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State By State Employee Monitoring Laws

Law360, New York (April 17, 2009) -- A 2007 survey conducted by the American Management Association suggests that 66 percent of companies monitor employees' Internet connections, 45 percent of employers track employees' keystrokes and time spent at the keyboard and 43 percent of companies monitor employees' e-mail. And, there is no doubt that those numbers have increased since 2007.

Aside from ensuring that employees do not create a hostile work environment by sending inappropriate e-mails, there are numerous other reasons why employers engage in electronic surveillance, most of which boil down to prohibiting their employees from engaging in improper activity, such as stealing a company's trade secrets or spending all day surfing the Internet.

While it typically is not a violation of an employee's privacy rights for an employer to conduct electronic monitoring of employees' computer and e-mail use at work, national employers should be aware that certain states require that employers provide notice before doing so, and several states have pending legislation that would require prior notice.

Specifically, Connecticut and Delaware currently have laws requiring employers to provide notice before conducting electronic monitoring, and New York, Massachusetts, and Pennsylvania all have legislation pending that would require notice before conducting electronic monitoring.

Connecticut

The Connecticut law, codified as Conn. Gen. Stat. § 31-48d (2008), requires employers who engage in any type of electronic monitoring to "give prior written notice to all employees who may be affected, informing them of the types of monitoring which may occur." *Id.* at § 31-48d(b)(1).

“Electronic monitoring” is defined as “the collection of information on an employer’s premises concerning employees’ activities or communications by any means other than direct observation ... but not including the collection of information (A) for security purposes in common areas of the employer’s premises which are held out for use by the public, or (B) which is prohibited under state or federal law.” Id. at § 31-48d(a)(3).

To satisfy the requirement of “prior written notice,” employers must “post, in a conspicuous place which is readily available for viewing by its employees, a notice concerning the types of electronic monitoring which the employer may engage in.” Id. at § 31-48d(b)(1).

The law provides exceptions however where an employer suspects an employee of engaging in misconduct.

If an employer has “reasonable grounds” to believe that employees are engaged in conduct which (1) violates the law; (2) violates the legal rights of the employer or other employees, or; (3) creates a hostile workplace environment; and electronic monitoring “may produce evidence of this misconduct,” the employer may conduct monitoring without giving prior written notice. Id. at § 31-48d(b)(2).

Employers who violate the law are subject to civil penalties levied by the Labor Commissioner. The maximum penalties are \$500 for the first offense, \$1,000 for the second offense, and \$3,000 for the third and each subsequent offense. Id. at § 31-48d(c).

Delaware

While Connecticut’s statute applies broadly to the monitoring of “employees’ activities or communications,” the Delaware statute applies specifically to the “monitoring of telephone transmissions, electronic mail and Internet usage.” 19 Del. C. § 705 (2008).

Under Delaware’s law, an employer may not “monitor or otherwise intercept any telephone conversation or transmission, electronic mail or transmission, or Internet access or usage of or by a Delaware employee unless the employer either:

1) provides an electronic notice of such monitoring or intercepting policies or activities to the employee at least once during each day the employee accesses the employer-provided e-mail or Internet access services; or

2) has first given a one-time notice to the employee of such monitoring or intercepting activity or policies.” Id. at § 705(b).

The notice must “be in writing, in an electronic record, or in another electronic form and acknowledged by the employee either in writing or electronically.” Id. at § 705(b)(2).

The law provides for a civil penalty of \$100 for each violation. However, this remedy is nonexclusive and does not “limit or bar any person from pursuing any other remedies available under any other law, state or federal statute, or the common law.” *Id.* at § 705(d).

Pending Legislation

Legislation proposing electronic monitoring laws similar to those of Connecticut and Delaware is currently pending in Massachusetts, Pennsylvania and New York.

Massachusetts

The Massachusetts bill contains multiple notice requirements. H.R. 1862, 2009, Gen. Assem. (Mass. 2009). For example, the “General Notice” provision requires the employer to give prior written notice “to all employees, customers or consumers who may be affected” by the monitoring in “any form that is reasonably calculated to reach the affected parties.” *Id.* at § 3(a)-(b).

There is also a “Specific Notice” requirement, under which the employer must provide to “each employee, customer or consumer who will be electronically monitored, and the exclusive bargaining representative, if any, prior written notice describing the following regarding the electronic monitoring of such employees: (1) the forms of electronic monitoring to be used; (2) the personal data to be collected; and (3) the hours and days per calendar week that electronic monitoring will occur. *Id.* at § 5(a).

As in Connecticut and Delaware, the Massachusetts statute provides for certain exceptions where notice would not be required.

For example, an employer could conduct monitoring without giving notice where it had “reasonable grounds to believe that the employees are engaged in conduct which violates the legal rights of the employer or the employer’s employees, customers or consumers and involves significant harm to that party, and that electronic monitoring will produce evidence of this misconduct.” *Id.* at § 3(c).

