SECURITY LINE

A PUBLICATION OF THE METROPOLITAN BURGLAR & FIRE ALARM ASSOCIATION OF NEW YORK

JULY - AUGUST 2017

If You Are Using Subcontractors, Be Careful

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Proposed Update To New York State Law

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MBFAA...Be a Part of It!

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In This Issue of Security Line

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Our New Website
(See Page 17)
For Date of Next Meeting
www.mbfaa.com

President's Message…

By: Michael H. Zemering
President, FM Systems, Inc.
President, MBFAA
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Mike Zemering

**"I can't change the direction of the wind,
but I can adjust my sails to always reach my destination."**
—Jimmy Dean

There is an important update proposed to the New York State law that governs how security companies operate, Article 6D. The changes are to Sections 195.1, 195.2,
195.8, 195.11 and 195.15.
This includes changes to the definition of who is included in the law, section "195.2 Need for license," 195.8 Fingerprinting and 195.11 I.D. cards.
You can view a copy of the purposed changes at the website listed below.
"https://www.dos.ny.gov/licensing/alarminstall/proposed21214.html"

Change to 195.1:
(g) Network- A network, also referred to as a computer network, consists of two or more devices that are linked together through any means, including but not limited to, ethernet, wifi, or serial bus, so that they can communicate with each other and thereby exchange commands and share data that may operate hardware and utilize other resources for the operation of a security, video, access and alarm detection and/or notification system.
And:
(h) Qualifying officer. A qualifying officer is the individual designated, pursuant to General Business Law section 69-q(3)(a), to represent the limited liability company or
corporation that is licensed to engage in the business of installing, servicing or maintaining security or fire alarm systems under article 6-D of the General Business Law. Such businesses are operated under the direction and control of the qualifying officer, who shall be required to meet the licensing requirements pursuant to Article 6-D of the General Business Law.

Changes to 195.2 Need for license:
(a) An individual, firm, company partnership or corporation must be licensed:
(1) if it installs, maintains or services alarm systems, including, but not limited to, such items as [the] detectors, control devices and alarm communication systems, conduits and associated wires of alarm systems; or
2) if it holds itself out to the public as being able to do so. This shall include, but not be limited to, selling alarm systems to consumers when the installation, maintenance or servicing of the alarm system will be subcontracted to or otherwise performed by another;
(4) single station battery-operated smoke alarm [detection] devices

There are other changes proposed, so I suggest you look at the above link and read it carefully to see if you agree with the changes.

The MBFAA requests you write a letter to the following person stating that you, as a licensed NYS alarm company, strongly support the changes to Article 6D, Reference DOS-32-17-00002-P), as posted on the Dept. of State Division of Licensing Services website
David A. Mossberg
Associate Attorney, Office of General Counsel
New York State Department of State
123 William Street, 20th Fl.
New York, NY 10038
Below is a link for a sample letter:
https://www.dropbox.com/sh/17bmg7lkeqwdmpd/AADbwxT_bd8Id8SQ27VWhoGa?dl=0

I look forward to seeing all our members and guests at the next meeting.

—Mike

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Executive Director's Message…

Alan Glasser

By: Alan Glasser, Executive Director, MBFAA

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IF YOU'RE USING SUBCONTRACTORS WHO ARE PAID ON A 1099, BE CAREFUL. *BE VERY CAREFUL!*

Many of our members rely on "subcontractors" who are not W2 employees and are being paid for the work they do and issued a IRS Form 1099 at the end of the year.

There are many issues that may arise from New York State alarm license issues, workman's compensation issues, IRS tax issues.

In this article I'll cover some of the IRS tax issues concerning "subcontractors, 1099" and "employees, W2."

Once again, I rely on the IRS... they have so much free and good information concerning your business... here is the place where I gleaned much of my information and for you to go for a follow-up after you read this article:

Small Business and Self-Employed Tax Center

Independent Contractor (Self-Employed) or Employee?

It is critical that business owners correctly determine whether the individuals providing services are employees or independent contractors.

