

BEWARE OF EMPLOYEES RECORDING EACH OTHER AT WORK

Q. *Is it legal for an employee to place a recording device or hidden camera in his work area? This area is shared with two or three other employees. Do we have some kind of liability regarding the other employees' privacy – especially if we are aware of the equipment?*

A. With current technology, it is common for employees to carry cell phones and other devices with video and audio recording capabilities. North Dakota's criminal code has a so-called one-party consent eavesdropping law. In general, if one party to a conversation – including the person making the recording – knows about the recording, it is not a crime to record a conversation with another person.

Additionally, tort liability may lead to privacy violations but, like many aspects of the law, this is a gray area (a tort is a wrongful act that may lead to civil liability). Tort claims for invasion of privacy are recognized in nearly every state, either through statutory enactments or court decisions. The North Dakota Supreme Court has not decided whether a tort claim for invasion of privacy exists in the state. Because the majority of states recognize tort claims for invasion of privacy, employers should address privacy issues with caution. From a liability standpoint, employers should assume that such a claim exists.

Generally, there are two types of invasion of privacy claims that stem from a placed recording device. The first occurs when Emma Eavesdropper (1) intentionally intrudes, physically or otherwise, (2) into a matter Innocent Ira has a right to keep private, and (3) the intrusion is highly offensive to a reasonable person. This type of invasion of privacy is called "intrusion upon seclusion" and it does not depend on Emma Eavesdropper publishing the recording. Note that privacy claims apply to public areas and areas outside of employees' homes, including public restrooms.

You would think that recording or videotaping employees in a work area would probably not intrude on their privacy. However, consider this hypothetical example: Innocent Ira uses his break to call his physician to discuss an extremely embarrassing medical condition. Innocent Ira ensures that no coworkers are present and closes the office door, but he doesn't know that Emma Eavesdropper has hidden a recording device in the room. In this situation, it is possible that Innocent Ira's privacy was intruded upon because Emma Eavesdropper intentionally intruded on

a matter Innocent Ira had a right to keep private and the intrusion was highly offensive to a reasonable person.

A second privacy claim exists when unreasonable publicity is given to a person's private life. Generally, this claim requires the publication of information that (1) is highly offensive to a reasonable person and (2) is not a legitimate concern to the public. Using the previous example, Emma Eavesdropper's Facebook posts about Innocent Ira's extremely embarrassing medical condition may lead to civil liability.

Generally, an employer is not responsible for wrongs committed by employees unless it authorized or ratified the act, but the employer that asked this question knew about the recordings. Additionally, employers can be liable for negligent supervision and retention of employees.

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From the CEO
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Thus, an employee using a recording device or hidden camera in a work area is problematic and should be stopped.

Bottom Line

Because it is unclear whether the North Dakota Supreme Court would recognize privacy claims or whether the hypothetical example above would meet the standard for tort liability, the prudent practice is to have a policy that explicitly prohibits all recording and videotaping at work.

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RISK SERVICES

Indemnification and Additional Insured Status in Contracts and Agreements

Almost any written business agreement you enter into will contain some type of indemnification and/or additional insured status requirement. These clauses can range from innocuous to onerous in their scope. NDIRF member political subdivisions should strike these indemnification clauses and additional insured requirements from agreements when the intent is for the political subdivision to indemnify and/or add the other party as an additional insured.

You may remember seeing news reports of one of those inflatable bouncy playhouses for kids being blown through a neighborhood. In rental agreements for that type of amusement, you are typically required to indemnify the rental firm for even the rental firm's own mistakes - like not providing adequate tie downs or instructions on proper tie down. We have seen agreements where the contractor requires indemnification from injury caused by the contractor's own employees or as a result of the contractor's work.

From our review of North Dakota law, our opinion is that North Dakota political subdivisions do not have the expressed or implied statutory authority to provide indemnification or additional insured status to another party except in very limited specific cases. Your legal counsel should be consulted on the appropriateness of indemnity clauses and additional insured status in agreements where these clauses will benefit another party.

Our review has identified one situation specifically provided for under North Dakota law (NDCC § 40-05-01(59)) where indemnity and additional insured requirements are expressly authorized for a political subdivision. If there are additional exceptions with which you or your legal counsel are familiar, we would appreciate your providing the citation.

There are also North Dakota Attorney General opinions that indirectly address indemnity and additional insured requirements, including Letter Opinion 2009-L-04 to Mr. Thomas L. Fischer, Chairman, Cass County Joint Water Resource District and Letter Opinion 2007-L-14 to Dr. Wayne G. Sanstead, Superintendent of Public Instruction.

