Enhanced Monitoring of White Collar Employees: Should Employers Be Required to Disclose?

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Technology enhances employers' ability to monitor the at-work activities of white collar employees.[1] As a consequence, employers increasingly utilize electronic devices to monitor telephone conversations, customer service operations, video display terminal (VDT) use, and other workplace activities in an attempt to objectively measure employee productivity, to pace work, and to combat crime.[2] This Comment examines the legal and economic effects of employers' enhanced monitoring of white collar employees and encourages the enactment of federal legislation requiring employers to disclose the use of enhanced monitoring to their employees.

In the typical white collar employment relationship, the employee is paid a wage or salary in exchange for services rendered. Compensation for roughly eighty-six percent of all employees is measured in units of time rather than output.[3] Although the employer can easily measure an employee's hours, the employer may find that measuring whether or not the employee is using that time efficiently is a far more difficult task. Consequently, because monitoring equipment is readily available to monitor employee efficiency, employers now use electronic monitoring to evaluate the performance of

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The authors would like to acknowledge the valuable assistance and comments of Professor Thomas J. Holdych of the University of Puget Sound School of Law and Professor Bruce Mann of the University of Puget Sound.

1. The term "enhanced monitoring" is used in this Comment to describe post-hiring monitoring of employees. Drug testing, honesty tests, polygraphs, and other employee screening techniques are not addressed in this Comment.

2. *See generally* Charles B. Craver, *The Inquisitorial Process In Private Employment*, 63 CORNELL L. REV. 1, 54-55 (1977); *New Means of Workplace Surveillance Seen Posing Legal Risks For Employers*, 193 Daily Lab. Rep. (BNA) A-13 (Oct. 6, 1989).

3. RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 2 (3rd ed. 1987).

four to six million employees.[4]

The effect of enhanced monitoring on the employment relationship depends upon the manner in which the employer implements the monitoring and the aversion to being monitored by the individual employee. Because the employment relationship exists for the economic benefit of both the employer and the employee, legal and economic considerations are significant in the employer's decision to monitor as well as the employee's decision to remain in a monitored environment. This Comment presents a five part legal and economic analysis of enhanced monitoring of white collar employees. Section I defines the employment contract. Section II provides an overview of the legal issues raised by enhanced monitoring of white collar employees. Section III discusses the economics of enhanced monitoring. Section IV presents an analysis of the legal and economic effects of an employer's enhanced monitoring of white collar employees. Finally, Section V describes and evaluates proposed federal legislation that would require employers to disclose the use of enhanced monitoring to employees.

I. THE EMPLOYMENT CONTRACT—EMPLOYMENT AT WILL

Roughly sixty-five percent of all American employees are hired on an at will basis.[5] Employees with employment contracts specifying the duration and terms of employment, union members employed under collective bargaining agreements, and civil servants comprise the remainder of the American labor pool. The unique economic and legal complexities presented by employment relationships involving union and civil service employees are not within the scope of this Comment.[6] As a result, this Comment will not address collective

4. John P. Furfaro & Maury B. Josephson, *Electronic Monitoring in the Workplace*, NEW YORK L.J., July 6, 1990, at 3, 32 n.1 (citing OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, THE ELECTRONIC SUPERVISOR: NEW TECHNOLOGY, NEW TENSIONS 28 (1987)).

5. Of the remainder, roughly 22% are union employees, and roughly 15% are federal or state government employees. *See* U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 299, 382, 419 (1990) (indicating number of government employees in 1987, total labor force in 1988, and union membership in 1988). *See generally* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only In Good Faith*, 93 HARV. L. REV. 1816 (1980) [hereinafter *Protecting At Will Employees*].

6. *See generally Protecting At Will Employees*, *supra* note 5, at 1837 n.109. Unionization has typically been unsuccessful among white collar, service sector, and

bargaining and civil service employment relationships. Instead, this Comment will focus solely on enhanced monitoring of white collar employees hired on either an at will basis or under an individual employment contract specifying the terms and duration of employment.

The employment contract can be either written or oral. Breach of a contract specifying the terms and duration of employment provides the employee with a contract action against the employer for lost wages, fringe benefits, reliance damages, and compensatory damages.[7] In the employment context, however, contracts specifying the terms and duration of employment are uncommon (roughly three percent or less of the total workforce).[8] The parties typically do not define all the terms of employment because high transaction costs, high information costs, and unequal bargaining power discourage complete negotiations and specified terms.[9] As a result, the scope of the employer's right to monitor is usually not defined by the parties.

Rather than define specific terms of employment and duration, the parties define only such basic terms of employment as wages, hours, and benefits. Under the doctrine of employment at will, an employment contract indefinite as to duration is terminable at will by either the employer or the employee.[10] In effect, employment at will is a series of unilateral contracts. The contract is formed when the employer unilaterally offers wage or salary compensation, and the employee accepts by either beginning or continuing to perform the job

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professional occupations. At the same time, these jobs are the fastest growing category. *Id.*

7. Michael H. Whitehill, *Damages in Employment Contract Cases*, 24 TRIAL MAG. 25 (July 1988).

8. *Protecting At Will Employees*, *supra* note 5, at 1830, 1837 n.2.

9. CHARLES G. BAKALY & JOEL M. GROSSMAN, THE MODERN LAW OF EMPLOYMENT RELATIONSHIPS § 3.3 (2d ed. 1989); *Protecting At Will Employees*, *supra* note 5, at 1831 ("[E]mployees may tend to discount substantially the risk of wrongful discharge, and as a result systematically undervalue job security. . . . In addition, most employees have only limited access to information about personnel relations in a firm and are unable to 'shop around' by comparing the firm's relative turnover rate and firing histories. Companies further contribute to the employee's predicament by promoting an image of job security that is not completely accurate." (footnotes omitted)).

10. Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 894, 568 P.2d 764, 767 (1977); *see* Odell v. Humble Oil & Ref. Co., 201 F.2d 123 (10th Cir.), *cert. denied*, 345 U.S. 941 (1953); *see also* Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977); *see generally Protecting At Will Employees*, *supra* note 5, at 1816.

offered.[11] In employment at will, despite the employee's expectations about the duration and nature of employment, the employee may be without a contract remedy when the employer alters the terms of the employment relationship. The employer's alteration of the terms of employment is simply an offer to the employee to accept a new unilateral employment contract. The employee may accept the contract and the new terms by continuing employment or reject the contract by resigning.

In the case of enhanced monitoring, strict application of the employment at will doctrine means that if the current employment contract does not limit the employer's right to utilize enhanced monitoring, then an employee has no basis for a breach of contract action when the employer implements such monitoring. Given that the white collar employment relationship is predominantly at will, are any legal restrictions placed on the employer's ability to utilize enhanced monitoring?

II. THE LEGAL BOUNDARIES OF ENHANCED MONITORING

Some type of employer monitoring of employees occurs in almost every employment relationship. Until recently, most white collar monitoring took the subjective form of random visual observation by the office supervisor. Historically, the supervisor observes the employees at work, and the employees are aware that they are being observed. In this context, courts have generally recognized that "the employer may exercise reasonable managerial rights of supervision even though this may not be specifically set forth in the parties' agreement."[12] Courts have upheld the employer's right to monitor employees for efficiency purposes, theft prevention, and compliance with employment regulations.[13]

As technology extended the employer's ability to monitor

11. *Protecting At Will Employees*, *supra* note 5, at 1818.

12. Craver, *supra* note 2, at 50; Thomas v. General Electric Co., 207 F. Supp. 792, 799 (W.D. Ky. 1962); *see* Picker X-Ray Corp., 39 Lab. Arb. Rep. (BNA) 1246 (1963); *see also* F & M Schaeffer Brewing Co., 40 Lab. Arb. Rep. (BNA) 199, 200 (1963).

13. *See Thomas*, 207 F. Supp. at 792; *Picker X-ray Corp.*, 39 Lab. Arb. Rep. (BNA) at 1246 (monitoring for efficiency purposes not a violation of employment contract); U.S. Steel Corp., 49 Lab. Arb. Rep. (BNA) 101 (1967) (monitoring for theft prevention permissible and "surreptitious nature of some techniques does not diminish their propriety"); FMC Corp., 46 Lab. Arb. Rep. (BNA) 335 (1966) (management properly concerned with employee theft and efficiency).

employee activities beyond mere supervision by a visibly present manager, the courts extended the employer's right to monitor. For example, still photographs, motion picture recordings, and closed circuit television monitoring of employees have been upheld as nothing more than an alternate method of supervision.[14] In *Thomas v. General Electric Co.*,[15] the United States District Court for the Western District of Kentucky ruled against an employee who sought nominal damages and injunctive relief prohibiting General Electric from utilizing pictures of plant operations in which the employee appeared.[16] Because the still photographs were taken solely to increase operating efficiency and to promote safety, the court dismissed the complaint.[17]

The employer's right to monitor is not without limits, however. When courts analyze employee monitoring, the propriety of monitoring depends on such factors as the nature of the monitoring, the employee's awareness of the monitoring, the classification of the monitored activity as business or private, and the egregiousness of the monitoring.[18] Constitutional issues are usually not a factor because Constitutional protection of employee privacy rights does not extend to private, non-governmental conduct.[19] Because Constitutional protections are limited and because statutory regulation of monitoring is currently limited to wiretap laws, employee challenges to employer monitoring are generally presented as contract or tort actions. Following a brief discussion of the wiretap laws, this Section will provide an overview of the legal aspects of enhanced monitoring, emphasizing the contract and tort actions available to an employee who believes that an employer is improperly utilizing enhanced monitoring.

A. *Partial Statutory Protection—Wiretap Laws*

Under the federal Omnibus Crime Control and Safe Streets Act of 1968 (Act), it is a crime to "intentionally inter-

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14. *Thomas*, 207 F. Supp. at 799; *FMC Corp.*, 46 Lab. Arb. Rep. (BNA) at 336; *see also* De Lury v. Kretchmer, 66 Misc. 2d 897, 899, 322 N.Y.S.2d 517, 519 (Sup. Ct. 1971).

15. 207 F. Supp. 792 (W.D. Ky. 1962).

16. *Id.* at 799.

17. *Id.*

18. *See* Watkins v. L.M. Berry Co., 704 F.2d 577 (11th Cir. 1983); *see also* James v. Newspaper Agency Corp., 591 F.2d 579 (10th Cir. 1979).

19. Griswold v. Connecticut, 381 U.S. 479 (1965).

cept . . . any wire, oral, or electronic communication."[20] In 1986, Congress extended the Act to private communication systems that affect interstate commerce. In addition, "electronic communication" was added to the activities protected by the Act, and the definition of "wire communication" was broadened to include digitized voice transmissions and voice transmissions by radio and fiber optic cable.[21]

Although electronic mail, digitized transmissions, and video teleconferences are now protected under the Act, the protection is limited to the content of the communications.[22] Thus, monitoring the existence of communications is not prohibited. Furthermore, broad exceptions for extension telephones and "providers of communications services" were retained in the 1986 amendment.[23]

Under the extension telephone exception, an employer can, "in the ordinary course of business," use an extension telephone to monitor employee calls.[24] In *James v. Newspaper Agency Corp.*,[25] telephone monitoring devices were considered within the ordinary course of business when employees were notified of their use and when the devices were used to protect employees from abusive calls and to instruct them on dealing with the public. In *Watkins v. L.M. Berry Co.*,[26] however, a supervisor's use of an extension phone to intercept employee's personal calls was not within the ordinary course of business. The *Watkins* court found that the employer had previously authorized personal calls and told employees that personal calls would only be monitored to the extent necessary to determine whether they were personal.[27] In such a case, the court held that monitoring of personal calls violated the Act.[28]

Under the communication services exception, phone companies and other providers of wire communication services are allowed to monitor employees to determine the quality of serv-

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20. 18 U.S.C. § 2511 (1)(a) (1989).

