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Monitoring your employees

In what cases is it OK?

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Employer-ism voyeurism. Modern American society seems obsessed with peering in on one's generally private thoughts and moments. Is it any wonder that the Society of Human Resource Management (SHRM) found that 75 percent of companies surveyed reported monitoring their employees' email and internet usage? Employee invasion of privacy lawsuits have become a highly volatile area of the law. Here is some information that can help employers navigate their way through this emerging area of legal importance.

The Fourth Amendment to the Constitution guarantees "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." But the writers of the Constitution did not intend to create a generalized right to privacy, they simply set out to protect individuals from governmental intrusions, and warrantless searches and seizures.

Our courts, however, have created case law interpreting the Fourth Amendment granting more generalized areas of privacy rights for individuals. Also, our federal and state legislatures have passed certain privacy acts creating more specific privacy rights under certain conditions. For example, the federal Electronic Communication Privacy Act makes it a crime to intercept an employee's email during the course of transmission. However, post-transmission retrieval is not "interception" and is legal. The case law and statutes apply to limited situations, and have certain exceptions, that effect different areas of privacy in the workplace. Violations of privacy laws can spur not only civil lawsuits but criminal penalties, as well.

Employers today are monitoring all kinds of employee activities for a variety of reasons: efficiency, quality, security, etc. If your company is monitoring, it must be able to articulate a legitimate business reason for monitoring their employees' actions. Legitimate reasons for monitoring may include: protecting other employees from sexual or other unlawful harassment; preventing employee theft of trade secrets or other assets; and monitoring for quality and efficiency.

The most common effected areas of privacy in the workplace are: wiretaps, monitoring e-mail and internet usage, reviewing computer hard drives, video surveillance and workplace searches. Whether the employer's conduct is legal depends on what type of communication the employer is trying to monitor, how reasonable it is for the employee to expect the communication to be private, and the employer's reason for such monitoring. Generally, the law allows employers to monitor an employee's communications in the workplace, with a few important exceptions.

Here are some of the rules:

Phone calls

In most instances, employers may monitor employee conversations with clients or customers for quality control. Federal law allows employers to monitor work calls unannounced. There is an exception for personal calls. Under federal law, once an employer realizes that a call is personal, the employer must immediately stop monitoring the call. However, if an employee has been warned not to make personal calls from particular phones, an employer might have more monitoring leeway.

Our state law, the Michigan Eavesdropping Act, requires you have the consent of all parties before intercepting and monitoring a call. This means an employer cannot secretly monitor employee calls even with customers.

Voicemail messages

Although this is not yet a settled question, employers probably have the right to check their employees' voicemail, at least if the employer has a sound, work-related reason for monitoring. However, employees may have a legitimate gripe if you led them to believe their voicemail box would be private by, for example, making a statement to that effect in your policies, giving employees private voicemail box access codes or allowing employees to make and receive personal calls at work.

Email messages

Employers generally have the right to read employee email messages, unless company policy assures workers that their email messages will remain private.

If the company takes steps to protect the privacy of email (by providing a system that allows messages to be designated "confidential" or creating private passwords known only to the employee, for example), a worker might have a stronger expectation of privacy in the messages covered by these rules.

Internet use

Employers may keep track of the Internet sites visited by their workers. Some employers install computer software that blocks access to certain websites (gaming or pornographic, for example) or limit the time workers may spend on websites that are not specified as work related.

Video surveillance

As a general rule, employers can monitor and videotape workplace activities. However, all employees have certain reasonable expectations of privacy and video taping restrooms should be off limits.

Changing areas and the like may be off limits as well unless the employer has a legitimate business purpose and employees or customers are warned in advance of any surveillance.

Searches

When judges evaluate whether a particular search is legal, they balance two competing concerns. First, they consider the employer's justification for performing the search: an employer with a valid work-related reason for searching has the best chance of prevailing. For example, an employer who receives a complaint that a worker has a gun in his locker and has threatened to use it has a strong basis for a locker search.

Second, judges will consider the employee's reasonable expectations of privacy. A worker who legitimately expects, based on the employer's policies, past practice and common sense, that the employer will not search certain areas has the strongest argument here. For example, a worker has a high expectation of privacy in the employee restroom or a changing area, particularly if the employer has not warned workers that these areas might be monitored.

How do courts decide? They have to consider the relative strengths of these two competing interests. The more steps an employer takes to diminish their workers' expectations of privacy and the stronger the employer's reason to search, the more likely a court is to find the search legal. The questions will come down to: what expectation of privacy did the employee have, who, what when, where, and why were you searching?

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