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Employee control?

How far can the employer go? **Interviewed by Curt Harler**

Employers who seek to regulate or monitor their workers' electronic communications could be stepping into a legal quagmire. Lest they get their shoes muddy (and mess up their legal standings, too), employers should be up to date on court rulings on employee communications. The latest ruling comes from the 9th Circuit Court of Appeals in California.

Smart Business asked Michael A. McCabe, a shareholder at the Dallas law firm of Munck Carter, P.C. with expertise in e-discovery and labor and employment law, to help sort out the situation.

Let's cut to the chase; can I legally monitor workers' e-mail accounts?

Yes, in most states. But, you have to go about it in the right way. The key is to defeat the employee's expectation of privacy in his or her workplace communications.

Employers can do this by distributing a policy that clearly and unambiguously states that any communication made over the company's e-mail system is not private and will be monitored by the employer. Having established no expectation of privacy to workplace communications, the employer is on solid ground to legally monitor the communications.

Does that mean I can monitor personal communications on company computers?

This is a relatively new and dynamic area of the law that is constantly being fine-tuned. However, most courts have consistently ruled that so long as an employer's policy dispels any expectation of privacy, it is fair game for the employer to review communications made over the employer's e-mail system.

Some courts have gone so far as to hold that communications between employees and their lawyers cannot be privileged if the employer retains the right to review communications sent or received over the company's e-mail system. In the words of one court, a properly drafted policy is equivalent to notifying employees that 'the employer [is] looking over your shoulder each time you send an e-mail.'



Michael A. McCabe
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How about monitoring other technology like cell phones, voice mail, BlackBerrys?

Written communications, in whatever form, that are transmitted over the employer's computer system can be monitored if the employer's policy eliminates any expectation of privacy. This same rule should apply to voice-mail communications that are transmitted over an employer's e-mail system.

Monitoring cell phone conversations is a different story altogether. The law of most states and the federal government is that telephone conversations can be monitored if proper notice is given and consent received. In some states, only one person to the conversation needs to consent to being monitored, while in other states, all parties to the conversation must consent. That's why you're informed that your telephone conversation is being recorded when you call a customer service hot line.

To monitor employee's cell phone calls, you would have to receive consent from both the employee and whomever he or she calls because you don't know if he or she is calling one of the more restrictive states.

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For all practical purposes, it would be very difficult to implement such a policy with cell phones.

But didn't the 9th Court's June decision draw some lines?

Not as much as you might think. The 9th Circuit ruled that Arch Wireless, a text message provider, violated the federal Stored Communications Act (SCA) by disclosing a police officer's sexually explicit text messages to his employer, the City of Ontario Police Department, even though the city was the subscriber on the service contract. In the court's view, Arch Wireless violated the SCA because it disclosed stored text messages to a third party without the consent of either party to the communications.

This does not, however, stop employers from monitoring e-mails that are sent entirely over their own e-mail and computer systems. The easiest way for employers to avoid the 9th Circuit's ruling is to limit business communications to those devices that can be monitored by the employer, such as BlackBerrys and traditional e-mail.

Can I take disciplinary action against an employee for a post to an industry blog?

Probably, but it can differ from one state to the next and between public and private employers. There are several cases in which employees were fired or disciplined for material they posted on an industry or personal blog that was critical of their employer. Other employees have been disciplined for making statements online that appear to be the employer's official position on a topic.

To avoid these problems, all employers should have a policy that prohibits employees from blogging about their employer without making their employment status known and without stating that the espoused views are personal to the employee and not the views of the employer. Furthermore, the policy should remind employees that they can be disciplined if they paint the company in a bad light. <<