Generally, you must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. You do not generally have to withhold or pay any taxes on payments to independent contractors.

Select the Scenario that Applies to You:

- **I am an independent contractor or in business for myself**
  If you are a business owner or contractor who provides services to other businesses, then you are generally considered self-employed. For more information on your tax obligations if you are self-employed (an independent contractor), see our Self-Employed Tax Center.
- **I hire or contract with individuals to provide services to my business**
  If you are a business owner hiring or contracting with other individuals to provide services, you must determine whether the individuals providing services are employees or independent contractors. Follow the rest of this page to find out more about this topic and what your responsibilities are.

Determining Whether the Individuals Providing Services are Employees or Independent Contractors

Before you can determine how to treat payments you make for services, you must first know the business relationship that exists between you and the person performing the services. The person performing the services may be -

- An independent contractor
- An employee (common-law employee)
- A statutory employee
- A statutory nonemployee

In determining whether the person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered.

Common Law Rules

Facts that provide evidence of the degree of control and independence fall into three categories:

1 : Does the company control or have the right to control what the worker does and how the worker does his or her job?

1: Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/

Continued on page 14

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Jeffrey Atkins
President

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Legal Side

By Kenneth Kirschenbaum, Esq.

Kenneth Kirschenbaum, managing partner of the legal firm of Kirschenbaum & Kirschenbaum, P.C., is legal counsel to the Metropolitan Burglar and Fire Alarm Association of New York. Mr. Kirschenbaum's offices are in Garden City, NY He can be reached at 516-747-6700, ext. 301. Email to: Ken@KirschenbaumEsq.com.

Can You Shorten The Statute Of Limitations in Your Alarm Contract

All claims [causes of action] have specified time periods by which the lawsuit must be commenced or the claim deemed abandoned and barred. The time period is called the Statute of Limitation and typically the time period is 6 years for contract, 4 years for warranty, 3 years for negligence, 1 year from intention tort. But these time constraints vary state to state. Alarm contracts typically shorten the time to bring an action against the alarm company and the shortened time is typically 1 year. So the question is, can you include a provision shortening the time to bring a lawsuit? Will that provision turn out to be unenforceable? Will that provision subject you to a potential claim for deceptive business practices, potentially making you a class action defendant target?

General rules of contract apply with some exception. Parties are free to contract as they wish provided the contract is not unconscionable [which is really a legal conclusion and not some subjective analysis], does not violate a public policy [which would make it unconscionable I suppose] or violate a statute prohibiting the shortening of the statute of limitations.

When we provide our Standard Form Agreements we do try to customize the contract provisions state by state.

If there isn't a statute to worry about, your focus will be whether the shortened period is reasonable. One year is fairly consistently enforced. But be mindful that the year needs to start when the claim arises, not when the contract is signed. If the period runs from contract signing the period could expire before the claim even arises; the provision won't be enforced.

I recently made a change in the Standard Form Agreement to make the shortened time period more acceptable. I made it reciprocal. Now not only will the subscriber have 1 year to bring an action but the alarm company will also have the same 1 year. Making the provision reciprocal, in my opinion, makes it seem fairer on its face. If you let a subscriber go a year without paying then you deserve to have your claim barred.

An appellate court case in Maryland just released a decision addressing the issue. See below for excerpts from the case. The case is Court of Appeals of Maryland. Richard and Daphne CECCONE v. CARROLL HOME SERVICES, LLC.

