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Monitoring Your Employees: How Much is Too Much?

Employers have many reasons to monitor their employees' activities while at work, including computer and email use, social networking programs and blogs. Most employers are concerned with employee productivity, interested in discouraging sexual and other illegal harassment, and preventing disclosure of trade secret and other confidential information, among other things. But how far may an employer go in its monitoring?

The answer hinges on the balancing of the employers' rights to monitor against the employees' right to privacy.[1] An employee's privacy extends to conducting personal activities without observation, intrusion or interference as determined by established social norms, taking into account customs, practices, physical settings surrounding particular activities in addition to the employer's notification in advance and the employee's consent to the intrusion. Hernandez v. Hillsides, Inc., 47 Cal. 4th 272 (2009).

This really means that if the employer intends to monitor its employee's personal activities during work, it needs to develop policies outlining what monitoring it intends to implement, notify the employees and obtain each employee's consent for the monitoring. It is important that the employee be notified that he/she has no reasonable expectation of privacy in his/her personal activities at work, and in any use of company computers, networks and systems.

Policies in the workplace are wide ranging, a sampling includes: review of content, keystroke, time spent on-line; review of stored computer files on company equipment; email use; web usage; personal instant messaging rules; operation of personal websites on company time; and operation of personal blogs on company time.

Some employers take it a step further creating policies that limit the content employees may post on personal blogs and social networking sites relating to company business, requiring express authorization if posting in

a professional capacity, limiting the employee from posting proprietary and other confidential company information and from posting negative content about other employees. These types of policies appear acceptable, although the court system has yet to test their validity. A potential problem could arise due to the National Labor Relations Act's protections extended to unrepresented employees and their rights to engage in concerted activities for the purpose of collective bargaining.

However the employer crafts its monitoring policies, ensure that the monitoring possibilities are reasonably related to the employers' legitimate business interests, clearly spelled out and provided to the employee, with a signed acknowledgement and receipt of the policy obtained from the employee.

[1] At times, the employee's Constitutional First Amendment right to free speech and California's statute protecting an employee's off-duty activities unrelated to employment may also come into play. This article does not address these concerns.

For more information about the topic above, contact Jennifer McQuarrie at jmcquarrie@pkwhlaw.com or (916) 442.3552.

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