An employee’s rights to privacy come from 4 sources:

1. Constitution (State & Federal)
   - The Bill of Rights protects citizens from unwarranted intrusions by the federal government.
   - The 14th Amendment protects citizens from unwarranted intrusions by state and local government.

2. Statutes (State & Federal)
   - The Electronics Communications Privacy Act of 1986 (ECPA) prohibits the intentional interception of oral, wire, or electronic communication, with limited exceptions.

   **Exceptions:**
   1. Readily accessible communications
   2. Service-provider exception
   3. Business Use Exception
An employee’s rights to privacy come from 4 sources:

3. State Common Law
   - Employees are protected from **intentional** intrusions into their private affairs.
   - The intrusion must have been **highly offensive to a reasonable person, and the employee must have had an expectation of privacy**.

4. Contract Law
   - Privacy rights are created by employers through promises in employee manuals, collective bargaining agreements, and employment agreements.
EMPLOYER/EMPLOYEE PRIVACY RIGHTS

CATEGORIES OF MONITORING EMPLOYEES

1. **Personal Surveillance** — This means observing or listening to employees without the use of mechanical aids.

2. **Email Surveillance** — ECPA does not normally protect the privacy of messages sent on *internal* company e-mail systems; but, the management’s act of accessing an employee’s e-mail may violate common law privacy protections.

3. **Video Camera Surveillance** — An employee’s right to privacy may be invaded by video monitoring when the monitoring happens at times, and in places, where an employee has a reasonable expectation of privacy. (EX: bathroom/fitting room).
   --Video monitoring can violate federal and state statutes prohibiting the interception of wire, electronic, or oral communication.
EMPLOYER/EMPLOYEE PRIVACY RIGHTS


CASE: Dr. Ortega worked at a state hospital, and managed the hospital's psychiatric residency program. Hospital officials became concerned about possible improprieties on the doctor's part, including him taking a computer from the hospital, and alleged incidents of sexual harassment of female employees and inappropriate disciplinary action against a resident. The hospital placed the doctor on paid administrative leave and conducted an investigation of the charges. As part of the investigation, hospital officials searched the doctor's office several times and seized personal items as well as articles belonging to the state. No formal inventory was made of the property in the office, but all the papers that were not seized were put in storage for the doctor to retrieve. After the investigation, his employment was terminated. The doctor brought suit alleging that the search of his office violated his 4th Amendment rights.

RULE: Dr. Ortega had a reasonable expectation of privacy in his office, but his privacy interest should be balanced against the hospital’s right to conduct a reasonable search under the circumstances.
EMPLOYER/EMPLOYEE PRIVACY RIGHTS

Amendment IV

• The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

• Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
EMPLOYER/EMPLOYEE PRIVACY RIGHTS

CATEGORIES OF MONITORING EMPLOYEES (continued)

5. Investigation- Making an inquiry about the employee from others and/or reviewing documents relating to an employee.

6. Testing- This involves direct inquiry of the employee, and may include physical tests (ex: blood/urine) or psychological tests.

Drug-Free Workplace Act of 1988

Employers have the right to require employees and applicants to cooperate in and pass tests for alcohol and drug use. Federal contractors and recipients of federal grants have drug-free workplace obligations.
Under the Drug Free Workplace Act, covered employers must:

- Have clear, written policies that are available to all applicants and employees and that emphasize confidentiality;
- Use federally-certified labs;
- Collect specimens in secure private locations pursuant to a chain of custody;
- Provide training for at least 2 hours to all employees on alcohol and drug abuse prevention; and
- Advise employees who test positive of assistance programs.
Federal law restricts what employers can discover and disclose about employees who abuse drugs or alcohol. The ADA protects:

- Former illegal drug users who have successfully completed treatment;
- Former illegal drug users who are participating in treatment;
- Persons erroneously regarded as illegal drug users; and
- Disable persons who are legally using prescription drugs.

**Types of Employer Drug & Alcohol Testing Programs:**

**Pre-employment:** Courts have generally upheld the legality of Pre-employment drug testing to the extent that it is reasonable, accurate, confidential, and consistently applied.
Types of Employer Drug & Alcohol Testing Programs:

Random or Periodic Testing on the job: Federal courts have rejected Random drug testing of broad categories of employees, and have Imposed strict criteria before the testing can be legally justified.

Reasonable Suspicion Testing: The employer must have a subjective suspicion that a specific employee is under the influence of drugs while on the job.

Post Accident Testing: Considered with jobs involving transportation or safety-sensitive positions, where accidents pose real risks to the health, safety, and welfare of others.
EMPLOYER/EMPLOYEE PRIVACY RIGHTS

Department of Transportation (DOT) required testing:

Pre-employment Testing: Employees who wish to work in safety-sensitive positions must pass a drug test first.

Random Testing: DOT employers must conduct several random drug Tests on their employees each year.

Post-accident/Incident: Drug testing must occur within 32 hours after serious accidents. Alcohol testing must be done within 8 hours after the accident, and should be done within 2 hours.

Reasonable Cause: Must be based on documented observations by a trained supervisor.
Department of Transportation (DOT) required testing (continued):

**Return to Duty:** Employees who fail or refuse to cooperate with drug/alcohol testing must take and pass a test before returning to a safety-sensitive job.

**Follow-up:** Employees are subject to follow-up testing after they return to duty.

**An employee cannot be hired for a safety-sensitive job unless and until** they pass the required pre-employment alcohol/drug testing.
Employee Polygraph Protection Act of 1988

- This act eliminated the use of polygraph testing as a pre-employment screening mechanism.

- **Employers cannot discipline, discharge, or discriminate against any applicant or employee:**
  1. who refuses to take a lie-detector test;
  2. based on the results of a lie-detector test; or
  3. for taking any actions to preserve employee rights under the Act.

- **Employers may lawfully require an employee to submit to a polygraph test if:**
  1. The employer is engaged in ongoing investigation involving economic loss or injury to the employer’s business.
  2. The employee to be tested had access to the property in question; and
  3. The employer has a reasonable suspicion that the employee was involved in the incident.
EMPLOYER/EMPLOYEE PRIVACY RIGHTS

If administering a polygraph test, employers must:

1. Inform the examinee of his or her right to seek an attorney or an employee representative;
2. Explain the physical operation of the polygraph machine to the examinee;
3. Explain to the examinee prior to the test that he or she need not submit to the test as a condition of continued employment, any statement made during the polygraph can be used as evidence to support disciplinary action, and the legal rights and remedies if the Act (Polygraph Protection Act) is violated;
4. Give the examinee all questions to be asked on the exam; and
5. Tell the examinee his or her right to terminate the exam at any time.
Federal Privacy Act
Prohibits federal agencies from disclosing personnel records without written consent.
If this Act is violated, employees can either 1) seek criminal penalties or 2) seek civil remedies including damages and injunctive relief. The employee can also bring a civil suit against the agency in federal court.

Federal Fair Credit Report Act (FFCRA)
Employers who use consumer reports for employment purposes must:
1. Make a written disclosure to the applicant or employee that a consumer report may be obtained and get the applicant’s written consent; and
2. Notify the applicant/employee if any adverse action is to be taken based upon the consumer report, and give a copy of the report and a summary of the consumer’s rights to the applicant/employee.