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Can You Shorten The Statute Of Limitations *from page 8*

"States have taken different approaches as to whether, and the extent to which, parties to a contract may agree in advance to shorten a statutory limitations period. Among the states that prohibit such provisions, some have enacted laws containing such a prohibition,12 while others have imposed that prohibition judicially on the basis of public policy.13 In other states, courts appear to allow for contractually-shortened limitations periods, absent a defense to contract formation.14 Many courts have assessed such provisions according to a criterion of reasonableness.15 In any event, it seems safe to say that "where a limitations period is imposed by a contract rather than by a statute, the public policy considerations that typically weigh in favor of strict enforcement of the limitations period do not apply."16

*6 9Maryland law has combined these approaches. There are some provisions in the Maryland Code that explicitly bar any effort to shorten a statute of limitations. See, e.g., Maryland Code, Insurance Article ("IN"), § 12–104 (provision in insurance or surety contract that purports to shorten period of limitations is "against State public policy, illegal, and void");17 see also St. Paul Travelers v. Millstone, 412 Md. 424, 987 A.2d 116 (2010) (applying IN § 12–104 to hold a contractually-shortened limitations period void). Otherwise, the validity of a contractual provision that purports to shorten a statutory limitations period is measured by its reasonableness and by whether certain defenses to contract formation can be established. The Court of Special Appeals aptly summarized the Maryland approach: "parties may agree to a provision that modifies the limitations result that would otherwise pertain provided (1) there is no controlling statute to the contrary, (2) it is reasonable, and (3) it is not subject to other defenses such as fraud, duress, or misrepresentation." College of Notre Dame of Maryland, Inc. v. Morabito Consultants, Inc., 132 Md.App. 158, 174, 752 A.2d 265 (2000).

Milton Co. v. Council of Unit Owners of Bentley Place Condominium, 354 Md. 264, 274–76, 729 A.2d 981 (1999).

12

See, e.g., Code of Alabama, § 6–2–15 (holding such agreements "void"); Florida Statutes § 95.03 (same); cf. Texas Statutes, Civil Practice and Remedies Code, § 16.070 (same, unless the contract "relates to the sale or purchase of a business entity" where there is an exchange of consideration and the contract is worth at least $500,000).

13

Dunlop Tire & Rubber Corp. v. Ryan, 171 Neb. 820, 108 N.W.2d 84 (1961) (holding such agreements void as "against public policy").

14

Rory v. Continental Ins. Co., 473 Mich. 457, 703 N.W.2d 23, 31 (2005) ("n unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written ... A mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions.")

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Can You Shorten The Statute Of Limitations *from page 10*

15
See, e.g., Order of United Commercial Travelers of America v. Wolfe, 331 U.S. 586, 608, 67 S.Ct. 1355, 91 L.Ed. 1687 (1947) ("in the absence of a controlling statute to the contrary, a provision in a contract may validly limit ... the time for bringing an action ... to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period"); Nuhome Investments, LLC v. Weller, 81 P.3d 940, 947 (Wy. 2003) (contractually-shortened limitations periods "are prima facie valid and will be enforced absent a demonstration by the party opposing enforcement that the clause is unreasonable ...");
16
Gallegos v. Mount Sinai Medical Center, 210 F.3d 803, 810 (7th Cir. 2000).
17
IN § 12–104 was enacted in reaction to a decision of this Court enforcing a provision in an automobile insurance contract shortening the period of limitations. See Amalgamated Cas. Ins. Co. v. Helms, 239 Md. 529, 540, 212 A.2d 311 (1965); Chapter 487, Laws of Maryland 1966; see also Harvey v. Northern Ins. Co. of New York, 153 Md.App. 436, 837 A.2d 223 (2003) (holding that IN § 12–104 did not apply to a marine insurance policy).
18
Barrie School v. Patch, 401 Md. 497, 933 A.2d 382 (2007) (liquidated damages clauses upheld if the stipulated amount is a "reasonable forecast of just compensation").
19
Gilman v. Wheat, First Securities, Inc., 345 Md. 361, 378, 692 A.2d 454 (1997) (forum selection clauses would be upheld unless "enforcement would be unreasonable").
20
National Glass, Inc. v. J.C. Penney Properties, Inc., 336 Md. 606, 610, 650 A.2d 246 (1994) (choice-of-law provisions upheld unless, among other things, "there is no ... reasonable basis for the parties' choice") (citing Restatement (Second) Conflict of Laws § 187(2) (1971)).
21
See, e.g., Henning Nelson Const. Co. v. Fireman's Fund American Life Ins. Co., 383 N.W.2d 645, 651 (Minn. 1986) (holding that a one year contractual limitations period was "unreasonably short"). But see, e.g., Capitol Fixture & Supply Co. v. National Fire Ins. Co. of Hartford, 131 Colo. 64, 279 P.2d 435, 437 (1955) (holding that a one year contractual limitations period was "not unreasonable").
22
Compare International Business Machines Corp. v. Catamore Enterprises, Inc., 548 F.2d 1065, 1073 (5th Cir. 1976) (upholding contractually-shortened limitations period contained in a "facially comprehensive written agreement[ ] between sophisticated corporate entities") with Long v. Holland America Line Westours, Inc., 26 P.3d 430, 435 (Alaska 2001) (refusing to enforce a contractually-shortened limitations period because, inter alia, one party "possessed disproportionate bargaining power in setting the terms of the tour contract"); McKee v. AT & T Corp., 191 P.3d 845, 859 (Wash. 2008) (refusing to enforce such contractually shortened limitations provision "when imposed on a consumer in a contract of adhesion for a basic consumer service")." •