21. IRA MICHAEL SHEPARD & ROBERT L. DUSTON, WORKPLACE PRIVACY 65 (BNA Special Report) (1987) (citing 18 U.S.C. § 2510(1), (4), (5)(a), and (12) (1986)).

22. SHEPARD & DUSTON, *supra* note 21, at 65.

23. 18 U.S.C. § 2510(1), (4), (5)(a), and (12) (1989).

24. 18 U.S.C. § 2510(5)(a) (1989); Terry Morehead Dworkin, *Protecting Private Employees From Enhanced Monitoring: Legislative Approaches*, 28 AM. BUS. L.J. 59, 77 (1990).

25. 591 F.2d 579 (10th Cir. 1979).

26. 704 F.2d 577 (11th Cir. 1983).

27. *Id.* at 582.

28. *Id.* at 583.

ices being provided.[29] In *Simmons v. Southwestern Bell Telephone Co.*,[30] monitoring of a Southwestern Bell employee's personal calls was permissible when the employee placed the calls on customer-trouble report lines and the employee was previously warned not to use those lines for personal calls.[31] The court found that keeping the lines free for customers was a sufficient enough business interest to allow the employer to monitor the calls.

In summary, the broad exceptions to the Wiretap Act limit its applicability to the usual forms of enhanced monitoring that check an employee's speed, efficiency, or presence.[32] The limitations of the Act are clearly demonstrated by the Supreme Court's holding that an employer's use of a pen register, a device used to record telephone numbers dialed, is not prohibited by the Act.[33] Until new legislation is passed, employees must look beyond statutory protection for relief from an employer's improper use of enhanced monitoring.

B. Contracts

Under traditional contract law, if the employer's right to utilize enhanced monitoring is not restricted in the contract, the doctrine of employment at will provides little protection for an employee's expectations that such monitoring will not occur.[34] As already discussed, under the unilateral contract interpretation of employment at will, despite the employee's job expectations, the introduction of enhanced monitoring into the employment relationship effectively provides the employee with only two options: acceptance of the monitoring as a term of the unilateral contract or resignation of the position. However, in order to account for employee job expectations, many courts now recognize three general exceptions to employment at will: (1) public policy, (2) implied-in-fact promise, and (3) implied-in-law covenant of good faith and fair dealing.[35] These

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29. Dworkin, *supra* note 24, at 77.

30. 452 F. Supp. 392 (W.D. Okla. 1978), *aff'd*, 611 F.2d 342 (10th Cir. 1979).

31. *Id.* at 396.

32. Dworkin, *supra* note 24, at 79-80.

33. United States v. New York Tel. Co., 434 U.S. 159 (1977).

34. Note that the principle of equity allows the employee to rescind an oral or written employment contract entered into in reliance upon a misrepresentation by the employer that monitoring would not occur. *See* RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981).

35. Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985). In *Wagenseller*, the Arizona Supreme Court recognized a trend toward modifying the

exceptions represent a recognition that employment at will "often leaves many contingencies unsettled either because it is too costly to negotiate every term or because parties lack adequate information about risks."[36]

The first exception, public policy, permits an employee to recover in tort for wrongful discharge when the court finds that the employer's conduct undermined a clearly mandated public policy.[37] The tort of wrongful discharge will be discussed in the following section of this Comment.

The second exception permits an employee to recover on the basis of an implied-in-fact contract term. An implied-in-fact contract term is one that is inferred from the statements or conduct of the parties.[38] These terms may be inferred from employee handbooks, personnel policies, and oral or written representations regarding job security, benefits, and business usage and custom.[39] In a case involving an employee handbook, the Idaho Supreme Court recently stated that

> unless an employee handbook specifically negates any intention on the part of the employer to have it become part of the employment contract, a court may conclude from a review of the employee handbook that a question of fact is created regarding whether the handbook was intended by

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at will rule, appling both the public policy and the implied-in-fact promise exceptions to a hospital employee's suit for wrongful discharge and breach of contract. The court also recognized an implied covenant of good faith and fair dealing in the employment at will contract but rejected application of the covenant in situations where it would create a duty for the employer to terminate the employee only for just cause. *Id. See also* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), *modified in* Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980) (stating that every employment contract has an implied-in-law covenant of good faith and fair dealing that limits the employer's discretion to terminate an at will employee); Fortune v. Nat'l Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984) (adopting public policy and implied-in-fact promise but refusing to adopt implied-in-law covenant); Seubert v. McKesson Corp., 223 Cal. App. 3d 1514, 1520, 281 Cal. Rptr. 857, 861 (1990) ("While there is a presumption that employment is terminable at will, that presumption may be superseded by contract, express or implied, which limits the employer's right to discharge the employee."). *See Protecting At Will Employees*, *supra* note 5, at 1830-33.

36. *Protecting At Will Employees*, *supra* note 5, at 1832.

37. Joseph DeGiusseppe, Jr., *The Effect of the Employment-At-Will Rule On Employee Rights To Job Security And Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 30-34 (1981).

38. *Wagenseller*, 147 Ariz. at 381, 710 P.2d at 1036; *see* Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880, *reh'g denied*, 409 Mich. 1101 (1980); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983).

39. Kenneth T. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80's*, 40 BUS. LAW. 1, 17 (1984).

the parties to impliedly express a term of the employment agreement.[40]

The Michigan Supreme Court also recently applied the implied-in-fact exception and found that an employer was contractually precluded from discharging employees without cause when the employer made policy statements that employees would be dismissed for just cause.[41] If the employer has announced an employment policy, the courts have treated that policy as binding.[42]

The Eleventh Circuit has held that it was illegal for an employer to authorize employees to make personal calls and to then subsequently monitor those calls when made.[43] Such a holding demonstrates the potential for a court to find implied-in-fact contract terms where an employer's representations imply that enhanced monitoring will not occur. By analogy, an employer risks an action for breach of an implied-in-fact contract if the employer implies by action, representation, or policy that employee evaluations will be based on the employer's subjective observations and then subsequently, the employer bases employee evaluations on objective data gathered through enhanced monitoring.[44]

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40. Metcalf v. Intermountain Gas Co., 116 Idaho 622, 778 P.2d 744 (1989); *accord* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

41. *Toussaint*, 408 Mich. at 611, 292 N.W. 2d at 890; *see also* Eales v. Tanana Valley Medical-Surgical Groups Inc., 663 P.2d 958 (Alaska 1983); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). In the State of Washington, the implied-in-fact exception is narrower. An enforceable contract is only created when an employer "creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations." Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 230, 685 P.2d 1081, 1088 (1984); *accord* Baldwin v. Sisters of Providence, 112 Wash. 2d 127, 769 P.2d 298 (1989); Seikawitch v. Washington Beef Producers, 58 Wash. App. 454, 793 P.2d 994 (1990). Furthermore, where a personnel policy manual is merely a guideline to management and is not disseminated to employees, the employer is not contractually obligated to abide by the policies unless the manual contains statements that constitute a promise of specific treatment in a specific situation and the statements were justifiably relied upon by the employee. Stewart v. Chevron Chemical Co., 111 Wash. 2d 609, 762 P.2d 1143 (1988).

42. *Thompson*, 102 Wash. 2d at 230, 685 P.2d at 1088 (providing that once an employer announces a specific policy or practice, especially in light of the fact that the employer expects employees to abide by the same, the employer may not treat its promises as illusory); Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 381, 710 P.2d 1025, 1036 (1985).

43. Watkins v. L.M. Berry Co., 704 F.2d 577, 582 (11th Cir. 1983).

44. Although the theory of implied-in-fact promise is distinguishable from the doctrine of promissory estoppel, the courts frequently apply them interchangeably. Promissory estoppel operates to bind express promises. "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the

The third exception permits both contract and tort recovery for breach of an implied-in-law covenant of good faith and fair dealing.[45] This covenant requires that neither party impair the right of the other party to receive the benefit of the bargain.[46] Decisions in *Fortune v. National Cash Register Co.*[47] and *Monge v. Beebe Rubber Co.*[48] extended this implied covenant of good faith and fair dealing to employment at will contracts.[49] Following the decisions in *Fortune* and *Monge*, courts have recognized both tort and contract actions for bad faith by an employer.[50] The scope of this covenant is uncertain, however. Not all states recognize the implied-in-law covenant, and the modern trend in those states that do recognize the covenant is to drastically narrow its scope.[51]

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promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). Interestingly, while implied-in-fact promise is now an exception to the doctrine of employment at will in over half the states, courts have regularly refused to extend the doctrine of promissory estoppel to employment at will. DeGiusseppe, *supra* note 37, at 44. There are, however, cases in which promissory estoppel has been applied to employment at will. *See* Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981) (applying doctrine of promissory estoppel when an employer offered employment and an employee resigned prior employment and declined other offers in reliance on the offer); *see also* Bowers v. AT&T Technologies, Inc., 852 F.2d 361 (8th Cir. 1988) (holding that under Missouri law employees can recover damages based on reasonable detrimental reliance on an employer's detailed promises of employment).

45. *Wagenseller*, 147 Ariz. at 381, 710 P.2d at 1036; RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement.").

46. *Wagenseller*, 147 Ariz. at 383, 710 P.2d at 1038.

47. 373 Mass. 96, 364 N.E.2d 1251 (1977).

48. 114 N.H. 130, 316 A.2d 549 (1974).

49. *Fortune*, 373 Mass. at 106, 364 N.E.2d at 1257 (providing that salesman employed under a written terminable at will contract could recover for breach of implied covenant of good faith when the employer's purpose in terminating the employee was to avoid paying the employee commission on a five million dollar sale); *Monge*, 114 N.H. at 130, 316 A.2d at 549 (allowing employee hired for indefinite duration and fired after resisting the sexual advances of foreman to recover contract damages for breach of implied covenant of good faith and fair dealing); *accord* Pstragowski v. Metropolitan Life Ins. Co., 553 F.2d 1 (1st Cir. 1977) (providing that an employee by reason of the bad faith of his employer has a right of action for breach of contract notwithstanding the fact that he was an employee at will).

50. Gates v. Life of Mont. Ins. Co., 205 Mont. 304, 638 P.2d 1063 (1983) (recognizing a bad faith tort cause of action that was eliminated by The Montana Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -914 (1991)); Metcalf v. Intermountain Gas Co., 116 Idaho 622, 778 P.2d 744 (1989) (recognizing bad faith contract cause of action).

