

Indiana Joins States Prohibiting Employers From Mandating Device Implantation in Employees

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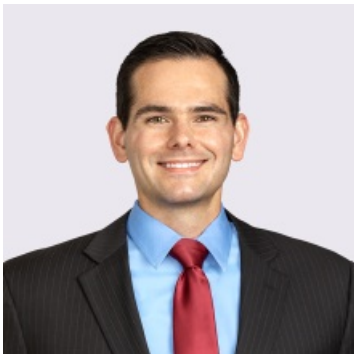
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Indiana has joined the growing list of states taking legislative action to proactively curtail the risk of employer-driven devices, radio frequency identification devices (RFIDs), and microchip implantation, which some perceive as the next battleground over employee privacy rights.

Indiana Code §§ 22-5-8-1, *et seq.*, prohibits employers from requiring employees to permit implantation of a device into their bodies as a condition of employment. It also prohibits employers from discriminating against non-consenting employees. Employers determined to have violated Indiana's statute may be enjoined from further violations and required to pay actual damages, costs, and attorneys' fees.

Employers nationwide have increasingly introduced employee monitoring technology into the workplace. Frequently, the aim is to track an employee's physical location, to measure productivity, or, most recently, to track close contacts for COVID-19-related contact tracing purposes. These measures bring up questions about proper protection for employee privacy rights. Several states have taken legislative action to prohibit an employer from requiring an employee to permit implantation of a device or microchip as a condition of employment or continued employment.

What is a Device?

A "device" under the Indiana statute includes "any acoustic, optical, mechanical, electronic, medical, or molecular device." Without any further guidance or interpretation, the precise breadth of coverage is unclear. Nevertheless, the term appears to imply a broader intended definition than the use of the term "microchip" in other similar statutes.

Prohibited Employer Conduct

The Indiana law applies to current employees and applicants or prospective employees. The employer prohibition is not limited to implantation of devices. Employers are prohibited from requiring an employee to undergo an injection of a device, ingest a device, inhale a device, or incorporate a device in some other manner.

The law also bars an employer from conditioning employment on an employee's willingness to accept a device. Likewise, it prevents requiring an employee to accept a device as a condition of employment in a particular position in the company or as a condition of receiving additional compensation or other benefits.

Finally, employers may not discriminate against an employee for refusing to permit a device to be implanted, injected, ingested, inhaled, or otherwise incorporated into the body. The lone statutory exception to the employer prohibitions is if a court has ordered or directed an employee or prospective employee to undergo any of the specified device-receiving actions.

States Enacting Similar Legislation Continues to Grow

In addition to Indiana, at least 10 states have enacted similar legislation:

- Arkansas
- California
- Missouri
- Montana
- Nevada
- New Hampshire
- North Dakota
- Oklahoma
- Utah
- Wisconsin

Arkansas and California maintain many of the same restrictions as Indiana on employers attempting to require implantation. *See* Ark. Code Ann. § 11-5-501; *see also* Cal. Civ. Code § 52.7. However, their restrictions are more limited and apply to microchips and identification devices. Other jurisdictions passing legislation in this area are less exhaustive in restricting employers attempting to require implantation. While the Indiana law contains a prohibition against retaliation for refusing to voluntarily receive a device implant, the Missouri law only prohibits an employer from actually requiring implantation.

Iowa, Rhode Island, and Tennessee have introduced bills in the past year that would similarly restrict device implantation.

Key Takeaways

Employers using or interested in using implanted devices, RFIDs, microchips, or other technology to collect employee information must remain vigilant, monitoring an ever-changing landscape of state laws and regulations. As this patchwork of employee privacy laws continues to develop, Jackson Lewis attorneys can assist employers attempting to navigate this complex area of the law.

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