



# Top 5 Surprising Takeaways as Fisher Phillips Launches Digital Wiretapping Litigation Tracker

Insights

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Some businesses might be surprised to learn that digital wiretapping litigation claims are one of today's fastest-growing compliance risks, with over 1,560 lawsuits filed in 28 states since a groundbreaking 2022 decision opened a new set of floodgates. And while businesses in any industry are susceptible to such a lawsuit, those in the retail, tech, and healthcare sectors need to be especially cautious. Those are just two of the key findings revealed by FP's new [Digital Wiretapping Litigation Map](#), which allows businesses to examine the up-to-the-minute state of these litigation matters in a detailed manner. What are the five biggest takeaways for employers?

## Quick Background

Any business that utilizes websites, apps, or email marketing to reach their intended audience can fall victim of a digital wiretapping lawsuit. Plaintiffs' attorneys are identifying those businesses that utilize tracking technology to collect and disclose information that could identify an individual user without their consent to determine if a lawsuit could be worthwhile. The tracking technology at issue includes cookies, pixels, tags, and web beacons installed on websites and apps – as well as digital tracking code embedded in marketing emails.

The Privacy and Cyber Practice Group at Fisher Phillips has been focused on this growing trend for the past several years and providing proactive guidance to businesses, not to mention litigation defense. In collaboration with our Knowledge Management and Technology teams, we created the [Digital Wiretapping Litigation Map](#) to provide detailed information and allow businesses to gain a comprehensive understanding of this current trend. By [clicking here](#) and maneuvering around the map and accompanying data lists, businesses have at their fingertips a wealth of data on digital wiretapping litigation matters – including which states and what industries are being subject to these claims.

## Top 5 Takeaways

While you can visit the [Digital Wiretapping Litigation Map](#) on your own and explore, here are the top five takeaways we noticed when examining the details.

### 1. Top States for Litigation Include the Expected – and Some Surprises

The first thing that jumps out from the [FP Wiretapping Litigation Map](#) are the bright red states on each coast and one in the Midwest. It comes as no surprise that we see traditionally privacy minded California as the state where businesses are facing the most litigation matters. In fact, close to 83% of all digital wiretapping claims to date have been filed in California.

But this litigation trend is taking off outside of California as well. The Map shows some states you might not have expected listed among those with the most. Here are the top states for claims since these lawsuits first started surfacing:

- California: 1,284
- Illinois: 64
- Pennsylvania: 34
- New York: 28
- Massachusetts: 27
- Arizona: 18
- Washington: 16

## 2. No Industry is Immune

The Retail industry has faced the lion's share of claims, with 522 lawsuits – about one out of every three – filed against retail businesses. The other two industries that stand out are the Tech sector (231) and Healthcare (161). The common thread among these high-target industries is that marketing is a significant business driver with them all, meaning they have website practices that expose them to additional risk.

But the data demonstrates that every industry is at risk. The good news is that there are steps that you can take to mitigate risk. Making small changes to your website or app can reduce the potential for a claim and can significantly reduce the costs of resolving any claims.

## 3. A State Consumer Privacy Act is Irrelevant

It might be easy to assume that this litigation trend isn't something you need to worry about if your business doesn't operate in one of the 31 states that have not enacted a generally applicable consumer privacy law – but that would be wrong. Plaintiffs' attorneys are filing these claims utilizing a variety of statutory and non-statutory claims.

- Some of the claims are based upon **decades-old statutes** that were written to prevent wiretapping on phone lines, and some local courts are interpreting them in new ways to apply to new technology.

- Claims also allege violations of **federal laws**, such as HIPAA in the healthcare industry, rendering the status of your state law as irrelevant.
- Finally, many claims allege **non-statutory theories**, such as invasion of privacy under a state's constitution or common law.

In other words: The absence of a consumer privacy statute in the state is not a factor in whether you are at risk of falling victim to one of these claims. And even if your business is subject to state consumer privacy laws like the California Consumer Privacy Act (CCPA), compliance with those laws will not immunize you from lawsuits under wiretapping laws.

#### 4. Even One Unknown Issue on a Website or App Can Lead To a Claim

If your business operates a website or app, there are a variety of common website features that are frequently the subject of wiretapping claims. While cookies are the most frequent culprit in digital wiretapping claims, some of the claims have alleged that a website's search bar and chat features is disclosing the contents of electronic communications to third parties. There are numerous ways to continue using cookies, search bars, and chat functionality with changes in how they are disclosed and the timing of their usage that can reduce the risks of becoming the subject of a wiretapping litigation claim. Businesses may want to look at ways to reduce risk that balance the business need for continued use of certain features.

#### 5. The Litigation Tracker Only Shows Part of the Picture

While the [Digital Wiretapping Litigation Map](#) is illustrative of this trend, it only reflects the publicly available data. FP knows from experience that business usually receive pre-litigation demands and many of these are resolved well before they show up in publicly available litigation data. Not to mention the fact that many might end up in private arbitration and are never revealed to the public. FP's experience with many such prelitigation demands and arbitration hearings tells us that many more businesses are finding themselves caught up in this new trend than the numbers reveal.

#### Thirsty for More Data?

But the exploration doesn't end here. This Insight only scrapes the surface of the data and information that can be found in our tracker on our website. For further information about digital wiretapping litigation across the country, and to run your own analyses of our data, you can visit Fisher Phillips' [Digital Wiretapping Litigation Map](#) at any time.

#### Conclusion

Fisher Phillips will continue to monitor the rapidly developing situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any member of the Fisher Phillips Consumer Privacy Team.

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