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ABSTRACT

Employee privacy rights are considered, along with practical problems and permissible parameters of employer activity. Included is a state-by-state analysis of the status of workplace privacy. Definitions are offered of "invasion of privacy," with attention to four types of privacy invasions: (1) placing someone in a "false light," (2) the public disclosure of embarrassing private facts, (3) intrusion into someone's solitude, and (4) misappropriation of someone's right to publicity, to the pecuniary advantage of the defendant. Avoiding invasion-of-privacy and defamation claims requires a coordinated program of information management covering all phases of the employment relationship. For the following employment issues, legal protections are examined, along with actions that can be taken to implement and maintain a management information policy: preemployment screening procedures, employee records, use of polygraphs, drug testing, employee searches and surveillance, regulation of nonworking time, and employment references. The state guide to right-to-privacy includes citations of relevant statutes and case law, along with narrative explanation. (SW)

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Introduction

The issue of employee privacy is quickly becoming one of the most dynamic and important areas of employee relations. The principal consideration involves the continuing tension between an employer's right and need to manage the work force and the reasonable privacy expectations of its employees. This daily struggle has recently received widespread attention due to the dramatic increase in drug testing in the workplace and the litigation which has erupted over such testing. However, privacy-related litigation reaches well beyond drug-testing questions.

Today, employees are bringing invasion-of-privacy suits in connection with all aspects of the employment relationship, from the initial job interview to letters of reference. Yet, as workplace privacy issues continue to sharpen, both employers and employees are discovering that many of the legal theories that control their respective rights are not well-settled. Thus, while legislatures and courts attempt to establish guidelines defining the competing privacy interests in the workplace–the right of an employer to investigate and the right of an employee to be left alone–it is essential that employers gain an understanding and appreciation of the issues emerging in this area of the law.

This publication, *Employee Privacy Rights: A Management Guide,* addresses the practical problems and permissible parameters of employer activity against the backdrop of the developing law of workplace privacy. After presenting a brief overview of employee privacy rights, the authors have organized the discussion around specific phases of employment, from preemployment screening procedures to workplace issues. Preventive measures also are covered. The text is followed by a state-by-state survey of workplace privacy law.

Common

Misappropriation

The tort of misappropriation involves situations in which one person, without authorization, appropriates to his or her commercial use or benefit the name or likeness of another.[7] No recovery on this theory will be permitted where a plaintiff's name or likeness is used in connection with the publication of newsworthy matters. For example, a sports magazine may legally print a photograph of a baseball star hitting a home run. If, however, a soft drink manufacturer takes a similar photograph and makes it into an advertisement for the product, without the baseball star's permission, a claim for misappropriation may be maintained. This cause of action is rarely used in the employment setting.

Defamation: Libel and Slander

The tort of defamation occurs when a communication tends to harm the reputation of another so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.[8] This tort is subdivided into libel and slander. Libel constitutes defamation by writing, while slander involves defamation through speech. Defamation may occur in the employment setting when an employer discloses to a third party false information that tends to injure an employee's reputation. In business defamation, a direct financial injury is presumed since the defamatory statement adversely relates to the plaintiff's particular trade or profession.

Truth is an absolute defense to all actions for libel or slander. In addition, either an "absolute" or "qualified" privilege may apply. An absolute privilege, as the name implies, gives complete protection to the defendant in spite of bad motives, negligence, or even deliberate falsehoods. Absolute privileges are usually a function of the special status of the defendant and the context of the statement in relation to that status. For example, a statement is absolutely privileged when made during judicial proceedings, including unemployment hearings and arbitrations.

A number of qualified (or conditional) privileges exist that may be raised as defenses, provided all three of the following conditions are met: (1) the statement was made in good faith; (2) it regards a subject matter in which the person communicating has an interest or toward which he or she has a duty; and (3) the communication is made to a person having a corresponding interest or duty. It is well-settled in most states that communications arising out of the employer-employee relationship enjoy a qualified privilege. The majority of courts are in agreement that when a former employer communicates with a new or prospective employer about a former employee, or with a union in the grievance process, a conditional privilege arises from the former employer's discharge of duty owed to the new or prospective employer.[9] However, the privilege is lost when the communication is not made honestly or is made with malicious intent. References provided by an employer generally fall within a qualified privilege.

