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LEGAL ALERT

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Did You Know: New York Has Adopted New Requirements For Electronic Monitoring of Employees

By: L. Micha Ordway

On November 8, 2021, Governor Hochul signed Senate Bill S2628, which requires employers to notify employees when the employer is monitoring or otherwise intercepting the employee's electronic communications. These new notice requirements become effective on May 7, 2022.

Requirements

S2628 amends § 52-c of the New York Civil Rights Law (the "Amendment") to include the notice requirements discussed below. It applies to all private employers, regardless of size. The Amendment defines an employer as any individual, corporation, partnership, firm, or association with a place of business in New York, but does not include the state itself or any political subdivision of the state.

The nature and type of monitoring affected by the Amendment is broad and is not limited to email communications. It specifically includes monitoring or interception of:

- telephone conversations; and
- transmissions, electronic mail or transmissions, or internet access or usage of or by an employee by any electronic device or system, including , but not limited to, the use of a computer, telephone, wire, radio, or electromagnetic, photoelectronic or photo-optical systems.

The Amendment specifically requires employers to provide prior notice to all employees, upon hiring, who are subject to electronic monitoring. The notice must be in writing but can be in an electronic record, or in another electronic form. Employees must also acknowledge the notice either in writing or electronically.

Additionally, each employer is required to post a notice of electronic monitoring in a conspicuous place that is readily available for viewing by all employees who are subject to electronic monitoring. As such, the notice should be placed in a break/lunch room or in common areas where employees congregate frequently.

The written notice required by the Amendment must advise employees that:

- any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including, but not limited to, the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means.

Notably, the Amendment does not apply to "processes that are designed to manage the type or volume of incoming or outgoing electronic mail or telephone voice mail or internet usage, which are not targeted to monitor or intercept the electronic mail or telephone voice mail or internet usage of a particular individual, and that are performed solely for the purpose of computer system maintenance and/or protection."

Enforcement

Under the Amendment, the attorney general is charged with enforcement of the notice requirements. Any employer found to have violated these requirements is subject to a maximum civil penalty of five hundred dollars for the first offense, one thousand dollars for the second offense and three thousand dollars for the third and each subsequent offense.

Justification

The Amendment was adopted in order to protect employee privacy by ensuring that employees understand "the consequences of inappropriate internet activity." The sponsors of the Amendment initially indicated that employees would be less likely to undermine an employers' company conduct standards by requiring employers to publish their guidelines of appropriate and inappropriate internet use. The sponsors indicated that such publication would increase transparency and avoid litigation. They also indicated that the Amendment would permit employees to make informed decisions about their internet use, while supporting companies' ability to monitor internet activity.

What now?

Employers that are currently monitoring, or intend to monitor, the communications covered by the Amendment should update their employee handbooks and policies to include the written notice required by the Amendment. Employers must also require new hires to acknowledge the notice in writing or electronically. The notices must also be posted conspicuously in common areas.

Should you like more information regarding the Amendment, or if we can provide counsel, please feel free to contact L. Micha Ordway, Jr. Esq., at lordway@blawpllc.com or 315.701.6441 or the attorneys in the Bousquet Holstein Labor and Employment or Litigation Practice Groups.

Labor & Employment Practice

In recent years, there has been an explosion of employment-related lawsuits. This trend is the result of several factors including the growing awareness by both employers and employees of their rights and responsibilities in the workplace and the continual development of new case law and statutes on discrimination. Our employment and discrimination lawyers monitor this dynamic area of law including changes and developments regarding state and federal regulations and legislation.

Our attorneys and paralegals possess diverse talents and interdisciplinary skills whose areas of concentration include employer representation, executive compensation and employment contracts, employee advocacy, and litigation.

We have provided representation before various federal and state agencies including the New York State Division of Human Rights, the Department of Labor, the National Labor Relations Board, the Unemployment Insurance Appeal Board, and the Equal Employment Opportunity Commission. In every stage of these proceedings, from investigation and settlement conferences to hearings and appeals, our involvement has been highly effective. Contact us to learn more about how our services can protect your business.

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