51. Willis v. Champlain Cable Corp., 109 Wash. 2d 747, 748 P.2d 621 (1988) (stating that an at will employment contract does not contain an implied covenant of good faith and fair dealing or a bad faith exception); *accord* Thompson v. St. Regis Paper Co., 102

Both the California and Idaho Supreme Courts have recently held that "a breach of the covenant is a breach of the employment contract and is not a tort."[52] Although limiting the covenant to actions in contract, California and Idaho have also rejected the bad faith standard as unworkable.[53] These courts have adopted the rule that "any action which violates, nullifies, or significantly impairs any benefit of the employment contract is a violation of the implied-in-law covenant."[54]

Enhanced monitoring modifies existing employment conditions.[55] For that reason, in those jurisdictions that recognize the covenant, a "general contract provision requiring management to preserve all working provisions beneficial to the employees might preclude implementation."[56] Thus, under the covenant, enhanced monitoring may be an actionable breach of the employment contract when the monitoring modifies employment conditions and deprives the employee of the benefit of the bargain.[57]

In employment at will, only when the employer's utilization of enhanced monitoring is against a legally or factually implied term of the employment contract can the employee allege that the monitoring breaches the employment contract. Thus, contract damages are only recoverable when the at will employee can demonstrate that the employer implied that monitoring would not occur, or where the employee can demonstrate that the employer's monitoring deprived the employee of the benefit of bargained-for employment.

Wash. 2d 219, 685 P.2d 1081 (1984); Foley v. Interactive Data Corp., 47 Cal. 3d 654, 700, 765 P.2d 373, 380, 254 Cal. Rptr. 211, 239 (1988) (eliminating bad faith tort cause of action). For a full analysis of the status of each state's recognition of the covenant, *see* JOHN C. MCCARTHY, RECOVERY OF DAMAGES FOR WRONGFUL DISCHARGE 2D (1990 and Supp. 1991) (illustrating six degrees to which the covenant is recognized: (1) jurisdictions recognizing bad faith contract cause of action, (2) jurisdictions recognizing bad faith tort cause of action, (3) jurisdictions recognizing limited "Massachusetts Version" of employer bad faith doctrine, (4) jurisdictions requiring public policy violation to establish employer bad faith, (5) jurisdictions declining to recognize bad faith cause of action in at will employment, and (6) unsettled jurisdictions).

52. *Metcalf*, 116 Idaho at 626, 778 P.2d at 748; *accord Foley*, 47 Cal. 3d at 700, 765 P.2d at 380, 254 Cal. Rptr. at 239; *see also* Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 384, 710 P.2d 1025, 1040 (1985).

53. *Metcalf*, 116 Idaho at 627, 778 P.2d at 749; *accord Foley*, 47 Cal. 3d at 700, 765 P.2d at 380, 254 Cal. Rptr. at 239.

54. *Id.*

55. Craver, *supra* note 2, at 62.

56. *Id.*

57. Misrepresentation by the employer that monitoring will not occur may also provide the employee with a tort action for deceit; *see infra* part II.C.

C. *Torts—The Common Law Right to Privacy*

Some uses of enhanced monitoring may provide an employee with a tort action. Depending on the manner in which enhanced monitoring is utilized, an employee may have a tort action for intrusion into the employee's right to privacy, wrongful discharge, or misrepresentation. Application of these tort actions to the employer's use of enhanced monitoring will be individually addressed.

1. Privacy

Although privacy issues are inherent in the intrusive nature of enhanced monitoring, the right to privacy guaranteed by the Fourth Amendment of the United States Constitution does not prohibit non-governmental intrusions.[58] Under the United States Supreme Court's interpretation of constitutional rights to privacy, only parties engaged in state action are constitutionally prohibited from invading an individual's privacy.[59] However, a constitutional right to privacy prohibiting certain non-governmental intrusions does exist under some state constitutions, such as California and Louisiana.[60] Furthermore,

58. *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1954); *see generally* 2 TUROW, PRIVACY LAW AND PRACTICE § 9.02 [3][d] (1990).

59. *Griswold*, 381 U.S. at 483. For the United States Supreme Court interpretations of the state action doctrine, *see also* Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (providing that threatened sale of furniture under New York statute permitting warehouseman to sell stored property does not constitute state action and therefore cannot violate Fourteenth Amendment); *see also* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (stating that termination of utility service by highly regulated private electrical company was not state action under the Fourteenth Amendment); Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (indicating that the Fourteenth Amendment creates no shield against merely private conduct); Lugar v. Edmonson Oil Co., 457 U.S. 922, 935 (1982) (providing that only conduct that may be fairly characterized as state action can violate the Fourteenth Amendment).

60. *See, e.g.*, Rulon-Miller v. IBM, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (applying CAL. CONST. art. I § 1 to private employers); LA. CONST. of 1974, art. 1, § 5; St. Julien v. South Central Bell Tel. Co., 433 So. 2d 847 (La. Ct. App. 1983). Washington State's Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7. In Southcenter Joint Venture v. NDPC, 113 Wash. 2d 413, 780 P.2d 1282 (1982), the Washington Supreme Court held that state action is required for free speech protection under WASH. CONST. art. I, § 7. The Washington Supreme Court stated in Seattle v. Mesiani, 110 Wash. 2d 454, 456, 755 P.2d 775, 776 (1988), that art. I, § 7 provides greater protection to individual privacy interests than the Fourth Amendment, and the Washington Court of Appeals stated in State v. Patterson, 51 Wash. App. 202, 204, 752 P.2d 945 946 (1988), that "the purpose of art. I, § 7 is to protect an individual's right to privacy rather than to curb governmental actions." Nevertheless, the Washington courts have not generally applied the Washington

private employees may be protected by the common law right to privacy that sounds in the tort of intrusion.[61] Because the courts have applied the same analysis to the invasion of employee privacy under both the state constitutional and the tort privacy actions, these actions will be addressed together.

The common law right to privacy protects employees from "an intentional interference with an interest in solitude or seclusion, either as to the person or as to the private affairs or concerns [of the person], of a kind that would be highly offensive to a reasonable man."[62] To create an action for invasion of privacy, the employer must intentionally intrude upon some aspect of the employee's private life in a manner that would be highly offensive to a reasonable person.[63]

While an employee "must face the prospect of discharge for failing or refusing to do his work in accordance with the employer's directions . . . there are innumerable facets of the employee's life that have little or no relevance to the employment relationship, and over which the employer should have no control."[64] Employee expectations of privacy in non-busi-

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constitution to prohibit non-governmental intrusions. *See also* State v. Gunwall, 106 Wash. 2d 54, 65, 720 P.2d 808, 814 (1986). In other cases, however, the Washington Supreme Court applied the privacy protection of art. I, § 7 to permit termination of life-support systems for terminably ill patients and to secure a sixteen year old woman's right to an abortion. *See In re* Colyer, 99 Wash. 2d 114, 660 P.2d 738 (1983); State v. Koome, 84 Wash. 2d 901, 530 P.2d 260 (1975). Privacy protection was extended, in those cases, because criminal sanctions, state licensing of physicians, judicial involvement in guardianship, and the state's *parens patriae* responsibility for incompetents were sufficient factors on which to base a finding of a nexus of state action.

For a full discussion of the state action doctrine in the State of Washington, *see* David M. Skover, *The Washington Constitutional "State Action" Doctrine: A Fundamental Right to State Action*, 8 U. PUGET SOUND L. REV. 221 (1985). Professor Skover argues that the Washington State Constitution does not compel the complete adoption of the United States Supreme Court's interpretation of the state action doctrine under the federal Constitution and concludes that because the state action doctrine fulfills no instrumental or normative state constitutional function, reason dictates that Washington should abandon the doctrine.

61. Baggs v. Eagle-Picher Indus., Inc., 750 F. Supp. 264 (W.D. Mich. 1990); PROSSER & KEETON, THE LAW OF TORTS § 117 (5th ed. 1984).

62. RESTATEMENT (SECOND) OF TORTS § 652B (1977); *see, e.g.*, Nader v. General Motors Corp., 25 N.Y.2d 560, 568, 255 N.E.2d 765, 769, 307 N.Y.S.2d 647, 653 (1970) ("privacy is invaded only if the information sought is of a confidential nature and the defendant's conduct was unreasonably intrusive").

63. RESTATEMENT (SECOND) OF TORTS § 652B cmt. a (1977).

64. Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1421 (1967); *see, e.g.*, Semore v. Pool, 217 Cal. App. 3d 1087, 1097, 266 Cal. Rptr. 280, 285 (1990) (dictum).

ness areas such as restrooms, changing rooms, and off-the-job activities are statutorily protected in some states.[65] While the employer's monitoring of the personal activities of the employee is restricted, privacy concerns may not preclude the employer from monitoring the business activities of the employee.

No bright lines can be drawn between personal and business activities.[66] In determining whether enhanced monitoring violates an employee's right to privacy, three factors are considered: the means used in obtaining the information, the employer's purpose in obtaining the information, and the nature of the information sought.[67] Like the wiretap laws, where the employer gives notice that monitoring will occur in a reasonably intrusive manner for a business concern, the employee cannot have a reasonable expectation of privacy.[68] Notice defines what the employer expects to be private and allows the employee either to seek alternative employment or implicitly consent to reasonable monitoring by continuing employment, thus negating the employee's expectation of privacy.[69] The California Court of Appeals recently declined to restrict an employer's use of a pupillary reaction eye examination as a method of drug testing, stating that "the employer can always [monitor] its employees to see if they are perform-

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65. TUROW, *supra* note 58, at § 9.02[3]. For statutes protecting employees' off-the-job privacy, see ILL. REV. STAT. ch. 48 ¶ 2001-12 (1986); MICH. STAT. ANN. § 17.62 (1), (8) (Callaghan 1988). For a statute protecting employee's restroom and locker room privacy, see CONN. GEN. STAT. § 31-48(b) (1987).

66. *See* Blades, *supra* note 64, at 1407.

67. *See generally* PROSSER & KEETON, *supra* note 61, at § 117; *see Nader*, 25 N.Y. 2d at 568, 255 N.E.2d at 769, 307 N.Y.S.2d at 653 ("Privacy is invaded only if the information sought is of a confidential nature and the defendant's conduct was unreasonably intrusive, . . . mere gathering of information about an individual does not give rise to a cause of action under intrusion.").

68. *Baggs*, 750 F. Supp. at 272; *see also* Saldana v. Kelsey-Haynes Co., 178 Mich. App. 230, 233-235, 443 N.W.2d 382, 384 (1989) (stating that employee's privacy expectations subject to legitimate interest of employer in investigating suspicions that employee's work-related disability was pretextual).