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tion rights."[35] Thus, an employer who is sued as a result of responding to a request for information about a former employee may assert, in addition to the defense of truth, a qualified business privilege. The qualified business privilege defense is available when an employment reference is given in good faith to one having an interest in learning of an employee's performance.

The qualified business privilege was upheld in *Duncantell v. Universal Life Insurance Company.*[36] A former debit agent was fired by the company for allegedly misappropriating $30 in sickness benefits which he had been directed to deliver to a policy holder. The policy holder asked that the agent apply the $30 toward a premium on another policy he wished to take out. When the new policy was not delivered promptly, the policy holder complained to the agent's supervisor, who rejected the agent's excuse that he had been unable to deliver the policy because of illness, and fired him. In response to queries from prospective new employers about the former agent's work record, his supervisor advised that they should "not . . . fool with" him since he could not be trusted. The company was sued for defamation and, although it could not prove that the former agent had been guilty of actual wrongdoing, the court held that:

> The publication made by [the agent] . . . was one by the former employer of the plaintiff to a prospective employer of the plaintiff. It was made to an inquiry of the prospective employer requested by the plaintiff. It related to the work record of plaintiff while he was in the employ of the publisher or the company which he represented. Under these circumstances it . . . was a qualified privileged publication and created no liability on the publisher in the absence of malice.[37]

This opinion reflected the deference commonly afforded to employers providing written or verbal employment references. Nevertheless, there are cases in which courts have held that the qualified business privilege was insufficient to outweigh the economic injury suffered by a former employee as a result of an employer's unfavorable reference. These decisions have prompted many companies to adopt a policy of responding to employment inquiries by acknowledging only the fact that the applicant was employed and reciting the dates of employment. This approach is overly cautious for most employers. The qualified business privilege generally has not been eroded to the extent that it no longer protects good-faith communications to parties having a valid business interest in an employee's prior performance. Most cases in which employers have been held liable in defamation for communications made in references involve the use of unnecessarily abusive language or other circumstances that support a conclusion that the employer acted in an ill-tempered manner or was motivated by ill-will. Good-faith responses to inquiries concerning employment are seldom actionable.

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Status of Workplace Privacy Law: State-By-State Analysis

As the cases in the above discussion demonstrate, right-to-privacy issues have been applied by arbitrators and by the courts of different states in widely divergent ways within the context of employee relations. Although virtually all states (and a growing number of municipalities) recognize some degree of employee privacy, the extent to which the right exists from state to state can mean the difference between no liability and very substantial liability for employers, depending on where the case is brought. Therefore, it is absolutely essential that managers consult corporate counsel before privacy-related litigation arises, develop preventive programs of policy formation, and disseminate such policies to supervisory personnel.

The following state-by-state survey of right-to-privacy law is not intended as a substitute for obtaining competent legal advice in this sensitive and dynamic area of employee relations. Since the case law is constantly changing, this chart serves only as an initial research guide. More important, the facts of the individual employment setting and potential case must be carefully analyzed from a legal and common-sense point of view likely to be applied by a jury. The following chart provides managers with an overview of the breadth of state responses to privacy concerns and should increase their awareness of some of the legislative and judicial decisions likely to bear on workplace right-to-privacy issues relevant to their institutions.

The chart is presented in alphabetical order by state and lists relevant legislation and court decisions. The "Scope-of–Right" section of the chart summarizes the applicable statute or case. Users of the chart should keep in mind, in addition to the general caveat given above, that the right to privacy is a rapidly developing area of the law. The clear trend is in the direction of the expansion of employees' right to privacy in the workplace. Thus, case law and legislation must be monitored closely in order to keep pace with developments in right-to-privacy law.

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STATE	STATUTES/CASE LAW	SCOPE OF P
	Nakano v. Matayoshi, ___ Hawaii ___, 706 P.2d 814 (1985)	State cons privacy gi expectatic personal a concerned; employees not reason interest i financial same exter light of c subjecting conduct.
IDAHO	Idaho Code § 44-903 through § 44-904 (Supp. 1975)	No person, "require" take a pol condition
	Baker v. Burlington Northern, Inc., 99 Idaho 688, 587 P.2d 829 (1978)	An employe an employe from a gui public, nc employee's and he was determinat rehabilita question w publicatic public rec criminal a actionable