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BE VERY CAREFUL! from page 6

supplies, etc.)

2: Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

Businesses must weigh all these factors when determining whether a worker is an employee or independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. There is no "magic" or set number of factors that "makes" the worker an employee or an independent contractor, and no one factor stands alone in making this determination. Also, factors which are relevant in one situation may not be relevant in another.

The keys are to look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination.

Form SS-8

If, after reviewing the three categories of evidence, it is still unclear whether a worker is an employee or an independent contractor, Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding (PDF) can be filed with the IRS. The form may be filed by either the business or the worker. The IRS will review the facts and circumstances and officially determine the worker's status.

Be aware that it can take at least six months to get a determination, but a business that continually hires the same types of workers to perform particular services may want to consider filing the **(PDF).**

Employment Tax Obligations

Once a determination is made (whether by the business or by the IRS), the next step is filing the appropriate forms and paying the associated taxes.

- Forms and associated taxes for independent contractors
- Forms and associated taxes for employees

Misclassification of Employees

Consequences of Treating an Employee as an Independent Contractor

If you classify an employee as an independent contractor and you have no reasonable basis for doing so, you may be held

liable for employment taxes for that worker. See Internal Revenue Code section 3509 for more information.

I think that's enough IRS information to get your brain cells working.

As I said at the very beginning of this article: You should always seek out the advice of an Attorney and/or Certified Public Accountant.

The MBFAA's attorney is:

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"Be a part of it" the MBFAA

Alan Glasser,

Executive Director, MBFAA

…and Thank You!

Should You Agree to Central Station's Demand For Direct Contract With Your Subscribers

By Kenneth Kirschenbaum,Esq

We're a California based ACO [Alarm Company Operator] and have been working with a monitoring center based in New York to establish them as our service provider. They require a Master Agreement with us, of course, and also an agreement with the subscriber specifically, signed by them. I've noticed more and more central stations are moving to this model. I am really uncomfortable with this and am not in favor of the individualized agreement between them and our customer.

My thought is the Master Agreement between our ACO and the monitoring provider should suffice. Do you have any advice for getting around this requirement or should we just find another vendor? At the very least, what should the Master Agreement specify if we should somehow be forced into contracting with this center?

I would like to remain anonymous if you should choose to print this question.

Continued on page 16

Should You Agree To Central Station's Demand For Direct Contract With Your Subscribers *from page 15*

Response

It's a great question and raises additional questions. Let's examine them.

Some [foolish in my opinion] may believe that the central station's only customer is the alarm dealer, not the subscribers. The argument goes, since the subscriber is not the customer of the cs, the cs owes no duty to the subscriber and can't be sued by the subscriber. While it may be true that the cs agreement with the dealer states that there are no third party beneficiaries of the agreement, that is a contract argument. However, even if there is no contractual duty owed to the subscriber, the fact that the cs has undertaken to provide monitoring services to the subscriber there will be a common law negligence cause of action if the services are negligently performed. "Negligently performed" is really a legal standard, but the common language vernacular is close enough for our purposes. Bottom line, the subscriber will be able to sue the cs station for monitoring errors. For that reason the cs has a right to require that there be a proper contract in place to protect the cs.