69. The effect of an employer's notice that locker rooms and dressing rooms are being monitored on the employee's expectation of privacy has yet to be addressed by the courts. However, cases have held that retail merchants can negate a customer's reasonable expectation of privacy in store dressing rooms by posting notice that the rooms are under surveillance. *See* Lewis v. Dayton Hudson Corp., 128 Mich. App. 165, 172, 339 N.W.2d 857, 861 (1983); Gillet v. State, 588 S.W.2d 361, 363 (1979). By analogy, "providing notice [to employees] that such areas as dressing rooms and locker rooms are under surveillance serves to defeat [the employee's] expectations of privacy." TUROW, *supra* note 58, at § 9.03[3][d].

ing the job properly and safely."[70] The court noted that because the employer was only observing what was visually obvious, the means of sensory monitoring was non-intrusive.[71]

The right to privacy provides only partial common law protection for the white collar employee. Where non-intrusive means of monitoring are used for the business purpose of ensuring safety, productivity, or performance, courts will generally tolerate the employer's action.[72] But, where the employer has not notified the employee that his activities are being monitored and the monitored activity is personal rather than business in nature, or where the monitoring is unreasonably intrusive, the employee may have a tort cause of action under the common law right to privacy.[73] Damages recoverable under such an action may include actual harm, mental distress, and special damages.[74] Special damages may also be awarded for loss of employment if the invasion of privacy was a substantial factor in the loss of that employment.[75]

2. Wrongful Discharge

"Workplace privacy litigation occurs most frequently when employees are terminated."[76] Privacy issues under the public policy exception to the doctrine of employment at will are regularly addressed as wrongful discharge. To be actionable under the public policy exception to employment at will, a wrongful discharge must affect a singularly public interest and not merely a private or proprietary interest.[77] The instances in

70. Semore v. Pool, 217 Cal. App. 3d 1087, 1097, 266 Cal. Rptr. 280, 287 (1990) (dictum).

71. *Id.*

72. TUROW, *supra* note 58, at § 9.02[3].

73. *See, e.g.*, TUROW, *supra* note 58, at § 9.02[3]; PROSSER & KEETON, *supra* note 61, at § 117.

74. TUROW, *supra* note 58, at § 9.06[5]; *see also* RESTATEMENT (SECOND) OF TORTS § 652H (1977).

75. TUROW, *supra* note 58, at § 9.06[5].

76. SHEPARD & DUSTON, *supra* note 21, at 91.

77. Norman v. Rec. Centers of Sun City, 156 Ariz. 425, 430, 752 P.2d 514, 519 (1988); *accord* Luck v. Southern Pac. Transp. Co., 218 Cal. App. 3d 1, 29, 267 Cal. Rptr. 618, 635 (1990) (stating that employee's termination for refusal to submit to urinalysis drug testing was not a violation of public policy). The jurisdictions that recognize the public policy exception differ in opinion about the sources from which public policy may be defined. MCCARTHY, *supra* note 51, at 3. Strict jurisdictions, including Indiana, Kentucky, Michigan, and Wisconsin, require a statutory expression of public policy. *See, e.g.*, Martin v. Platt, 179 Ind. App. 688, 386 N.E.2d 1026 (1979). Liberal jurisdictions, including Arizona, Hawaii, New Jersey, and Vermont, accept expressions of public policy from other sources such as court decisions, regulations, and

which courts have recognized a wrongful discharge cause of action on public policy grounds fall into four categories: (1) employees discharged for refusing to commit an unlawful act, (2) employees discharged for performing a public obligation, (3) employees discharged for exercising a legal right or privilege, and (4) employees discharged for whistleblowing.[78]

The first category encompasses employees discharged for refusing to commit unlawful, wrongful, or unethical acts.[79] In *Petermann v. Local 396, International Brotherhood of Teamsters*,[80] wrongful discharge liability was imposed on a labor union for terminating an employee because he refused to perjure himself before a state legislative committee.[81] Cases in this category have allowed employees recovery in tort for discharges that result from employees refusing to violate federal or state laws and "for refusing to perform tasks that were either unlawful or unethical."[82]

In the second category are employees discharged for performing a public obligation. Employees fired for performing various public obligations, such as attending jury duty, phoning the police, and refusing to ignore a subpoena, have stated a cause of action under this category.[83] In *Nees v. Hocks*,[84] the Oregon Supreme Court affirmed a judgment in favor of an employee discharged for performing jury duty on the grounds that the jury system and jury duty are obligations of citizenship.[85] Similarly, in *Kouff v. Bethlehem-Alameda Shipyard*,[86] the California Court of Appeals held that employees fired for

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professional ethics codes. *See, e.g.*, Parnar v. Americana Hotels, 65 Haw. 370, 652 P.2d 625 (1982) (recognizing that public policy may be derived from prior judicial decisions and administrative regulations). Washington is among the most liberal jurisdictions. In Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 232, 685 P.2d 1081, 1089 (1984), the court defined the public policy standard as broader than the standards articulated in *Parnar*. *See also* Dicomes v. State, 113 Wash. 2d 612, 782 P.2d 1002 (1989).

78. *Dicomes*, 113 Wash. 2d at 618, 982 P.2d at 1007; Lopatka, *supra* note 39, at 7.

79. Lopatka, *supra* note 39, at 8.

80. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

81. *Id.*

82. Lopatka, *supra* note 39, at 8 (citing Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980)); Perry v. Hartz Mountain Corp., 537 F. Supp. 1387 (S.D. Ind. 1982); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505, 512 (1980).

83. Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (jury duty); Girgenti v. Cali-Con, Inc., 15 Conn. App. 130, 544 A.2d 655 (1988) (phoning the police); Ludwick v. This Minute of Cal., Inc., 287 S.C. 219, 337 S.E.2d 213 (1985) (refusal to ignore subpoena)).

84. 272 Or. 210, 536 P.2d 512 (1975).

85. *Id.*

86. 90 Cal. App. 322, 202 P.2d 1059 (1949).

serving as election poll officials could recover compensatory and punitive damages in tort.[87] Finally, in *Girgenti v. Cali-Con, Inc.*,[88] the Connecticut Court of Appeals held that a movie theater employee stated a tort claim when he was fired for clearing the theater and calling the police to apprehend a suspected intruder in the projection booth.[89]

In the third category are employees discharged for exercising certain legal rights or privileges. While the most common cases involve employees discharged for filing workers compensation claims, "other examples include cases in which employees were fired for exercising their state law rights to join a labor union, to refuse to take a polygraph test, [and] to refuse to submit to a serious invasion of privacy."[90] The theory underlying this particular exception, as outlined by the Indiana Supreme Court in *Frampton v. Central Indiana Gas Co.*,[91] is that, absent protection from the threat of employer reprisal, employees would not avail themselves of legally available compensation for work related injuries and losses.[92]

In the fourth, and final, category are employees discharged for blowing the whistle on employer wrongdoings. In *Palmateer v. International Harvester Co.*,[93] the Illinois Supreme Court held that an employee discharged for providing local law enforcement with information about a co-worker's criminal activity stated a wrongful discharge cause of action.[94]

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87. *Id. See also* Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980) (terminating quality control director for efforts to correct false food labeling); *see* Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 234, 685 P.2d 1081, 1089 (1984) (providing that employee has a tort claim when discharged for attempting to institute accounting procedure designed to deter bribery of foreign officials).

88. 15 Conn. App. 130, 544 A.2d 655 (1988).

89. *Id.* at 138, 544 A.2d at 656.

90. Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (recognizing a wrongful discharge cause of action for retaliatory firing of employee who filed a worker's compensation claim); Glenn v. Clearman's Golden Cock Inn, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961) (interference with right to join labor union); Hentzel v. Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982) (discharging employee in retaliation for protesting cigarette smoking as a hazardous working condition); Fulford v. Burndy Corp., 623 F. Supp. 78 (D.N.H. 1985) (discharging employee in retaliation for filing a personal injury action against supervisor states a cause of action for wrongful discharge).

91. 260 Ind. 249, 297 N.E.2d 425 (1973).

92. *Id.*

93. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

94. *Id.* at 133, 421 N.E.2d at 878; *see also* Dicomes v. State, 113 Wash. 2d 612, 620, 782 P.2d 1002, 1009 (1989); Cagle v. Burns and Roe, 106 Wash. 2d 911, 726 P.2d 434 (1986) (employee discharged after threatening to report orders to violate safety regulations to the Nuclear Regulatory Agency); Wagner v. City of Globe, 150 Ariz. 82,

The court stated that "there is no public policy more basic, . . . than the enforcement of a state's criminal code."[95]

Wrongful discharge sounds in tort on the theory that "although the cause of action arises in the context of contractual relationship, the source of the legal duty inheres in public policy."[96] Because actionable wrongful discharge is dependent on the employer's violation of public policy, courts have historically looked to statutory policies for support of the action.[97] Where an employer utilizes monitoring in a manner that violates the wiretap laws or the privacy rights of an employee and the information subsequently results in the discharge of that employee, the employee may seek punitive damages under a wrongful discharge theory.[98] In addition to potential punitive damages, wrongful discharge allows recovery of compensatory damages for loss of wages, earnings, or commissions.[99]

3. Misrepresentation and Nondisclosure

Misrepresentation and nondisclosure encompass a broad set of tort actions designed to protect a party's economic interest in arriving at a business judgment without being misled.[100] Misrepresentations fall into three general categories based upon intentional deception (deceit), negligence, or strict liability. Misrepresentation in the employment relationship typically involves either deceit or negligence.

An action for deceit may arise where the employer, without belief in the representation, knowingly or recklessly represents to the employee, either at the time of contracting or during the course of employment, that monitoring will not occur and then the employer subsequently monitors the employee.[101] In *Berger v. Sec. Pac. Information Sys.*,[102] the Colorado Court of Appeals recently held that "[a]n employer's

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722 P.2d 250 (1986) (refusal to allow the termination of a police officer who informed a judge sentencing a prisoner that the prisoner had been unlawfully detained).

95. *Palmateer*, 85 Ill. 2d at 128, 421 N.E.2d at 878.

96. Lopatka, *supra* note 39, at 16.

97. *See, e.g.*, Petermann v. Local 396, Int'l Brotherhood of Teamsters, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959).

98. Francis M. Dougherty, Annotation, *Damages Recoverable for Wrongful Discharge of At-Will Employee*, 44 A.L.R.4th 1131 (1986).

99. Lopatka, *supra* note 39, at 16.

100. 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 7.1 (2d ed. 1986 and supp. 1991); PROSSER & KEETON, *supra* note 61, at § 105.

101. *See, e.g.*, PROSSER & KEETON, *supra* note 61, at § 107.

102. 795 P.2d 1380 (Colo. Ct. App. 1990).

right to terminate an at-will employee without cause does not protect the employer from liability for fraud in inducing the employee to accept employment."[103] To recover on the basis of deceit, the employee must show that the false representation was knowingly or recklessly made by the employer with intent to induce the employee to rely on the representation and that the employee was injured by justifiably relying on the representation.[104]

Negligent misrepresentation occurs when a person makes a false statement without reasonable grounds for belief in the truth of the statement.[105] Liability for negligent misrepresentation resulting in economic harm generally requires a relationship accepted in the community as carrying an obligation on the part of one party to employ reasonable care not to mislead the other party.[106] *In Brown v. Maxfield*,[107] the United States District Court for the Eastern District of Pennsylvania demonstrated that the at will employment relationship carries such an obligation.[108] The *Brown* court found that an applicant

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103. *Id.* at 1384; *see also* Ramsay Health Care, Inc. v. Follmer, 560 Ala. 746, 752, 560 So. 2d 746, 751 (1990) (financially unstable health care provider's failure to fulfill assurances of a termination benefits package, which was equivalent to one year of salary and was offered as inducement for an accountant to accept employment, was sufficient evidence to support a finding of fraud in inducement).