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ILLINOIS

STATE	STATUTES/CASE LAW	SCOPE OF R
INDIANA	Ind. Code § 4-1-6 (1981)	Governs the of personal agencies.
IOWA	Winegard v. Larsen, 260 N.W.2d 816 (Iowa 1978)	The State (law tort f(
	McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985)	State corre may be held employee's correctiona utilize a r searching e or inspect: (2) conduct without "re (3) conduct vehicle wh: confines o: or (4) dema of an emplo suspicion.'
		An employee searches is searches a: circumstan(

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NEBRASKA

STATE	STATUTES/CASE LAW	SCOPE OF R
	Dunphy v. Sheehan, 92 Nev. 259, 549 P.2d 322 (1976)	The financ an ethics public off financial unconstitu broad intr privacy of
NEW HAMPSHIRE	N.H. Rev. Stat. Ann. § 275.56 (Supp. 1983)	Defines em procedure employees' files.
NEW JERSEY	N.J. Rev. Stat. § 2A:170-90.1 (1971)	An employe "requires" submit to disorderly This secti who are ma dispensers This secti for admini test in th
	Devlin v. Greiner, 147 N.J. Super. 446, 371 A.2d 380 (N.J. Super. Ct. Law Div. 1977)	New Jersey vacy actio Restatemen (1977).

STATE	STATUTES/CASE LAW	SCOPE OF
NEW MEXICO	Gengler v. Phelps, 92 N.M. 465, 589 P.2d 1056 (N.M. Ct. App. 1978), cert. denied, 92 N.M. 353, 588 P.2d 554 (1979)	A former slander a employer' desirable employer. absolute slander s stems frc former em employee'
NEW YORK	Caesar v. Chemical Bank, 66 N.Y.2d 698, 487 N.E.2d 275, 496 N.Y.S.2d 418 (1985)	A bank em and all c situated, employer employees without c The bank obtained only a pa damages.
	DeLury v. Kretchmer, 66 Misc.2d 897, 322 N.Y.S.2d 517 (N.Y. Sup. Ct. 1971)	Sanitatio were not them were to be sho that sani collectin enterpris

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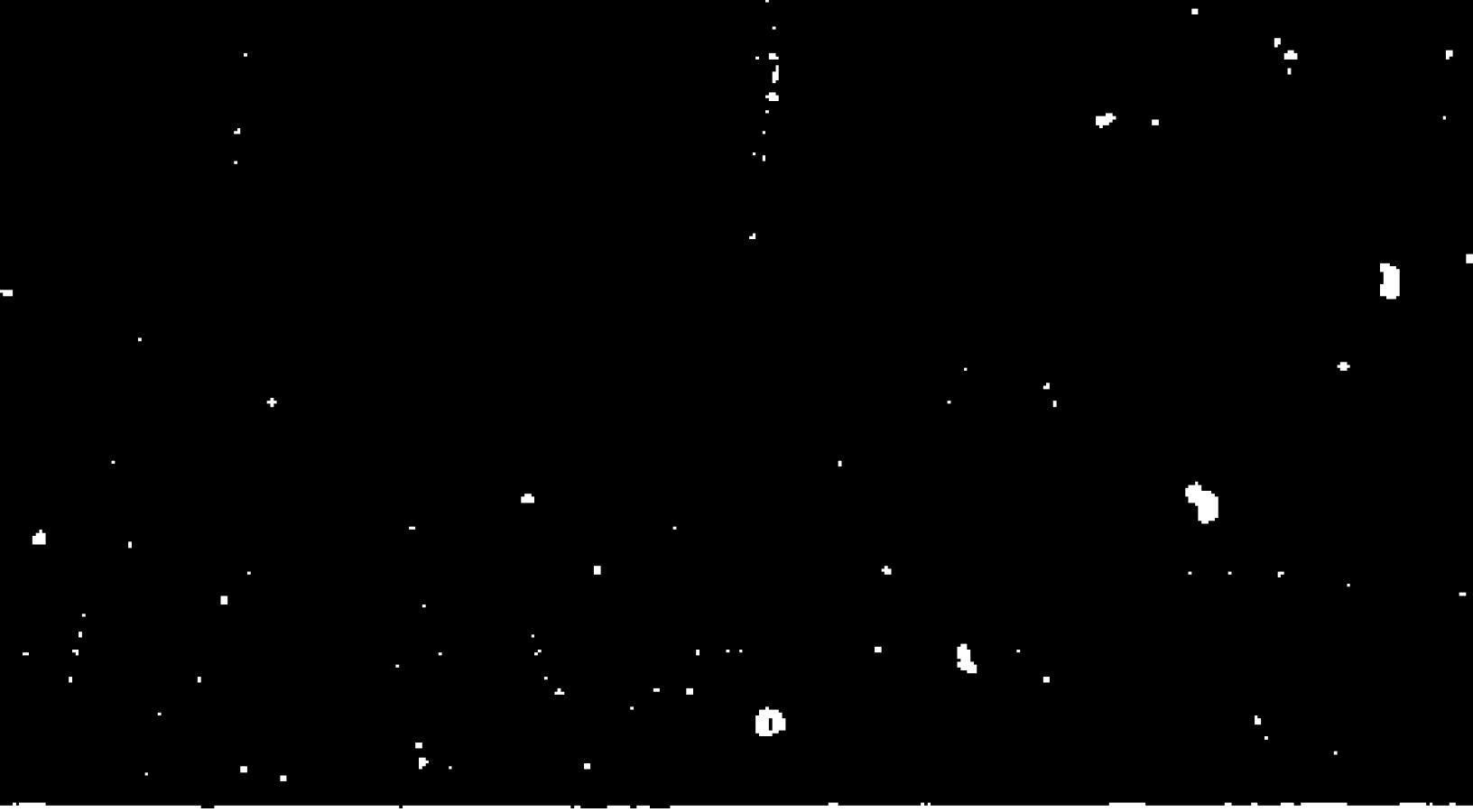

