

Chapter XIV

Employee Privacy in Virtual Workplaces

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ABSTRACT

This chapter addresses the legal aspects of employee privacy in virtual workplaces. The body of law regarding employee workplace privacy that has evolved over the years establishes a minimal expectation of privacy on the part of the employee (meaning employers have been found guilty of violating employee privacy only in rare and extreme cases). No one has yet examined whether virtual workplaces alter the fundamental assumptions underlying employee privacy rights. By reviewing the current status of employee privacy law and juxtaposing it with virtual workplace environments, with a particular focus on communication technologies, this chapter seeks to provide guidance for the privacy issues that are sure to arise with the growth and development of virtual workplaces.

INTRODUCTION

This chapter analyzes whether the growth of virtual workplaces changes the expectations employees may have regarding workplace privacy, and, consequently, whether employers face different legal standards regarding employee privacy. Traditionally, employees have been presumed to have minimal expectations of privacy in the workplace. What has not been addressed is whether these expectations carry over to virtual workplaces.

The focus of this chapter is on employer monitoring of employee communications in a virtual

workplace environment. The critical issue is whether the dynamics of the virtual workplace—particularly where employees work primarily from home—are altered with respect to employees' legally protected expectations of privacy and, if so, the potential legal liabilities employers face when monitoring employee communications. While employers have many legitimate reasons for monitoring employee communications, if their monitoring exceeds legitimate business purposes, they may find themselves liable to an employee fired as a result of the content of those monitored communications if the employer has violated the employee's right to privacy.

BACKGROUND

In today's modern workplace, employers find themselves dealing with growing legal concerns over the use of electronic communications. One survey has reported that 24% of companies have had employee e-mail messages subpoenaed by a court or regulatory body, and that 15% of companies have gone to court to defend lawsuits triggered by employee e-mail messages. As a result, more companies, according to the survey, are monitoring employee communications and enforcing company communications policies (*More Workers Fired*). When an employer monitors the communications of its employees, one naturally wonders to what extent do those employees have a legal right of privacy in the workplace.

There is a substantial body of literature reviewing the extent of employee privacy in the modern workplace (Kesan, 2002; Gabel & Mansfield, 2003; Hornung, 2005). While this research factors in the use of the Internet and e-mail communications, for the most part it does not distinguish between physical and virtual workplaces. The nature of the virtual workplace may, however, change the dynamics somewhat. First, because there is reduced physical interaction among virtual coworkers, there are heightened trust issues. Social control based on authority is replaced by self-direction and self-control; therefore, there is concern whether coworkers will fulfill their obligations and behave predictably (Cascio, 2000). This concern can lead to an increased desire to monitor employee communications.

Second, because of the very nature of the virtual workplace—in which employees operate remotely from each other and from managers (Cascio, 2000)—the reduction of face-to-face communication among coworkers creates a greater reliance on electronic forms of communication, particularly by telephone and e-mail messages. Employers are therefore more likely to monitor such communications to monitor the workflow of their employees. Finally, the virtual workplace exaggerates the mingling of personal and profes-

sional lives of employees. Their office is also their home in many cases. There is a greater likelihood of eliminating a clear demarcation between using computers, the Internet, and e-mail for personal use and for work.

EMPLOYEE COMMUNICATIONS AND EMPLOYER CONCERNS

Employers have a number of legitimate reasons for monitoring employee communications (particularly e-mail communications). First and foremost, they want to ensure that employees are performing their work according to expectations. Employers have legitimate concerns that employees may be using valuable work time for excessive personal activities, such as sending personal e-mail messages and surfing the Web (Finkin, 2002). In addition, employers may wish to assure that employees are appropriately communicating with fellow employees. For example, Michael Smyth was fired from the Pillsbury Company after sending e-mail messages concerning sales management that allegedly contained threats to “kill the backstabbing bastards” (Smyth, 1996, p. 99).

Employers may also be concerned that trade secrets and confidential information may inadvertently or purposely be disclosed to competitors or other businesses. For example, Shurgard Storage Centers sued Safeguard Self Storage alleging that in late 1999 Safeguard attempted to hire away some of Shurgard's employees and that one of those employees, while still working for Shurgard, had sent trade secrets and proprietary information to Safeguard through Shurgard's e-mail system (Shurgard, 2000).

Employers must also be concerned with communications sent among employees that may be deemed to create a “hostile” work environment. E-mail messages distributed within the workplace that contain obscene, sexually offensive, or racist content may result in the employer violating Title VII of the Civil Rights Act of 1964. Title VII makes it “an unlawful employment practice for

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