The Master Agreement [called a Dealer Agreement if they are using the Standard Form Dealer Agreement; formerly called the Installer Agreement] requires the dealer to indemnify the cs, but that indemnity is only as good as the dealer or the dealer's insurance, assuming the dealer has insurance.So even if a Dealer covers the cs with its insurance , a claim by the subscriber could easily exceed a Dealer's insurance coverage and exceed the value of the dealer. Keep in mind it's the Dealer getting most of the monitoring charge paid by the subscriber, not the cs. Why should the cs accept such enormous risk without trying to protect itself. The first layer of protection is the contract.

So the cs is clearly right demanding a contract with the subscriber. I know many Dealers don't like the idea of a contract between the cs and subscriber [usually also signed by the Dealer, making it a 3 Party Contract]. There is a way around the 3 Party Contract and the cs' demand that it have a direct contact with the subscriber. How? Use a proper alarm contract, one universally recognized by the alarm industry and those serving the alarm industry. That's right, it's the Kirschenbaum TM Contract. You get the contracts you need for your alarm operation at www.alarmcontracts.com. Need help figuring out which contract forms you need? Contact our Contract Administrator Eileen Wagda at 516 747 6700 x 312 and she will assist you. •

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If you are a <u>paid-up 2014/15 member</u>, I still need you to fill in your information on line, even if we had it in our old data base. If you are a paid-up 2015 member the website may ask you for payment. I will DELETE the invoice. You do not have to pay twice.

<u>PLEASE FOLLOW THE INSTRUCTIONS BELOW</u>

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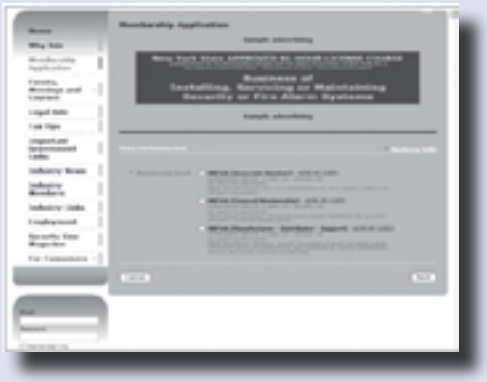

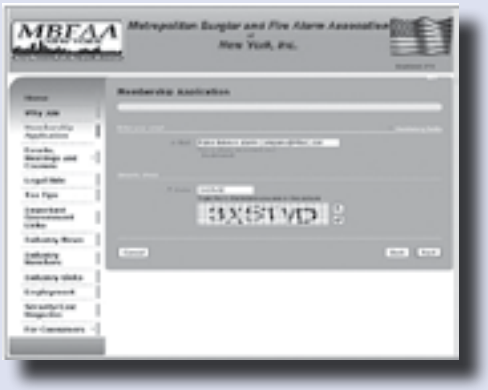

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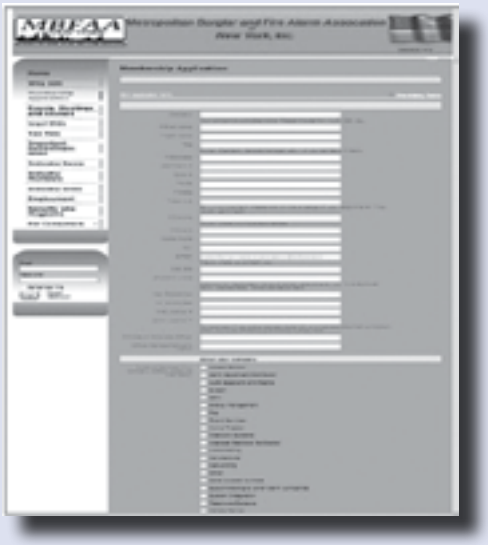