104. PROSSER & KEETON, *supra* note 61, at § 105; Douglas v. Superior Court (Weiner), 215 Cal. App. 3d 155, 263 Cal. Rptr. 476 (1989); *see generally* Albrant v. Sterling Furniture Co., 85 Or. App. 272, 736 P.2d 201 (1987) (where the employer promised to hire an employee for day shifts at 8% commission and subsequently gave the employee night shifts at less than 8% commission, the court held that the employee had a right to rely on the representations until she knew or should have known the terms of her employment were modified); Matthews v. Fed. Land Bank of St. Louis, 718 S.W.2d 220 (Mo. Ct. App. 1986) (employee proved elements of fraudulent misrepresentation against employer by proving that employer represented to her that existing sick leave benefits were protected during a personal leave of absence, that employee took a leave of absence in reliance on employer's representations, and that employee was subsequently terminated for taking sick leave).

105. Semore v. Pool, 217 Cal. App. 1087, 1097, 266 Cal. Rptr. 280, 287 (1990) (citing, 5 WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS, § 676 at 778 (9th ed. 1988)); *see* Holland Furnace Corp. v. Korth, 43 Wash. 2d 618, 622-23, 262 P.2d 772, 776 (1953) ("If a person represents as true material facts susceptible of knowledge, to one who relies and acts thereon to his injury, he cannot defeat recovery by showing that he did not know his representations were false or that he believed them to be true.").

106. *See generally* 2 HARPER ET AL., *supra* note 100, at § 7.4 ("On the whole, . . . courts have provided a remedy for negligent misrepresentation principally against those who advise in an essentially nonadversarial capacity." In comparison, where misrepresentations entail the forseeability of physical harm and such harm in fact results, the ordinary rules of negligence apply.).

107. 663 F. Supp. 1193 (E.D. Pa. 1987).

108. *Id.*

for a newscasting position established a cause of action for negligent misrepresentation by proving that he was told by the newstation to which he had applied that he could quit his prior job, that he quit his prior job in reliance on the newstation's representations, and that he suffered pecuniary loss as a result of that reliance.[109] Stating that "a party negotiating a terminable at will contract has a right to assess the risks inherent in such employment free from the distortions of tortious conduct," the court held that the applicant's potential employers had acted with "conscious indifference" to the truth of their representations and thus were liable in tort for negligent misrepresentation.[110]

Nondisclosure of material facts can also result in tort liability where the employer, who has a duty to disclose, makes representations that would be misleading without disclosure or tells only half the truth.[111] When dealing with another, a person has a duty to disclose facts that "in equity or good conscience should be disclosed.[112] Stated more precisely, in the employment relationship an employer has a duty to disclose to the employee facts that the employer knows will create a false impression unless other facts are disclosed.[113]

Employees have successfully pursued nondisclosure actions against their employers for failure to disclose pending changes in employment policy and for failure to disclose the pending termination of a position shortly after hiring for that position.[114] Thus, in situations where an employer does not disclose the use of enhanced monitoring or where an employer represents that employee productivity will be subjectively measured, the employer's implementation of enhanced monitoring without notice to employees may create an action for nondisclosure if the employer knows that nondisclosure of monitoring will give a false impression to the employee.

Damages for misrepresentation and nondisclosure may be measured on either an out-of-pocket or benefit-of-the-bargain

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109. *Id.* at 1206.

110. Brown v. Maxfield, 663 F. Supp. 1193, 1203, 1206 (E.D. Pa. 1987).

111. Berger v. Sec. Pac. Info. Sys., 795 P.2d 1380, 1383 (Colo. Ct. App. 1990) (citing RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1965)).

112. *Id.* at 1383.

113. *Id.* at 1383; *see* RESTATEMENT (SECOND) OF TORTS § 551(2)(b) (1965).

114. Elizaga v. Kaiser Found. Hosp. Inc., 259 Or. 542, 547, 487 P.2d 870, 873 (1970); Andolsun v. Berlitz Sch. of Languages of Am., Inc., 196 A.2d 926, 927 (D.C. 1964).

basis.[115] The out-of-pocket rule attempts to restore the claimant to the position occupied before entering employment. The benefit-of-the-bargain rule attempts to place the claimant in the position occupied if the representations were true. In the cases involving failure to disclose, cited above, the courts have awarded the more favorable benefit-of-the-bargain damages.[116] Only where misrepresentation reaches the level of deceit may punitive damages be awarded.[117]

D. Legal Summary

The employer's right to implement enhanced monitoring is not without limitations. First, the employer and the employee can bargain restrictive terms into the employment contract. Second, wiretap laws provide partial statutory protection for the content of an employee's personal communications. Third, exceptions to the doctrine of employment at will provide employees with contract and tort remedies when the employer's use of enhanced monitoring is against public policy or breaches a legally or factually implied term of the employment contract. Fourth, tort law provides the employee with a cause of action when the employer intrudes upon the employee's privacy, misrepresents to the employee that monitoring will not occur, or uses monitoring in such a manner that results in a wrongful discharge of the employee. Given the partial legal limitations on the employer's right to monitor, an economic analysis of the white collar employment market in which enhanced monitoring occurs is useful for determining whether further legal restrictions on the employer's right to monitor are necessary.

III. THE ECONOMICS OF ENHANCED MONITORING

Economic analysis of enhanced monitoring expands on the issue of economic efficiency in a Capitalist economy. Employers are in business to maximize profit. For that reason, a legal

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115. *See, e.g.*, Annotation, *Measure of Damages for Fraudulently Inducing Employment Contract*, 24 A.L.R.3d 1389 (1969).

116. *Elizaga*, 259 Or. at 547, 487 P.2d at 873; *Andolsun*, 196 A.2d at 927.

117. Boivin v. Jones & Vining, Inc., 578 A.2d 187, 189 (Me. 1990). "An award of punitive damages is justified where the plaintiff proves by clear and convincing evidence that the defendant acted with malice (citation omitted). Express or actual malice exists when the tortious conduct is motivated by ill will toward the plaintiff." *Id.* Punitive damages are also available where deliberate conduct by the employer is so outrageous that malice can be implied.

analysis of enhanced monitoring must account for the economic incentives and disincentives that encourage the employer to obey or disobey the law. Because economic considerations potentially play as significant a role in an employer's decision to monitor employees as do legal considerations, legislation that does not account for the economic forces that bear upon the employment relationship will run the risk of being ineffective. Section III of this Comment examines wage determination and market equilibrium within the context of an internal primary labor market under the influence of enhanced monitoring.[118]

A. *The Labor Market*

A labor market strives to match the employers' need for labor time with the employees' desire for income. A labor market equilibrium exists when the amount of labor time desired by the employer equals the supply of time or effort from the employee at market wage and working conditions. Stated another way, the labor market strives to voluntarily match employers and employees so that both are better off by bargaining for employment than by not bargaining for employment. However, equilibrium is not static in labor markets.[119] Instead, labor markets are subject to continual change and are always adjusting toward equilibrium.

The average labor market model employed in this Comment is based on the following assumptions: The model assumes that employees are rational and have incentive to maximize utility and that employers in a competitive market have incentive to maximize profits and to operate at a zero economic profit. Employees in the labor market are assumed to have perfect information and to be heterogeneous in their sen-

118. *See, e.g.*, EHRENBERG & SMITH, *supra* note 3, at 3. The term labor market refers to many different markets, including the national or local, primary or secondary, and internal or external labor markets. Primary labor markets address white collar employment, whereas secondary labor markets are concerned with blue collar employment. External labor markets refer to pre-employment labor markets. Internal primary labor markets exist within the firms themselves and can be considered post-employment markets.

119. Market equilibrium is subject to market forces on both the supply and demand side. The five basic forces that cause a shift in supply are technological advances in production, the expectations of the supplier, the number of the suppliers in the market, the opportunity costs of providing the good, and the cost of resources for producing the good. The five basic forces that cause a shift in demand are the tastes and preferences of the consumer, expectations of the consumer, money, the price of the good, and the price of substitute goods.

sitivity to monitoring. Employers in the labor market are assumed to be heterogeneous in their level of efficiency and in their ability to implement monitoring systems. The model also assumes that a variety of jobs exist with differing levels of monitoring, that fixed costs of initially implementing monitoring are very high, and that monitoring will always be costly to the employer, but that the rational employer will conduct a cost-benefit analysis. The final assumption of the average labor market model employed in this Comment is that monitoring represents varying degrees of disutility to all workers.

The labor market is composed of two elements: supply and demand. The price of labor in the market is represented by the real wage rate, W/P.[120] The employee represents the element of supply. In other words, the employee is the labor. The employer represents the element of demand. The employer is a price taker; in other words, the employer must pay the employee the prevailing market wage.

The employer's demand is equal to the employee's marginal revenue of product.[121] The marginal revenue of product is equal to the change in revenue generated by a change in the number of employees employed. Assuming diminishing marginal returns, each additional employee hired will increase marginal revenue of product at an increasing rate. Eventually, however, the hiring of each additional employee will increase revenue at a decreasing rate.

An increase in the real wage rate will yield a subsequent decrease in the quantity of labor demanded. Moreover, the quantity of labor supplied will increase because the employee's

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120. W is the wage rate paid out, and P is the price of the good or product.

121. *See generally* EHRENBERG & SMITH, *supra* note 3, at 3. In the short term, the employer's labor demand schedule is represented by the downward sloping portion of its marginal product of labor schedule. Employers in a perfectly competitive market have incentive to maximize profits. Profit is equal to the total revenue minus the total cost, $P = TR - TC$ (where P is profit, TR is total revenue, and TC is total cost). Employers will then hire workers until marginal revenue of labor is equal to marginal cost of labor, $MRL = MCL$ (where MRL is the marginal revenue of labor and MCL is the marginal cost of labor). At any point on the marginal productivity of labor schedule where marginal revenue of labor is greater than marginal cost of labor, $MRL > MCL$ (points to the northwest of point M on Figure 1), the employer will increase employment to capture more profit. Conversely, where marginal revenue of labor is less than marginal cost of labor, $MRL < MCL$ (points to the southeast of point M), employers will decrease employment in order to cut costs and thus increase profit. At point M on Figure 1, marginal revenue of labor is equivalent to marginal cost of labor, $MRL = MCL$, and a move to increase or decrease employment would decrease profits. Similarly, any movement from point M would upset economic profits, which firms in a competitive market must maintain at zero.

opportunity costs of choosing leisure time over work time have increased. In plain terms, the increase in real wages will increase the employee's willingness to work, and the employee will trade leisure time for income. The increased wage rate will induce more people into the market, thus increasing the supply of labor to the point where the price of labor is bid down to equilibrium. See Figure 2.