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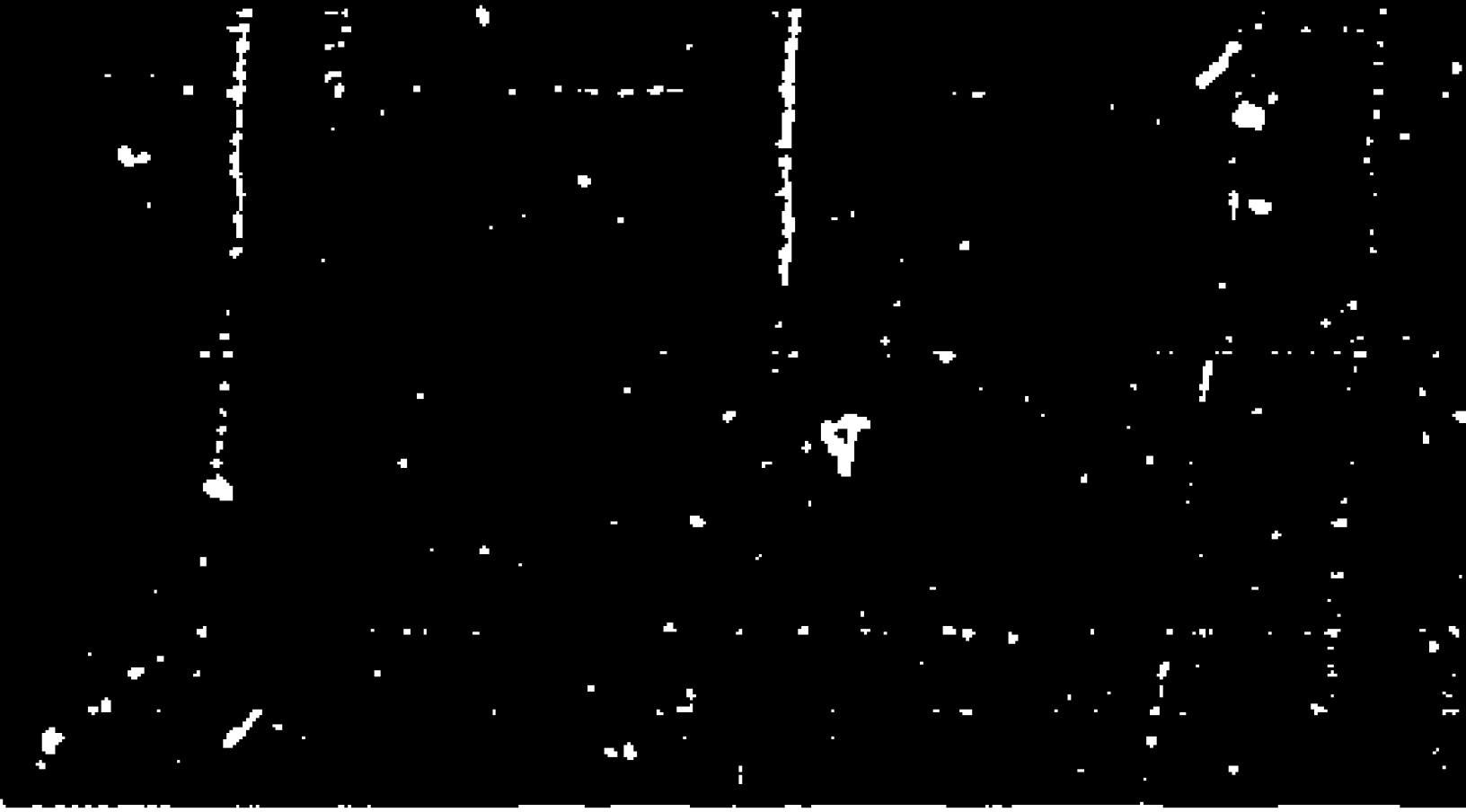

