

Employee Surveillance and Monitoring

By Jill K. Blackmer

Worried that employees may be using the company's e-mail to send risqué jokes? Would you like to videotape segments of a factory production line for quality assurance? Can you monitor employees' voice mail? Check their desks or lockers? Require employees to submit to drug testing or lie detectors?

In response to concerns about growing litigation with employees, increased business competition, protecting trade secrets and other confidential information, many private employers are instituting a variety of techniques and policies designed to protect businesses and give them a competitive edge. While businesses have a wide array of potential tools available to them, there are limits on the measures they may take and the policies they may adopt. This article focuses on several issues private businesses commonly encounter. Note that the rules for public, or governmental, employers such as public schools, fire and police departments and towns, cities and counties vary.

Company E-Mail, Voice Mail and Computer Systems

The law in some states protects employees and others from interception and disclosure of telecommunications or oral communication unless all parties to the conversation consent. Businesses generally may monitor and review employees' e-mail,

voice mail and computer files provided they have given the employees prior notice that the company may do so and the employees consent. It is best to adopt a written policy and include it in the employee handbook. The monitoring should be done only for business reasons and, as with other company policies, employees should be informed that their consent to these policies is necessary to their continued employment.

Videotaping and Sound Recording

In limited circumstances it may be permissible to videotape employees, even if the recording equipment includes an audio feature. Again, it is necessary to provide prior notice, obtain the employees' consent and of course have a legitimate business reason for the practice. In fact, even where a written policy exists, a business may want to consider requiring the employees to acknowledge in writing that they are aware of the recording and have consented to it. While some businesses routinely record

— without sound — customers for security reasons, this practice can be problematic. Video and audio recording of customers, restaurant patrons and other business guests is not advised as it may result in claims for invasion of privacy and violation of state and federal law.

Drug Testing

Drug testing by employers has spawned much litigation. The general trend is that drug testing programs, if sufficiently justified and carefully designed to minimize intrusiveness, are not likely to expose employers to liability for invasions of privacy. A business's practices must also comply with the Americans with Disabilities Act and must not single out a particular race, gender or ethnicity.

Keeping Tabs on Employees' Activities After Hours

Concerned about potential liability for sexual harassment, some employers have adopted anti-fraternization policies restricting romantic relationships between employees. These policies should be narrowly tailored to the specific circumstances of the business and should be applied in a non-discriminatory fashion.

It is illegal in some other states to require as a condition of employment that employees do not use tobacco products off the job. Unless closely related to particular job duties, a policy prohibiting the drinking of alcohol after hours is unlikely to withstand challenge. ■

EMPLOYEE SURVEILLANCE AND MONITORING

by Jill K. Blackmer, March 1998

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Company E-Mail, Voice Mail and Computer Systems

New Hampshire law protects employees and others from interception and disclosure of telecommunications or oral communication unless all parties to the conversation consent. Businesses generally may monitor and review employees' e-mail, voice mail and computer files provided they have given the employees prior notice that the company may do so and the employees consent. It is best to adopt a written policy and include it in the employee handbook. The monitoring should be done only for business reasons and, as with other company policies, employees should be informed that their consent to these policies is necessary to their continued employment.

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Concerned about potential liability for sexual harassment, some employers have adopted antifraternization policies restricting romantic relationships between employees. These policies should be narrowly tailored to the specific circumstances of the business and should be applied in a nondiscriminatory fashion. It is illegal in New Hampshire to require as a condition of employment that employees do not use tobacco products off the job. Unless closely related to particular job duties, a policy prohibiting the drinking of alcohol after hours is unlikely to withstand challenge.