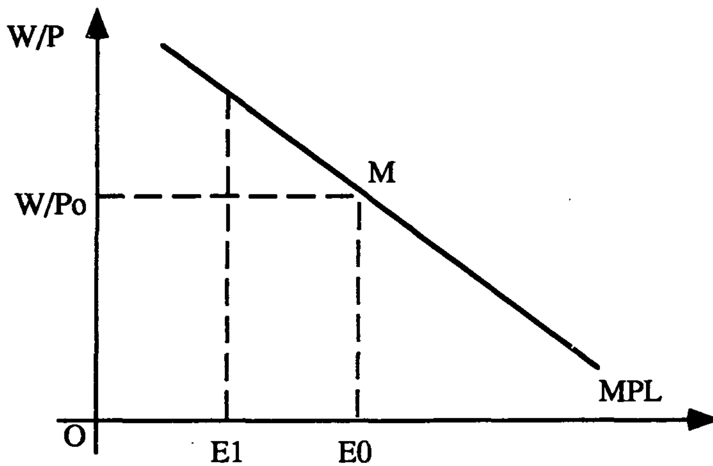

FIGURE 1

Based on the fact that employers in the competitive market will hire to the point where MRL = MCL, it follows that employers will pay a real wage rate equal to the employee's marginal product of labor. The wage rate, W, represents the marginal cost of labor, MCL (*ceterus parabus*). In a competitive market, the employer's marginal revenue equals the price of the good, MR = P (where P is equal to the price of the good produced and MR is the marginal revenue). The additional revenue generated is also referred to as the marginal revenue of product (MRP). Where equation 1 is

$$MRP = (MPL)*(MR) \quad (1)$$

or equally where equation 2 is

$$MRP = (MPL)*(P) \quad (2)$$

profits will be maximized by a competitive firm. In other words, this is the point where the MRL = MCL (3) or where MRP = W (4). Substituting equation number 2 into equation number 4 yields, MPL*P = W. Dividing by P yields the equation, (MPL)=W/P. At this point the marginal product of labor is equal to the real wage rate, and the competitive firm will stop hiring. The conclusion is one that has remained a cornerstone of labor economics; employers in a competitive market will pay employees a real wage equal to their marginal productivity of labor.

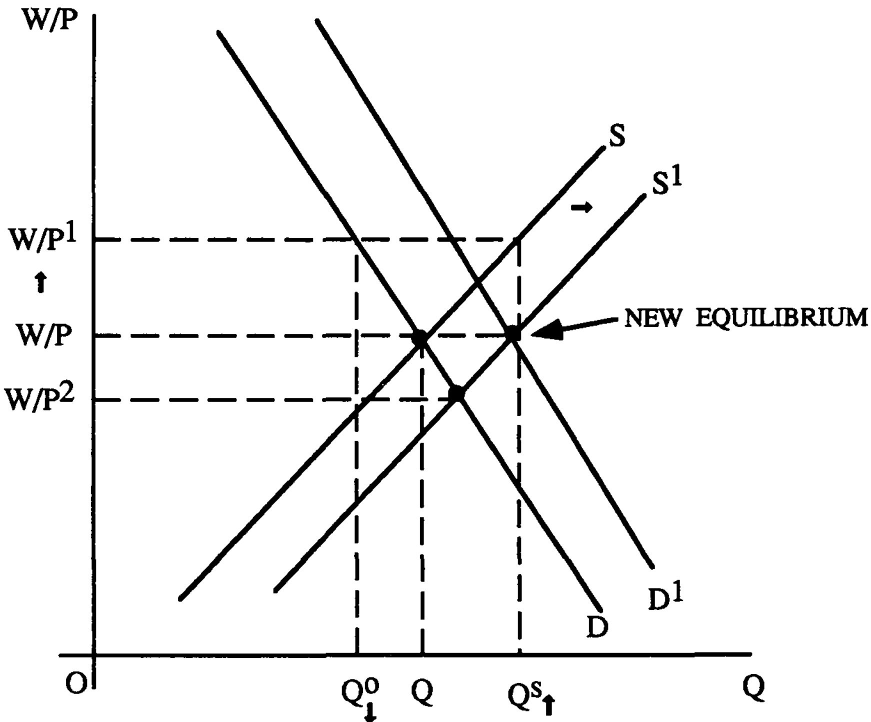

FIGURE 2[122]

Employers, however, are primarily concerned with the employees' level of productivity in relation to the wage rate. This relationship is important because the employer's profits decrease as the marginal productivity of labor falls below the real wage rate.[123] Thus, the supply of labor is a function of the wage rate.

Nevertheless, even though the supply of labor is a function of the wage rate, employees will expect the wage rate to reflect the bundle of characteristics of a particular job, including the work environment. Use of enhanced monitoring to evaluate employee productivity inherently alters the work environment.[124] As one noted labor economist states, as "those things

122. D represents original demand. S represents original supply. W/P is the original wage rate. W/P[1] is the (charge) increase in wage rate. Q is the equilibrium. Qo is the decreased quantity demanded. Qs is the increased quantity supplied. S[1] is the increase in supply.

The increase in supply bids down the equilibrium wage to W/P2 yielding an increase in demand to D[1] and a return to the original wage W/P.

123. *See supra* note 121.

124. *See generally* JOHN HICKS, THE THEORY OF WAGES (1932).

which we have to take as final data of economic enquiry—changes in tastes, changes in knowledge, and changes in the . . . environment . . . change, so the marginal product of labor changes with them."[125] Intuitively, as enhanced monitoring alters the work environment, it will affect employee productivity.[126] Three main questions must then be addressed. First, under what circumstances does enhanced monitoring increase employee productivity? Second, will enhanced monitoring be more effective if concealed? Finally, can equilibrium exist in the white collar employment relationship when the use of enhanced monitoring is concealed? These questions are addressed in Part IV of this Comment. However, an understanding of the answers is predicated upon the legal issues already discussed and a review of Adam Smith's Theory of Compensating Wage Differentials and the Hedonic Theory of Wages.

The Theory of Compensating Wage Differentials states that jobs with unattractive or disagreeable work environments or recurring tasks will command higher wages than jobs free from these characteristics.[127] The increase in wages is the compensating wage differential,[128] which should equal the marginal disutility experienced from working in a particular job.[129] Therefore, "the whole of the advantages and disadvantages of the different employments of labor and stock must, in the same neighborhood, be either perfectly equal or continually tending toward equality," and compensating wage differentials will exist up to the point where the marginal cost of providing the differential equals the marginal benefit.[130]

The Hedonic Theory of Wages is predicated upon the concept of compensating wage differentials.[131] This theory dissects jobs into their unique characteristics and groups these characteristics according to the utility or disutility employees are expected to derive from the job. Each characteristic is then

125. HICKS, *supra* note 124, at 18. John Hicks is a noted economist and the originator of the ISLM Model, a model that combines the real and monetary sectors of the economy. *See*, WILLIAM S. BROWN, MACROECONOMICS 74, 106 (1988).

126. HICKS, *supra* note 124, at 18.

127. ADAM SMITH, THE WEALTH OF NATIONS 100 (1937).

128. *Id.*

129. Utility is the pleasure, satisfaction, or need fulfillment that people get from their economic activity. Disutility is the opposite: the displeasure, dissatisfaction, or lack of fulfillment that people get from their economic activity.

130. SMITH, *supra* note 127, at 100.

131. *See generally* EHRENBERG & SMITH, *supra* note 3, at 207-16.

priced in terms of wages. Utility increasing characteristics such as flex-time or a quiet work environment are purchased by the employee in the form of lower wages. Characteristics which exhibit disutility to the employee are, in a sense, sold to the employee in the form of higher wages. The model is comprised of the employer (demand side) iso-profit curves and the employee (supply side) utility curves.

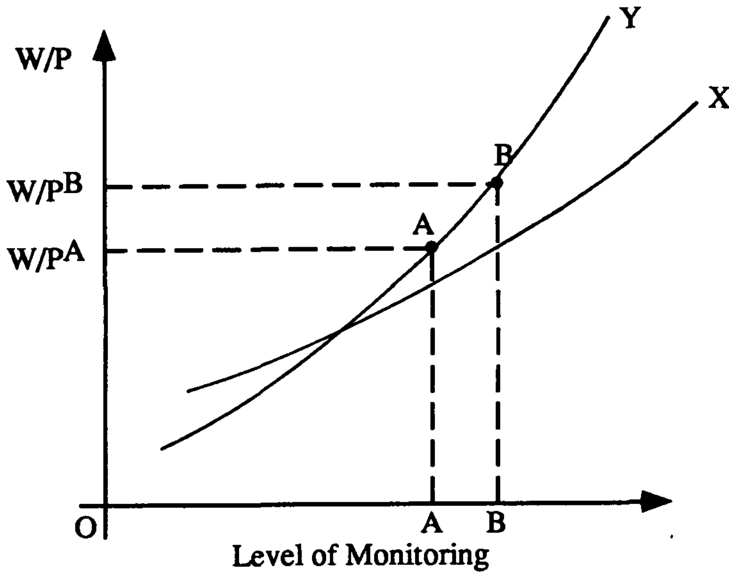

FIGURE 3

Figure 3 represents various wage/monitoring combinations that yield equal amounts of utility for the employee. At point A, the level of monitoring is compensated by wage A. As monitoring increases to point B, compensation increases to wage B. The upward slope of the utility curve represents the average labor market model assumption that monitoring is a bad job characteristic, and as such, yields disutility to the employee. The degree of slope, however, represents the assumption that the steeper the degree of slope, the greater the employee's aversion to monitoring and the larger the wage differential required to offset an increase in monitoring.

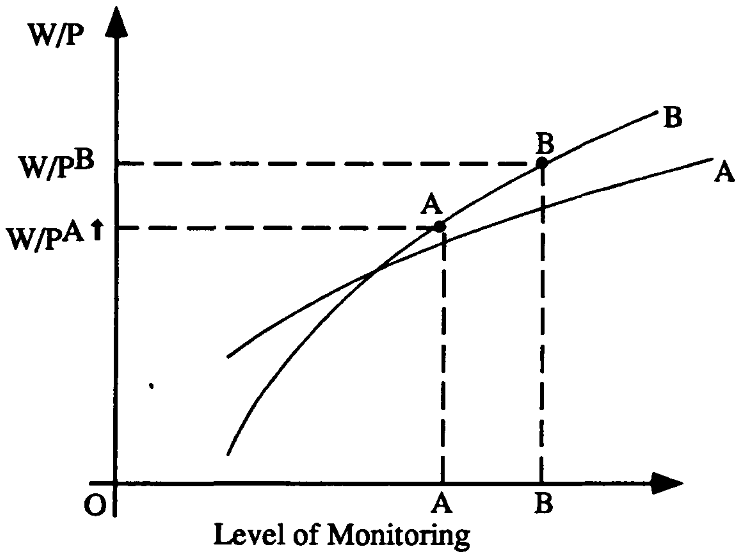

FIGURE 4

In Figure 4, the employer is represented through iso-profit curves. The iso-profit curves in Figure 4 illustrate various combinations of monitoring and wages that yield the same amount of profit. At point A, the firm pays wage A, but as monitoring increases to point B, the firm pays wage B. The firm is able to pay this wage differential because the increase in monitoring leads to an increase in productivity, and subsequently, revenue. The wage differential is equal to the marginal revenue gained through monitoring. Thus, all points on the curve represent equal amounts of profit for the firm.

The shape and slope of the iso-profit curves convey important information. The concave shape of the iso-profit curves represents the diminishing marginal returns to the firm after monitoring is increased beyond the optimal point. However, firms are heterogeneous in their ability to implement monitoring systems in an efficient manner. This ability is represented in the slope of the curves. The flatter the slope the less efficient the firm is at monitoring. The more efficient firm will derive a greater net benefit from monitoring and the wage differential they are able to pay will be higher, as illustrated in Figure 5.

