Eric M. Fink[[1]](#footnote-2)

# Introduction

In recent years, two states, North Carolina and Arkansas, have adopted nearly-identical statutes heralding a new approach to state laws against unauthorized recording and other data collection on private property.[[2]](#footnote-3) The term “data trespass” describes the basis of liability under these statutes: entering and collecting data on the premises without the owner’s permission.[[3]](#footnote-4)

While sometimes described as “Ag-Gag” laws,[[4]](#footnote-5) the North Carolina and Arkansas statutes differ from their precursers in three significant respects. First, while Ag-Gag laws specifically apply to agricultural facilities,[[5]](#footnote-6), the North Carolina and Arkansas statutes apply more broadly to private property, regardless of the type of facility or operation.[[6]](#footnote-7). Second, while earlier Ag-Gag laws impose criminal liability for prohibited activity, the North Carolina and Arkansas statutes permit the property owner to bring a civil action for trespass against those engaged in unauthorized data collection.[[7]](#footnote-8) Third, the North Carolina and Arkansas statutes specifically target unauthorized recording and other data collection by employees.[[8]](#footnote-9)

This third distinctive feature of the North Carolina and Arkansas data trespass laws is the focus of this article. At least some of the employee activity subject to civil liability under these statutes is protected under federal labor and employment laws. This conflict raises the question of federal pre-emption. Thus far, the courts have not addressed this issue.[[9]](#footnote-10) Previous scholarship on the NCPPA and earlier Ag-Gag laws has likewise been silent on the matter.[[10]](#footnote-11)

This article examines federal pre-emption of employee liability under state data trespass laws, focusing on the NCPPA. Part 2 provides an overview of the NCPPA. Part 3 discusses the protections that federal law affords to the types of employee activity subject to liability. Part 4 reviews federal labor and employment pre-emption doctrines and considers how these apply to state data trespass liability for employee activity. The conclusion urges state legislatures to avoid pre-emption problems by more careful drafting, and urges courts to apply pre-emption where state data trespass laws (whether carelessly drafted or by design) would penalize or chill employee activity that federal law protects.

# The North Carolina Property Protection Act

The North Carolina Property Protection Act (“NC PPA”)[[11]](#footnote-12) provides that,

Any person who intentionally gains access to the nonpublic areas of another’s premises and engages in an act that exceeds the person’s authority to enter those areas is liable to the owner or operator of the premises for any damages sustained".[[12]](#footnote-13)