Prior notice would also not be required where an employer has “a reasonable suspicion that an employer’s employee, customer or consumer is engaged in or is about to engage in conduct which violates criminal or civil law or constitutes willful gross misconduct and has a significant adverse effect involving economic loss or injury to the employer, the employer’s employees or the employer’s customers or consumers.” *Id.* at § 3(c)(i)(A)-(B).

However, under this exception, the employer would be required to “execute a notarized statement” setting forth the particular conduct being electronically monitored, the basis for the electronic monitoring and an identification of the specific economic loss or injury to the employer or the employer’s employees.

The employer would be required to sign and retain the statement “for three years from the date the electronic monitoring began or until judgment is rendered in an action brought under [the statute] by an employee affected by such electronic monitoring, whichever is later.” *Id.* at § 3(c)(ii).

Proposed penalties include injunctive relief and a civil fine of up to \$5,000. The bill would also allow for a private right of action in which a person injured under the statute would be eligible for special and general damages along with attorneys’ fees and costs. *Id.* at § 12.

Pennsylvania

Pennsylvania’s proposed statute is intended to “balance the expectations of privacy of employees who may use work place e-mail messaging systems to communicate personal or private information with the legitimate needs of employers to prevent misuse or abuse of their e-mail systems.” S. 363, 2009, Gen. Assem. (Pa. 2009), § 2(b).

Similar to the other statutes, under the proposed Pennsylvania statute, “an employer who intentionally reads, listens to or otherwise engages in electronic monitoring, or otherwise monitors the computer usage of an employee, without first having provided the employee with notice” is liable to the employee for relief. *Id.* at § 4(a).

The employer satisfies the notice requirement by providing to the employee “a clear and conspicuous written form distributed to and acknowledged by all employees, written or electronically, in a manner reasonably calculated to provide actual notice.” *Id.* at § 4(b).

Pennsylvania would also allow an exception to the notice requirement where the employer “has reasonable grounds to believe that a particular employee of the employer is engaged in conduct that: (1) violates the legal rights of the employer or another person; (2) involves significant harm to the employer or such other person; and (3) the electronic monitoring is reasonably calculated to lead to evidence of such conduct. *Id.* at § 5(1)-(3).

As in Delaware, Pennsylvania would require every affected employee receiving notice to sign or electronically verify that the employee has received, read and understood the notice. If the employee refuses to do so, the person providing the notice on the employer’s behalf would be required to sign and retain a statement to this effect and provide a copy to the affected employee. *Id.* at § 8.

Unlike the other statutes, Pennsylvania’s proposed law does not provide for penalties levied by the state. However, the law would allow a private right of action against the offending employer. Under the proposed law, an employee injured by illegal electronic monitoring would be eligible to recover from his employer:

1) such preliminary and other equitable or declaratory relief as may be appropriate and attorneys’ fees and other litigation costs reasonably incurred; and

2) the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation as well as punitive damages, but in no case less than the sum of \$2,000. *Id.* at § 9(a)(1)-(2).

New York

Legislation is also pending in New York that would amend the labor law to require employers to notify employees when they engage in electronic monitoring. See A. 3871, 2009-2010, Reg. Sess. (N.Y. 2009).

The New York bill is similar to Connecticut's and adopts much of the Connecticut statute's language verbatim. As in Connecticut, New York defines "electronic monitoring," in part, as the collection of information "by any means other than direct observation." *Id.* at § 1(C).

The proposed New York law would require employers to provide prior written notice of monitoring to employees upon hiring, and once each year, informing them of the types of monitoring which may occur.

As with some of the other statutes, the notice would have to be in writing or in electronic format and acknowledged by the employee in a similar manner. Written notice would also be required to be displayed in a conspicuous place. *Id.* at § 2(A).

New York would provide employers with exceptions to the notice requirement in the same manner as Connecticut.

For example, employers in New York would be able to conduct electronic monitoring without giving prior written notice where they have reasonable grounds to believe that employees are engaged in misconduct and electronic monitoring may produce evidence of this misconduct. *Id.* at § 2(B).

New York would provide for a private right of action against violators, as well as assess civil penalties. Prevailing plaintiffs would be eligible for injunctive relief, damages and attorneys' fees and costs. *Id.* at § 3(A). Civil penalties would be set at \$500 for the first offense, \$1,000 for the second offense, and \$3,000 for the third and each subsequent offense. *Id.* at § 3(B).

As electronic monitoring is now a fact of life for most employers and employees, we will likely continue to see an increase in legislation requiring notice to employees. Accordingly, employers should be aware of and make sure that they are in compliance with these statutes.

But, even if an employer conducts electronic monitoring in a state that does not require notice, employers can significantly increase their protection against an invasion of privacy claim by providing notice to employees.

It is difficult for an employee successfully to argue that he or she had a reasonable expectation of privacy in e-mails at work if provided with notice by the employer that they were being monitored.

Accordingly, in terms of best practices, employers should have a policy in place regarding computer use and electronic monitoring, provide notice of the policy to its employees, and require employees to read and sign a statement acknowledging receipt of the policy.

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