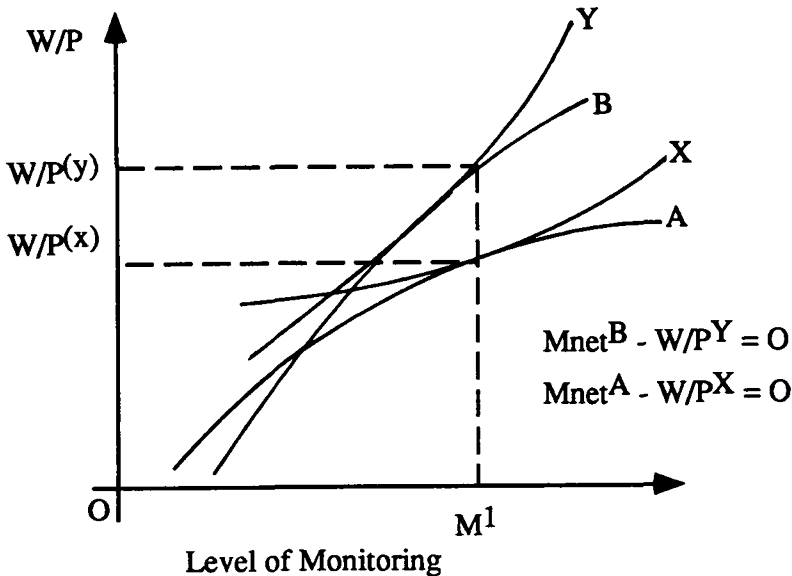

FIGURE 5

Having examined the basic elements of the market within the context of the Hedonic Theory of Wages, a full market graph can now be constructed. Figure 5 represents the iso-profit curves of two employers A and B and the utility curves of two employees X and Y. Employee X, having a low aversion to monitoring, is more efficiently matched with employer A. Employer A is less efficient at monitoring and will thus pay a smaller wage differential to employees. Based on the curve of employee X, this employee requires less compensation for working in a monitored environment. Employee Y maximizes utility by working for employer B. Employee Y requires greater compensation for working in a monitored environment. Employer B is more efficient at monitoring and is thus able to pay a higher wage differential. By paying a higher wage, employer B operates at zero economic profit. Thus, employees with a high aversion to monitoring maximize their utility with employers who are more efficient in implementing monitoring systems. Employees with a lower aversion to being monitored are more efficiently matched with employers who are less efficient at implementing monitoring systems.

The Hedonic Wage Theory model presented above assumes that monitoring is disclosed by the employer. Assuming disclosure, the market leads to efficient allocation of

employees among employers. However, employers who monitor may choose to conceal the monitoring. Concealment leads to costly implications for both the employer and the employee.

IV. Effect Of Enhanced Monitoring Upon White Collar Employment

Monitoring increases the employers' ability to measure objectively employee productivity, to pace work, and to reduce employer losses from employee theft and fraud.[132] Although implementation of enhanced monitoring will initially be costly, the employer will have incentive to monitor where the net benefits of measuring the value of an employee outweighs the costs of implementation.

At the same time, employees will derive disutility from enhanced monitoring and will therefore have incentive to determine whether or not the employer is monitoring. As already noted, the effect of enhanced monitoring on the employment relationship is contingent upon the manner in which the employer implements the monitoring and the aversion of the individual employee to being monitored. Employees who derive disutility from monitoring will either seek wage compensation for this disutility or seek alternative employment. Therefore, an employer opting to implement enhanced monitoring faces two options: (1) disclose the use of enhanced monitoring to the employees or (2) conceal the use of enhanced monitoring and surreptitiously monitor the employees. This section of the Comment will discuss the relative merits of these options.

A. *Disclosure*

The first of the employer's options is to disclose the use of monitoring to employees. An employer's decision to inform employees that enhanced monitoring techniques are being used will result in certain costs and benefits.

Along with the start-up costs of implementing enhanced monitoring, the employer may incur costs in the form of higher wages. Employees aware of the employer's use of enhanced monitoring will have perfect information that monitoring is occurring and the prevailing market wage will compensate employees for any disutility incurred. Thus, although

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132. Craver, *supra* note 2, at 54-55.

the wage the employer pays will be higher than the wage paid if monitoring is not disclosed, employees will be able to make a utility-maximizing choice of employment.

Disclosure of enhanced monitoring produces the additional benefit of avoidance by both parties of the costs of mismatched employment. The employer avoids the costs of hiring an employee with a strong aversion to monitoring, and the employee with a high aversion to monitoring will be able to make a utility-maximizing choice not to seek employment with that employer. Both avoid the potential cost of that employee seeking alternative employment when monitoring is disclosed. Furthermore, the highly productive employee with a low aversion to monitoring may derive utility from monitored work environments in the form of promotion and wage increases resulting from a greater opportunity to demonstrate objective performance.[133]

Finally, all parties avoid the high transaction costs of litigation that may occur when the employer's use of enhanced monitoring is disclosed. The employer's disclosure of monitoring to employees prior to implementation of monitoring or employment provides the employee with notice and the opportunity to seek alternative employment. Such notice defines monitoring as a new term of the employment contract and limits the employee's expectations of privacy. As a result, disclosure may eliminate litigation arising under the wiretap laws, the exceptions to the doctrine of employment at will, the tort of intrusion, and the torts of misrepresentation or non-disclosure. Elimination of such litigation avoids inherently high transaction costs.

B. *Concealment*

The employer's second option is to conceal monitoring. The ability to conceal monitoring is inherent in many forms of enhanced monitoring.[134] Video cameras can be hidden from view, electronic measuring devices can be surreptitiously programmed into computers, phones can be tapped, and rooms can be bugged.

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133. [9A Individual Employment Rights Manual] Lab. Rel. Rep. (BNA) 509:706 (1987) ("Monitoring is most successful when a bonus is given for working above a certain level.").

134. Peter A. Susser, *Electronic Monitoring in the Private Sector: How Closely Should Employers Supervise Their Workers?*, 13 EMPLOYEE REL. L.J. 575, 577-79 (1988).

If the employer conceals monitoring, then a situation of asymmetric information results in which the employee cannot verify the employer's observation of the employee's productivity.[135] Ideally, employee and employer information about employee output must be symmetric so that both parties can bargain for a utility maximizing, mutually beneficial employment relationship.[136]

For the employer, however, concealment provides two tempting short run benefits. First, the employer will avoid the cost of higher wages because employees unaware of monitoring will have asymmetric information and no incentive to bargain for increased wages to compensate for the disutility of monitoring. Second, the employer can measure productivity and pace work without having to account for deceitful employee actions designed to mislead monitoring systems. Employees aware that they are being monitored have found ways to counter monitoring. A late 1980's study by the Bureau of National Affairs reported that

> [w]hen keystrokes are monitored one key can be held down continuously to make the count go up. Telephone operators who are monitored can often tell if a call is going to be difficult; they disconnect it or give bad information so they can terminate the call in the time necessary to meet statistical norms. [And] where video monitoring is done, employees have shown their displeasure by spray-painting the lenses of video cameras.[137]

Consequently, concealment is advantageous to the employer because employees cannot demand higher wages for their disutility, and they cannot defeat the monitoring system if they are unaware that the system exists.

In most cases, however, employers can not maintain surreptitious monitoring indefinitely and concealment will eventually be revealed. The employer will ordinarily record the data gathered through monitoring. In at least twelve states, "records-access" laws exist that provide employees with a right to review personnel records maintained by their employers.[138]

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135. JAMES M. MALCOMSON, WORK INCENTIVES, HIERARCHY, AND INTERNAL LABOR MARKETS (1984) *appearing in* EDWARD P. LAZAAR & ROBERT L. MOORE, EFFICIENCY WAGE MODELS OF THE LABOR MARKET 157 (1984).

136. MALCOMSON, *supra* note 135, at 159.

137. [9A Individual Employment Rights Manual] Lab. Rel. Rep. (BNA) 509:707 (1987).

138. Susser, *supra* note 134, at 583 n. 19; CAL. LAB. CODE §§ 432, 118.5 (1989);

Furthermore, the exceptions to the doctrine of employment at will contribute to disclosure by limiting the employer's right to discharge. Where the exceptions apply, the employees may force the employer to articulate the grounds for discharge and thereby force the employer to reveal data surreptitiously collected through monitoring. Even where the exceptions do not apply, dismissed employees will seek to determine the grounds for their dismissal. Likewise, when employees with similar characteristics gain raises and promotions, speculation will rise among the employee pool about the data used to measure employee performance. Eventually, information that monitoring is occurring will be discovered and disclosed throughout the workforce.

When concealed monitoring is disclosed, the employer faces costs that may be substantially greater than the costs the employer would incur if monitoring was disclosed at the outset. One of these costs may be litigation expense. For the courts, the propriety of monitoring appears to depend on the nature of the monitoring, the employee's awareness of the monitoring, the classification of the monitored activity as business or private, and the egregiousness of the monitoring.[139] As described above in Part II, the relatively recent exceptions to the doctrine of employment at will and the recent strengthening of the right to privacy widen the avenues of legal relief available to employees.

Under the statutory protection of wiretap laws, the monitoring of an employee's personal calls without notice is illegal. Under contract law, the employer's use of enhanced monitoring in a manner that violates an express or implied term of the employment contract may result in liability for breach of contract. Similarly, under the tort of intrusion, where the employer fails to notify the employee that his or her activities are being monitored and the monitored activity is personal rather than business in nature or the monitoring is unreasonably intrusive, the employee may have a common law right to

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CONN. GEN. STAT. ANN. §§ 31-128a to 31-128h (1987); DEL. CODE ANN. tit. 19, §§ 719 to 724 (1985); ME. REV. STAT. ANN. tit. 26, § 631 (West 1990); MICH. STAT. ANN. §§ 423.501-.512 (Callaghan 1991); NEV. REV. STAT. § 613.075 (1989); N.H. REV. STAT. ANN. tit. 23, § 275:56 (1987); 43 PA. CONS. STAT. ANN. §§ 1321-24 (1991); WASH. REV. CODE § 49.12.240-.260 (1990); WIS. STAT. § 103.13 (1988).

139. *See generally* Watkins v. L.M. Berry Co., 704 F.2d 577 (11th Cir. 1983); *see also* James v. Newspaper Agency Corp., 591 F.2d 579 (10th Cir. 1979).

privacy action.[140] Under the tort of wrongful discharge, an employee can recover punitive damages when monitoring is used in a manner that violates the wiretap laws or the privacy rights of the employee and subsequently results in the employee's discharge.[141] Finally, in the situation where an employer chooses not to disclose that employee productivity will be surreptitiously measured, the employer's implementation of enhanced monitoring without notice to employees may provide a tort action for nondisclosure.

Recent studies illustrate the enormous costs that employee legal actions impose on an employer. According to one study, workplace privacy actions brought by employees against their employers between 1985-1987 resulted in a nationwide average jury verdict of $316,000.[142] Similarly, two mid-1980's California studies of wrongful discharge jury trials reported, respectively, "a ninety and a ninety-five percent plaintiff success rate and a $450,000 average and $548,000 median damage award."[143] Given these figures, damages alone could be sufficient to put a small employer out of business.

Additionally, the employer will incur turnover costs as employees with high aversion to monitoring seek alternative employment. Turnover costs will include loss of the experience and training invested in current employees, the cost incurred while training replacement employees, and the potential loss of reputation in the market for future employees.