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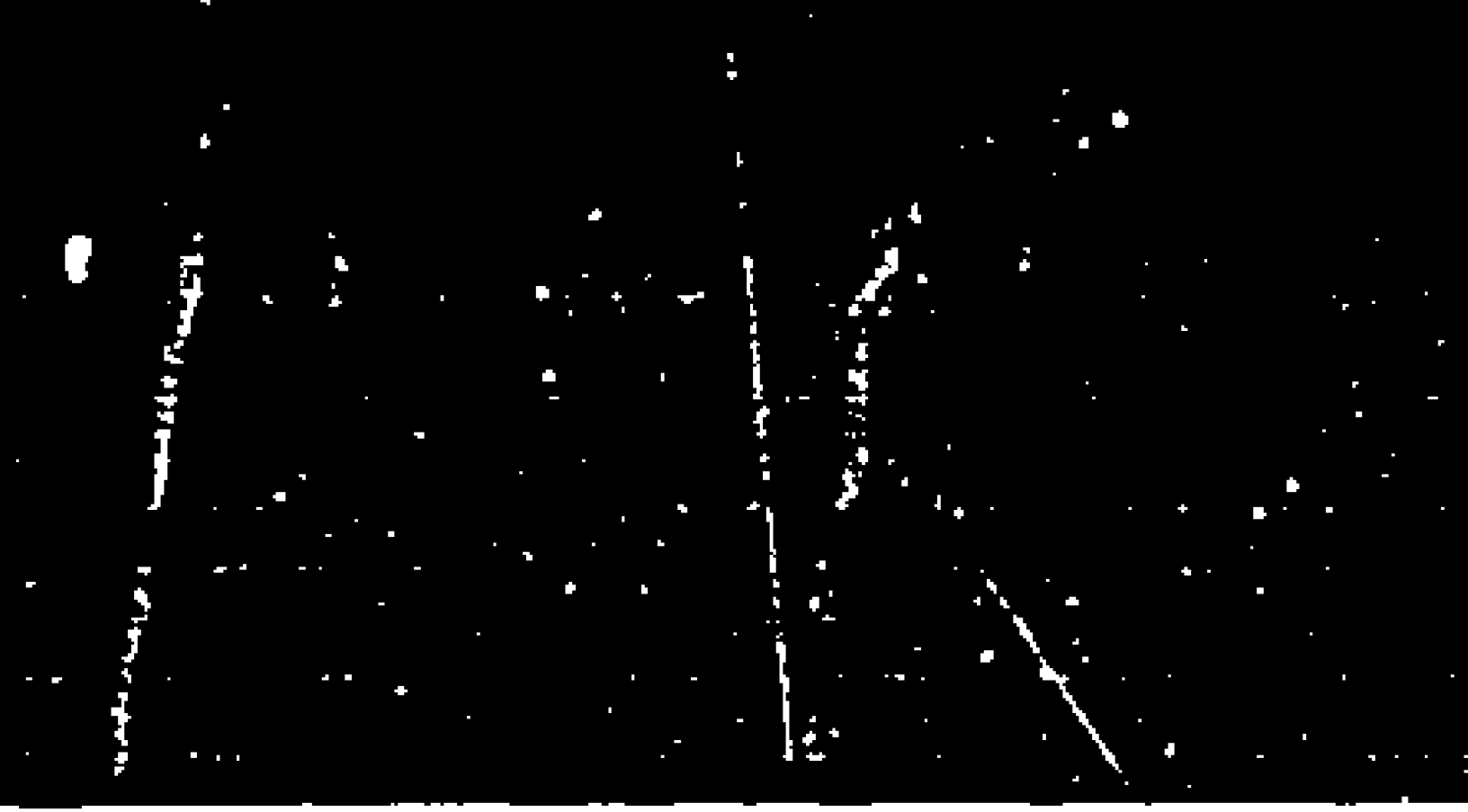

