology Corp., 849 F.2d 41 (1st Cir. 1988) (applying Louisiana law).

5
6 Comment d. As noted in comment a to § 5.04, some courts faced with claims that
7 employer drug testing constitutes an unlawful intrusion upon seclusion have given
8 controlling weight to the employee's or applicant's agreement to submit to the testing in
9 rejecting the claims of unlawful intrusion upon seclusion. See Jevic v. Coca-Cola
10 Bottling Co. of New York, 1990 WL 109851 (D.N.J.); Stein v. Davidson Hotel Co., 1996
11 WL 230196 (Ct.App. Tenn.); Farrington v. Sysco Food Services, 865 S.W.2d 247
12 (Ct.App.Tex. 1993). While that approach is inconsistent with the approach taken in §§
13 5.04 and 5.05, the ultimate outcome of the cases – that regardless of the employer's
14 particular business-related reasons for drug testing, the testing is not an unlawful
15 intrusion upon employee seclusion – remains the same under the present section because
16 there is no indication that any of these cases involved an especially intrusive drug testing
17 procedure.

18
19 Comment e. For cases finding no unlawful intrusion upon seclusion when an employee
20 or applicant refuses to submit to drug testing, see Rushing v. Hershey Chocolate-
21 Memphis, 2000 WL 1597849 (6th Cir.) (applying Tennessee law); Baggs v. Eagle-Pitcher
22 Industries, 957 F.2d 268 (6th Cir. 1992) (applying Michigan Law); Luedtke v. Nabors
23 Alaska Drilling, Inc., 768 P.2d 1123 (Alaska 1989); and Hart v. Seven Resorts Inc., 190
24 Ariz. 272 (1997). For successful claims of wrongful discharge in violation of public
25 policy in cases of refusal to submit to drug testing, see Borse v. Piece Goods Shop, Inc.,
26 963 F.2d 611 (3rd Cir. 1992) (applying Pennsylvania law); Twigg v. Hercules Corp., 185
27 W.Va. 155 (1990).

28
29 Comment f. For a compilation of state statutory restrictions on employer drug testing,
30 see Mark A. de Bernardo & Gina M. Petro, Guide to State and Federal Drug-Testing
31 Laws (13th ed. 2005) (providing a 50-state survey).

32