Loss of a solid reputation within the market may bring about the most damaging costs.[144] "[A]n equilibrium in which neither [the employer or employee] defaults may exist even when it pays to default in the short term. . . . The cost to [the employer] of losing a reputation for honesty, and hence not being trusted not to default in the future, may exceed the

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140. *See, e.g.*, TUROW, *supra* note 58, at § 9.02[3]; PROSSER & KEETON, *supra* note 61, at § 117.

141. Dougherty, *supra* note 98, at 1131.

142. SHEPARD & DUSTON, *supra* note 21, at 1-2 (the survey embraced all workplace privacy jury verdicts including allegations of employer liability for defamation, breach of confidentiality, disclosure of private facts, and wrongful discharge).

143. Lopatka, *supra* note 39, at 3 (citing, Cliff Palefsky, *Wrongful Termination Litigation: "Dagwood and Goliath,"* ABA Sec. on Lab. and Employment Law Manuscript at 1-2 (1983) (referring to a study by San Francisco law firm of Orrick, Herring, and Sutcliffe); Joann S. Lublin, *Firing Line: Legal Challenges Force Firms to Revamp Ways They Dismiss Workers*, WALL ST. J., Sept. 13, 1983, at 15-16 (referring to a study by Frederick Brown, a San Francisco management lawyer)).

144. Blades, *supra* note 64, at 1421.

short-term gain from defaulting."[145] This threat of unfair treatment has a "significant negative economic impact because [it] foster[s] dissatisfaction and disloyalty."[146] Once current and potential employees learn of employers' surreptitious use of enhanced monitoring, employers will have to implement greater wage differentials to lure and maintain loyal employees. Furthermore, some employees, "offended by what they see as a sudden lack of trust, [will] reduce their efforts to only what is necessary."[147]

In the long term, incentives exist for the employer to disclose information to the employee. The short term benefit of surreptitious monitoring is limited and will result in substantial long term costs to the employer. "The continuity and expertise supplied by a stable workforce, the benefits from loyalty, and the savings from reduced training costs and lower turnover all contribute to the long-run success of an enterprise."[148] Although disclosure of enhanced monitoring may result in less effective monitoring, the long term loss of trust and reputation, coupled with turnover costs and possible legal transaction costs, will offset the short term gains of concealment.

The apparent short term benefits of concealed monitoring provide employers with strong incentives not to disclose. Disutility incurred from monitoring, however, provides employees with incentive to discover the employer's concealed use of enhanced monitoring. If the employer discloses, then employees will have perfect information that monitoring is a term of employment, and the parties will mutually bargain for a utility maximizing relationship. Even if the employer conceals, the employees have incentive to maximize their utility by forcing disclosure. Thus, over time the market will force disclosure.

The critical difference between concealment and early disclosure is that the costs of concealment will be incurred before eventual disclosure. Early disclosure avoids the additional costs of concealment. Therefore, legislation should be enacted requiring employers to disclose the use of enhanced monitoring to employees. Mandatory disclosure would provide an

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145. MALCOMSON, *supra* note 135, at 159.

146. *Protecting At Will Employees*, *supra* note 5, at 1835.

147. [9A Individual Employment Rights Manual] Lab. Rel. Rep. (BNA) 509:707 (1987).

148. *Protecting At Will Employees*, *supra* note 5, at 1835.

effective mechanism for the avoidance of the costs of concealment.

V. PROPOSED NOTICE LEGISLATION

During the 101st Congress, comprehensive disclosure legislation was introduced in both the United States House of Representatives and the United States Senate as The Privacy for Workers and Consumers Act.[149] During the 102nd Congress, the legislation was reintroduced in the United States Senate.[150] The goal of the legislation is to "prevent potential abuses of electronic monitoring in the workplace."[151] If adopted, the legislation would require employers to provide written notification to employees that the employees' activities are being electronically monitored.[152]

The legislation would specifically require employers to disclose the type of information being collected, the frequency with which the information is collected, the purpose for which the information is collected, and the effect the information will have on performance standards.[153] Employers would, however, be allowed to collect information relevant to the employees' work performance.[154] Although the employer would be allowed to collect relevant information, the legislation would protect the employee's privacy by prohibiting the employer from disclosing the information collected to anyone except the

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149. The House proposal, sponsored by Representatives William Clay (Mo.-D), Don Edwards (Ca.-D), Pat Williams (Mt.-D), and Benjamin Gilman (N.Y.-R), was referred to the House Committee on Education and Labor but never passed out of committee. *See* S. 2164, 101st Cong., 2d Sess. (Feb. 22, 1990) The Senate proposal, sponsored by Senator Paul Simon (Ill.-D), was referred to the Senate Committee on Labor and Human Resources but never passed out of committee. *See* H.R. 2168, 101st Cong., 2d Sess. (May 2, 1989).

150. *See* S. 516, 102nd Cong., 1st Sess. (Feb. 27, 1991) [hereinafter S. 516]. The Senate proposal, again sponsored by Senator Paul Simon (Ill-D), was referred to the Senate Committee on Labor and Human Resources and remained there as of the Committee's Aug. 5, 1991 recess.

151. *Id.* at § 2 (1). The legislation defines "electronic monitoring" as:

> [T]he collection, storage, analysis, and reporting of information concerning an employee's activities by means of a computer, electronic observation and supervision, remote telephone surveillance, telephone call accounting, or other form of visual, auditory, or computer-based surveillance conducted by any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by wire, radio, electromagnetic, photoelectronic, or photo-optical system.

152. *Id.* at § 3(a).

153. Dworkin, *supra* note 24, at 82; S. 516, *supra* note 150.

154. S. 516, *supra* note 150, at § 5(a).

employee. Employers would, however, be allowed to disclose if the employee consents or the information collected is relevant to the employee's work performance and disclosure is made to officers and employees of the employer who need to know, to law enforcement, or pursuant to court order.[155]

Information collected could not be used as the "exclusive basis for individual employee performance evaluation or disciplinary action, unless the employee is provided with an opportunity to review the personal data within a reasonable time after such data is obtained."[156] The proposed legislation would provide similar protection to prospective employees and third parties. Job applicants would have to be notified of the employer's existing forms of monitoring at "any personal interview or meeting," and third parties interacting with employees would have to be notified by periodic visual or aural signals that electronic monitoring is taking place.[157] As a whole, the legislation would force employers to fully disclose to employees and third parties interacting with employees that enhanced monitoring is in use. By forcing disclosure, the legislation would eliminate the costs of concealment.

However, the proposed legislation goes beyond merely forcing disclosure. The proposal prohibits an employer from using personal data as the sole basis for setting production quotas or work performance expectations. Employers have never been prohibited from setting production quotas or work performance expectations solely on the basis of the means by which their data is collected. The desired goal of disclosure is to eliminate the costs of concealment by allowing the employer and the employee to form a utility-maximizing relationship with full knowledge about whether or not the employer is utilizing enhanced monitoring. To prohibit the use of such data simply because it is collected through electronic instead of conventional means infringes upon the employer's ability to objectively determine the value of an individual employee. Such infringement unnecessarily decreases the value of monitoring to the employer.

The proposal's requirement that the information collected through electronic monitoring be relevant to the employee's

155. *Id.* at § § 5(a) and (b).

156. *Id.* at § 6(a).

157. *Id.* at § § 3(b)(1), (3).

work performance raises similar concerns.[158] The stated purpose of the relevancy requirement is not necessary to the goal of forcing employers to disclose the use of monitoring and may, in fact, generate additional costs. Ongoing electronic monitoring of employees will inevitably result in the collection of data irrelevant to the employee's work performance. A requirement that the employer fine tune monitoring to exclude the collection of data irrelevant to work performance will increase the cost of monitoring by increasing the technological requirements for monitoring equipment. Employee privacy can be as effectively protected without increasing the costs of monitoring by limiting disclosure of the data collected. The tort of intrusion and the disclosure limitations of the proposed legislation provide that protection.[159]

As one noted economist has indicated, the value of proposed intervention is determined by weighing the advantages and disadvantages of the proposal.[160] In the advantages column, the legislation will overcome the employer's incentive to conceal the use of monitoring by forcing disclosure. As a result of disclosure, the employer and the employee will have perfect information that monitoring is a term of the employment contract, and the market will provide a wage rate at which they will form a utility-maximizing relationship. Employees will balance their aversion to monitoring against their wage compensation, and the stability of the workforce will increase. Information costs will be reduced, the expectations of the parties will be defined with greater certainty, and the employer will be allowed to utilize monitoring within the parameters of the proposed legislation and existing law. The risk of turnover costs and legal transaction costs will be diminished, and the employer's risk of loss of reputation will be eliminated. Finally, the employee's expectations of privacy will be protected.

In the disadvantages column, the employer will lose the advantages of concealment. The employer will have to pay higher wages to compensate the employee for the disutility of monitoring, and employees will find ways to counter the monitoring. Disclosed monitoring is thus likely to be less effective than concealed monitoring. However, as discussed above, the

158. *Id.* at § 5(a).

159. *Id.* at § 5; *see supra* part II.C.1.

160. FRIEDMAN, CAPITALISM AND FREEDOM 32 (1962).

costs associated with disclosure are clearly outweighed by costs likely to result from concealment.

Another disadvantage is that government intervention itself creates costs. These will include the costs of enactment, administration, and dissemination. The primary cost of intervention will be enforcement. Under the proposal, enforcement will be delegated to the Department of Labor.[161] Delegation to the Department of Labor advantageously reduces enforcement costs because the notice regulations can be enforced under Department procedures already in place for the enforcement of wage and hour regulations. Furthermore, the proposal provides for both civil penalties enforced by the Department and civil actions brought privately by employees.[162] Private civil action under the legislation provides a plaintiff with legal and equitable relief "including employment, reinstatement, promotion, . . . the payment of lost wages and benefits . . . and attorney's fees."[163] Providing for private civil action ensures that employees have an incentive to expose employer monitoring on their own. Such a provision partially shifts the cost of enforcement to those employees who incur the greatest disutility from the employer's use of enhanced monitoring.

Enforcement costs can be further reduced by tailoring the legislation to balance the interests of both the employer and the employee. These interests are best balanced by encouraging the employer to disclose the use of enhanced monitoring without restricting either party's ability to gather information. As proposed, the legislation sharply restricts the employer's ability to utilize enhanced monitoring. In order to alleviate those restrictions, the requirements that the information gathered be relevant to the employee's work performance and that the employer not use personal data as the sole basis for setting production quotas or work performance expectations should be eliminated. The proposed legislation should simply encourage disclosure of the use of enhanced monitoring and allow the informed parties and the market to determine what effect monitoring will have on the white collar relationship.

VI. Conclusion

As technology advances, employers will increasingly have

161. S. 516, *supra* note 150, at § 7(a)(2).

162. *Id.* at § 7.

163. *Id.* at § 7(3)(c).

the opportunity to implement enhanced monitoring of white collar employees. Despite the fact that the market will eventually force disclosure of an employer's use of enhanced monitoring, unrecognized costs are associated with concealment. The economic and legal effects of enhanced monitoring of white collar employees indicate that the enactment of narrowly tailored legislation requiring the employer to disclose the use of enhanced monitoring will reduce those costs. With modification, enactment of the federal Privacy for Workers and Consumers Act can reduce those costs by effectively encouraging employers to disclose the use of enhanced monitoring to their employees.