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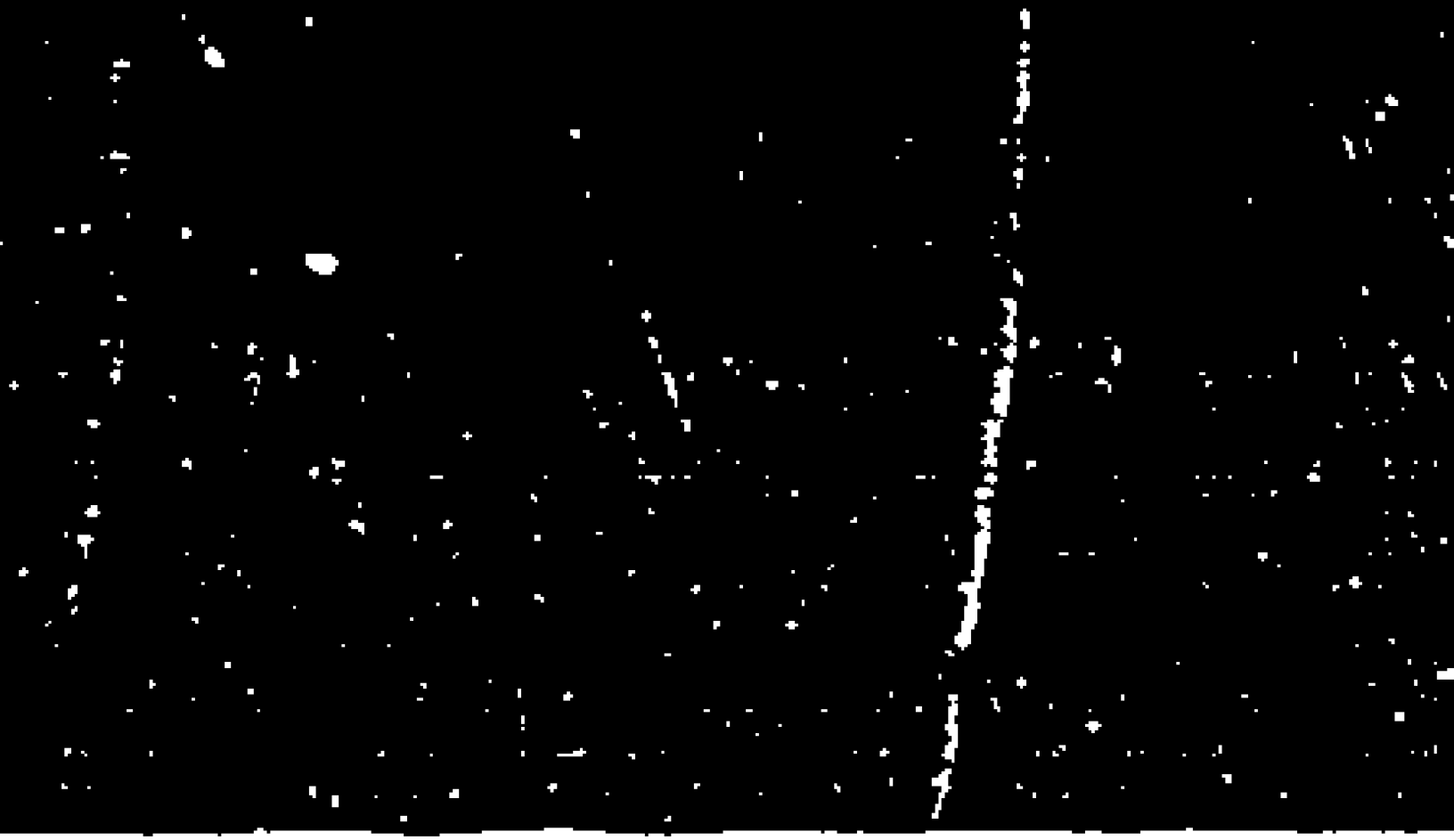