The NDIRF will provide coverage for contractual indemnification and we will provide additional covered party (additional insured) status for other parties as required in written contracts if requested by a member and approved

RISK SERVICES

by our underwriting department. However, NDIRF coverage includes defense of our member in a dispute over the legality of these clauses. The coverage does not waive any statutory defense a member has available in defense of any claim for damages against a member. This means that if it is found a member did not have the statutory authority to indemnify another party in a specific instance, the NDIRF coverage will not respond to the party that was to be indemnified or provide that party any added covered party status for defense of any liability claim.

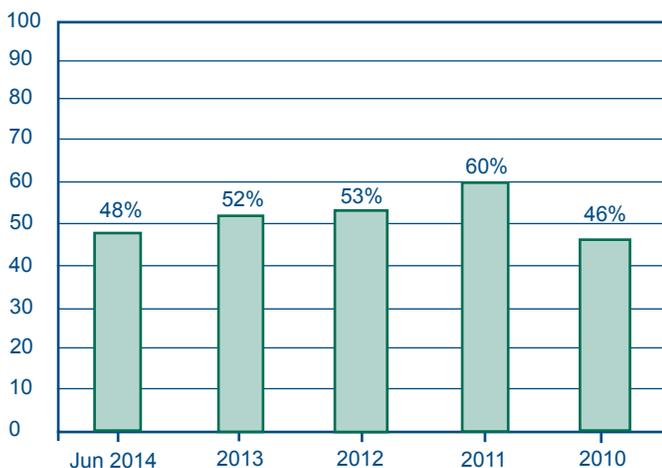
From a risk management perspective, we suggest NDIRF members have indemnity clauses and additional insured status requests to benefit any other party eliminated from all contracts and agreements. If these requirements are not eliminated, we strongly advise that the party that has an expectation of indemnity and/or additional insured status be advised by you that the NDIRF coverage does not waive any statutory defenses available to your entity as a result of any claim or suit against your entity.

Lastly, we recommend you establish control over which individuals from your organization have authority to enter into contracts that require indemnification and/or additional insured status. We realize our members just want to get a project accomplished, some work completed, a display set up or some equipment rented but it is important to not expose your entity or yourself to huge potential costs that were never anticipated.

If you have any questions on this information, please contact NDIRF Risk Services Manager Ross Warner at the NDIRF office. ross.warner@ndirf.com ■

FINANCIAL INSIGHTS

LOSS RATIO



The loss ratio is calculated by dividing incurred losses, including loss adjustment expenses, by earned premium. A ratio greater than 100% means incurred losses exceed premium income. The loss ratio for all years is 48% so, as the chart indicates, the first half of 2014 is an average loss year. ■

FROM THE CEO

It seems like summer is just really getting into the swing of itself but, as I look at the calendar, the annual conference season is just around the corner (or, more accurately, on the next page). I encourage you to take advantage of the training and networking opportunities afforded by the annual conferences of North Dakota's political subdivision associations.

I have met and gotten to know many of you through our mutual attendance at these events and look forward to seeing you there again this year – and to meeting those who may be making the trip for the first time. The conferences are an excellent means by which to stay current on the issues faced by local officials and discuss solutions to common problems.

As you have heard from me and others at NDIRF many times, appropriate training is a very important factor in keeping our liability costs under control. A fundamental gateway to providing that training is the exposure elected decision makers receive to these opportunities at the state association conferences. I hope to see you there! ■



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MEET YOUR BOARD

Blake Crosby, Executive Director of the North Dakota League of Cities (NDLC), is the newest NDIRF board member, having been appointed to the board in January, 2014.

Mr. Crosby is a born and raised North Dakotan (in Rolla), holds undergraduate and graduate degrees from the University of North Dakota and has done post-graduate work at the University of St. Thomas in St. Paul, MN. Daughter Jill is an Emergency Medicine physician.

Prior to joining the NDLC, Blake compiled an extensive background as a private business owner, business consultant and



college administrator. He is an active member of Rotary International and the Elks and, in addition to his work, enjoys hunting, fishing and biking (the motorcycling kind).

In describing the relationship between the NDLC and NDIRF, Mr. Crosby states “It is my understanding that the North Dakota League of Cities was a primary driver behind the formation of the NDIRF. We have a vested interest in protecting our cities and keeping NDIRF viable.”

As far as advantages provided by NDIRF membership and a vision for its future, Blake indicates “The NDIRF is local, understands North Dakota cities and is fiscally prudent as evidenced by the conferment of benefits. We must assess the current and future needs of the membership and encourage initiation of programs that lower risk and exposure to costly litigation.” ■

Mark Your CALENDAR

- Sept 18: NDIRF Board of Directors Meeting
NDIRF offices, Bismarck
- 25-27: ND League of Cities
Annual Conference,
Grand Hotel, Minot
- Oct 12-14: ND Association of Counties
Annual Conference & Expo
Ramkota Inn, Bismarck
- 23-24: ND School Board Association
Annual Convention,
Ramkota Inn, Bismarck