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Proskauer on Privacy
A Guide to Privacy and Data Security
Law in the Information Age

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In this thirteenth supplement to Proskauer on Privacy, the editor, along with an array of industry experts from the government, academic, and legal sectors, has updated the treatise to provide you with the latest developments in privacy law and practice. Highlights include:

Privacy of Electronic Communications. The Wiretap Act prohibits the interception of the contents of a wire, oral, or electronic communication. Courts continue to look at the issues raised by the blurry line between contents and non-contents, particularly as those issues relate to smartphones and other modern devices. The Ninth Circuit recently held that “contents” as defined in the ECPA does not include record information regarding the characteristics of the message. Thus, a user’s Facebook ID and his or her web page address did not constitute “contents.” See the discussion of Zynga Privacy Litigation and other recent cases in §§ 6:2.2[A][3] and 6:2.5[A]. Other recent cases look at the “consent exception” to the Wiretap Act, and whether the terms-of-use agreements of certain service providers (here, Yahoo and Apple) evoke user consent for interception of those users’ communications. See §§ 6:2.4[B] and 6:2.5[A].

Workplace Privacy. Many states have recently restricted when and how employers may request and use information regarding job applicants’ criminal records with legislation often referred to as “ban-the-box laws.” These statutes and ordinances vary significantly by jurisdiction and contain exceptions to their limitations. See new § 9:2.2[B][2]. Courts continue to address the subject of claims under the Stored Communications Act by employees whose private online postings are accessed by their employers. See the discussion in § 9:3.8[B][1], which includes coverage of a 2013 New Jersey case in which a registered nurse claimed her employer violated the SCA when...
it suspended her for comments she had made on Facebook. In December 2014, the NLRB overruled its earlier holding in *The Register-Guard*, which held that employees have no statutory right to use an employer’s email system for union-related communications. See the discussion of *Purple Communications* in § 9:4.3[B][1][c].

**Canadian Privacy Law.** Manitoba has introduced the *Personal Information Protection and Identity Theft Prevention Act*, which has not yet come into force, but which effectively duplicates the Alberta PIPA requirements in almost all respects. See § 13:1.1[B][3]. **Canada’s anti-spam legislation (CASL)** came into effect July 1, 2014. See the updated discussion in §§ 13:4.4[A]–13:4.4[G] of the legislation, its provisions, exemptions, enforcement, and jurisdiction, as well as detailed coverage in *new* § 13:4.4[H] examining the compliance challenges CASL poses as it begins its staged roll-out.

**Payment Card Industry Data Security Standard.** Merchants and service providers that become aware of a potential security breach must take prompt action to help prevent additional damage and unauthorized access to cardholder data. See § 15:6.2 for Visa’s most recent fraud investigations procedures, which detailed steps that should be taken in such cases.

**Location Privacy.** As case law addressing government access to cell site location information (CSLI) develops, courts in Massachusetts and Florida have recently found that despite the lower standards under the Stored Communications Act, a warrant was required to obtain certain CSLI and that the third-party doctrine did not apply. See § 17:3.2[B]. In the area of GPS tracking and related technologies, *new* § 17:4.1[C], Industry Self-Regulation, reports on one recent initiative by an alliance of auto manufacturers aimed at protecting consumer privacy. Updates also include the latest developments in various class actions addressing private location tracking via mobile devices and smartphones. See § 17:4.2.

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FILING INSTRUCTIONS

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NOTE: Because of ambiguous filing instructions in a previous supplement, it is possible that your treatise contains two versions of the chapter entitled “Location Privacy: Technology and the Law,” one version numbered 17 and the other numbered 18. If this is the case, discard both versions when filing the replacement pages you have just received. We apologize for our error and any confusion it may have caused.

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