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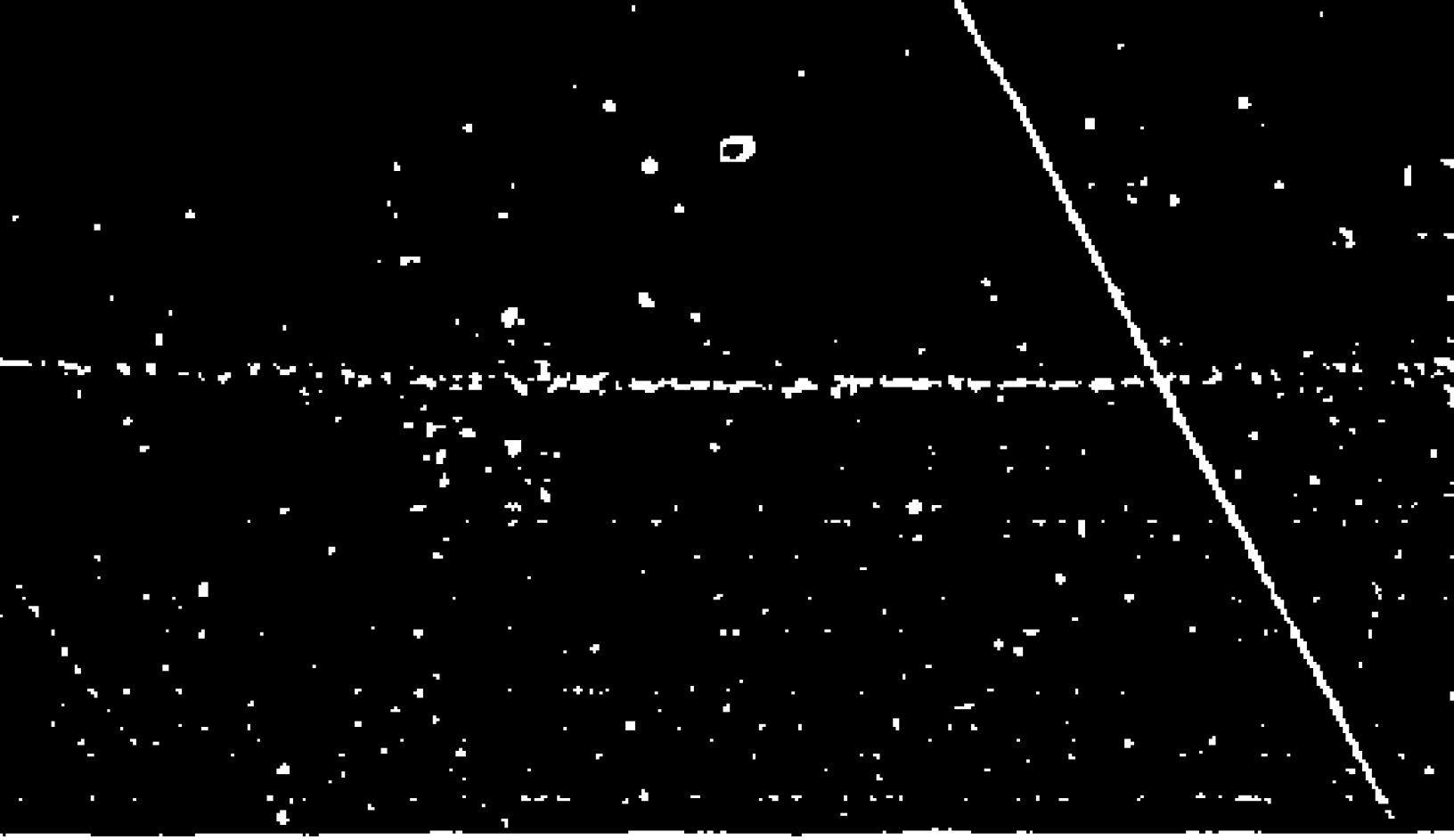

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