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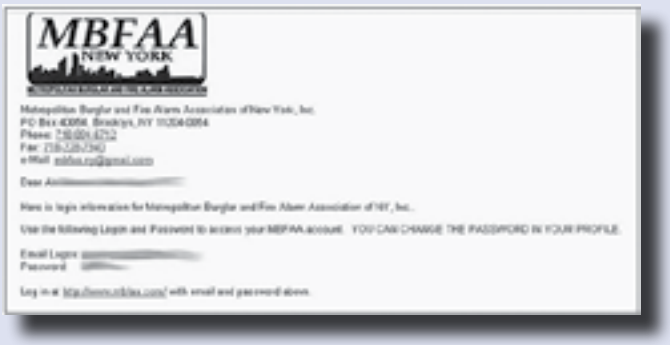

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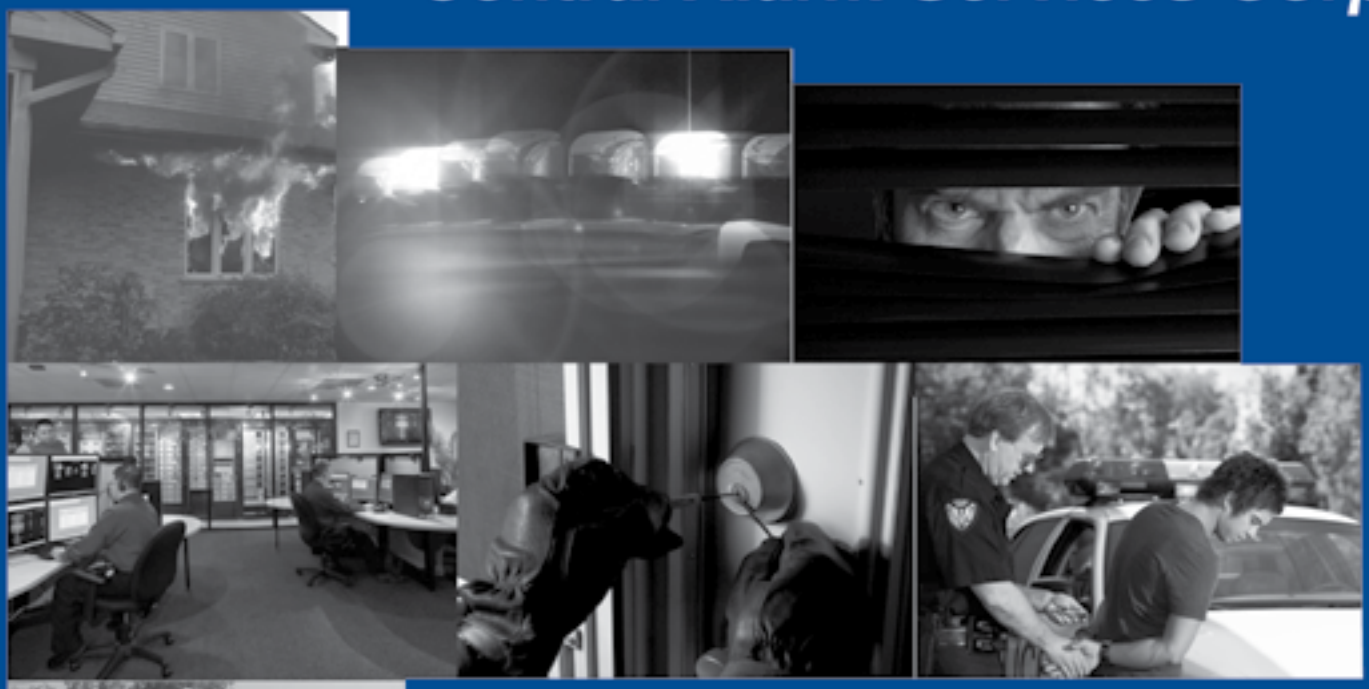

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