1. Associate Professor of LawAssociate Professor of Law, Elon University School of Law, Greensboro, North Carolina. efink@elon.edu. Acknowledgments [↑](#footnote-ref-2)
2. { | NC Property Protection Act, 2015 | | | zu:21885:9BQD5SVF } (“NCPPA”); Arkansas { | 2017 | | | zu:21885:RSQBADU5 }. [↑](#footnote-ref-3)
3. { | NC Property Protection Act, 2015 | | | zu:21885:9BQD5SVF } (“NCPPA”); Arkansas { | 2017 | | | zu:21885:RSQBADU5 }. Another recent entrant to the data trespass field is Wyoming. See { | 2015 | | | zu:21885:YPRFJBFW }; { | 2015 | | | zu:21885:J7AWHBBX }. The Wyoming statutes are sui generis, particularly in their specific targeting of “resource data” collection. *See* { | 2015 | | | zu:21885:YPRFJBFW } § (h)(iii) and { | 2015 | | | zu:21885:J7AWHBBX } § (e)(iv) (defining “resource data” as “data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archaeology, air, water, soil, conservation, habitat, vegetation or animal species.”). [↑](#footnote-ref-4)
4. See, e.g., { | Center for Constitutional Rights, & Defending Rights & Dissent, 2017 | | | zu:21885:8GWTM8ET } (identifying North Carolina & Arkansas statutes as examples of second-wave Ag-Gag laws) [↑](#footnote-ref-5)
5. Kansas, { | 2006 | | | zu:21885:MQTF7G4J }; Montana, { | 1991 | | | zu:21885:YERF9GF8 }; North Dakota, { | 1991 | | | zu:21885:NC9TEXML }; Alabama, { | 2002 | | | zu:21885:LWIYUCX5 }; Iowa, { | 2004 | | | zu:21885:G5BMRLNT }; Missouri, { | 2012 | | | zu:21885:RMYY566N }; Utah, { | 2012 | | | zu:21885:X8E4LY7G }; Idaho, { | 2014 | | | zu:21885:T6BV2SCG }. See also { | Center for Constitutional Rights, & Defending Rights & Dissent, 2017 | | | zu:21885:8GWTM8ET } 1-2, 10-11; { | Marceau, 2015 | | | zu:21885:EK4MRCTH }, 1332 [↑](#footnote-ref-6)
6. The NCPPA applies to “the nonpublic areas of another’s premises”, without limitation as to the nature or use of the property. { | NC Property Protection Act, 2015 | | | zu:21885:9BQD5SVF }; The Arkansas statute applies to “commercial property”, defined to include any “business property”, “Agricultural or timber production operations”, and “Residential property used for business purposes”. { | 2017 | | | zu:21885:RSQBADU5 } 16-118-1131(a)(1). [↑](#footnote-ref-7)
7. { | NC Property Protection Act, 2015 | | | zu:21885:9BQD5SVF } (“NCPPA”); Arkansas { | 2017 | | | zu:21885:RSQBADU5 }; see, { | Center for Constitutional Rights, & Defending Rights & Dissent, 2017 | | | zu:21885:8GWTM8ET } (distinguishing North Carolina & Arkansas statutes from previous Ag-Gag laws on this basis). [↑](#footnote-ref-8)
8. { | NC Property Protection Act, 2015 | | | zu:21885:9BQD5SVF }; { | 2017 | | | zu:21885:RSQBADU5 }. Some earlier Ag-Gag statutes contain specific provisions aimed at so-called “employment fraud” for the purpose of gaining access to an agricultural facility, See, e.g., { | 2014 | | | zu:21885:T6BV2SCG } (imposing liability on one who “Obtains employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury”), but otherwise generally apply to anyone engaged in the activities prohibited. [↑](#footnote-ref-9)
9. Pending suits challenge the North Carolina and Arkansas statutes on constitutional grounds, but do not raise pre-emption arguments based on federal labor or employment law. See { | People for the Ethical Treatment of Animals v. Stein, 737 Fed. Appx. 122 2018 | | | zu:21885:RC55NET5 } reversing and remanding { | People for Ethical Treatment of Animals v. Stein, 259 F. Supp. 3d 369 2017 | | | zu:21885:QIKJR77V }; ARKANSAS SUIT. In { | Animal Legal Defense Fund v. Otter, 118 F. Supp. 3d 1195 2015 | | | zu:21885:BA3FE9UI }, the plaintiffs sought a declaratory judgment invalidating the Idaho Ag-Gag statute on non-labor pre-emption grounds. See Complaint at 46-48 (asserting pre-emption under the False Claims Act, Food Safety & Modernization Act, and Clean Water Act.). On appeal, an amicus brief by the United Farm Workers union argued that the statute would undermine employee protections under federal law. UFW Amicus Brief at 7-29. Another amicus brief by the Idaho Building Trades Council and state AFL-CIO specifically argued for pre-emption under the NLRA. { | anon. Amicus Curae Brief of the Idaho Building Trades Council and the Idaho AFL-CIO, in Support of Appellee and for Affirmance, 2016 | | | zu:21885:JI4EU8UK } at 4-13. However, neither the District Court nor the Court of Appeals reached these issues. See { | Animal Legal Defense Fund v. Otter, 118 F. Supp. 3d 1195 2015 | | | zu:21885:BA3FE9UI } (granting summary judgment in favor of plaintiffs on other grounds); { | Animal Legal Defense Fund v. Wasden, 878 F. 3d 1184 2018 | | | zu:21885:P485J6LL } (affirming in part and reversing in part). [↑](#footnote-ref-10)
10. ONE PREVIOUS PIECE ON THE NCPPA; NUMEROUS ARTICLES ON AG-GAG. MOSTLY FOCUSED ON THE CONSTITUTIONAL ISSUES [↑](#footnote-ref-11)
11. { | NC Property Protection Act, 2015 | | | zu:21885:9BQD5SVF } [↑](#footnote-ref-12)
12. { | NC Property Protection Act, 2015 | | | zu:21885:9BQD5SVF } [↑](#footnote-ref-13)