

## Electronic Communications Workplace Privacy Legal Issues

Leonard T Bier, JD, CAPP

Employers monitor the activities of employees in the workplace for many reasons. Legitimate reasons for monitoring employee activity include: productivity, appropriate use of work time, adherence to company procedures, theft prevention, preservation of confidential information, prevention of unauthorized activities, enforcement of company rules and to prevent sexual harassment or illegal activities.

In the course of their employment, employees use company owned personal computers, telephone systems, cell phones, pagers, electronic tablets or PDAs and other electronic communication devices.

Current technology gives the employer the ability to monitor, record and retrieve phone calls, voice messages, emails, internet access and searches, webpage downloads and other electronic fragments created by these communication devices. According to a 2005 study by the American Management Association, 76 percent of employers monitored Web site visits, 55 percent monitored e-mail and 50 percent monitored employee computer files.

New Jersey Chief Justice Stuart Rabner, in a recent New Jersey Supreme Court decision that has far ranging nationwide application to the monitoring of employee electronic communications by private sector employers, speaking for a unanimous Supreme Court, noted:

"In the past twenty years, business and private citizens alike have embraced the use of computers, electronic communication devices, the Internet, and e-mail. As those and other forms of technology evolve, the line separating business from personal activities can easily blur. In the modern workplace, for example, occasional, personal use of the Internet is common place. Yet, that simple act can raise complex issues about an employer's monitoring of the workplace and the employee's reasonable expectation of privacy."

The New Jersey Supreme Court supported a line of national cases regarding private employers, and reinforced that electronic communications initiated at the workplace or over the employer's electronic devices are the property of the employer and can be regulated and monitored.

However, in order for a private employer to exercise their ownership rights to, monitor and access employee electronic communications and/or devices, it is necessary for the private employer to fully inform the employee that they should have no expectation of privacy. Proper notice must be given by the private employer to the employee regarding its policies.

Best practices dictate that an employer does the following, to eliminate an employee's expectation of privacy regarding their workplace electronic communications or use of company electronic devices.

- Have a written electronic communication manual or policy and have employees acknowledge acceptance of this.
- State that the company reserves the right to review, audit, intercept, access and disclose all matters on the company's media and communications systems and services at any time without notice.
- State that e-mail and voice mail messages, internet use and communication and computer files are considered part of the company's business records. Such communications are not to be considered personal to any individual employee.
- State that third parties may monitor employee telephone, email and computer use, including social networking on company time.
- State that the principal purpose of email is for company business communications.
- Advise employees that their communications are stored in the memory of individual personal computer hard drives, company system servers, third party system service providers as well as in the memory of company supplied handheld communication devices and may be retrieved and reviewed by the company at any time.
- If personal e-mails or communications are allowed by the company on company electronic devices on an occasional basis or during non-work hours, state whether the employee must use their own personal, password protected email accounts (hotmail,

yahoo, gmail, etc.) and not their company email address for the communication to be considered by the company as private.

- Alternatively, state that any e-mail or communication sent or received on a company owned electronic communications device, even if sent from or received by the employees personal web based email account is subject to company monitoring, review, storage and retrieval.
- Prohibit use of the company's computers and e-mail system to solicit for outside business ventures, charitable organizations, or for any political, or religious purpose, unless authorized in writing by the human resources director.
- Prohibit sending e-mails or texts messages that are inappropriately sexual, discriminatory, harassing, chain letters, in violation of state or federal laws, related to job searches, or other activities prohibited by the company.
- Advise employees that, abuse of the electronic communications system may result in disciplinary actions, including termination of employment.

Courts nationwide, have found that a clear company policy banning personal e-mails and/or stating that electronic communications records are the property of the company, eliminate or diminish the reasonableness of an employee's expectation and claim to privacy.

However, an exception to the employer's right to unlimited access or review of employee electronic communications is the attorney-client privilege. The nation's courts have virtually unanimously upheld an employee's right to communicate with their attorney to discuss potential grievances or legal action against their employer and found the employee's expectation of privacy between themselves and their attorney is legitimate and enforceable. ■

---

**Leonard T Bier, JD, CAPP**, is an attorney and parking consultant who is the principle of Bier Associates. He can be reached at [lenbier@op-tonline.net](mailto:lenbier@op-tonline.net) or 732.828.8864.