

Employment Law Digest

An Update from Thornton, Biechlin, Segrato, Reynolds & Guerra, L.C. Employment Law Department

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ELECTRONIC MONITORING: WHAT YOU CAN AND CANNOT DO

Electronic monitoring allows an employer to observe what employees do on the job and review employee communications, including e-mail and Internet activity. There are many business justifications for employers to electronically monitor employees in the workplace including assessing worker productivity, protecting company assets from misappropriation, and ensuring compliance with workplace policies. Software enables employers to secretly, and in real-time, monitor employee's use of networked computers including individual monitoring of each connected computer. Software also enables employers to capture the images from an employee's computer screen at random intervals and to compress those images to provide documentation of all computer work. It can also reveal the online activities of all employees, including Websites visited, the length of the employee's visit to Websites, and whether those sites are productive or unproductive. Recently, the business justifications for employer monitoring have been bolstered by national security concerns.

Basic Federal Protection

The basic federal protection for the privacy of electronic communications is found in the Electronic Communication Privacy Act (ECPA). Under these federal statutes it is unlawful for anyone, including an employer, to intentionally "intercept" the content of a wire, oral or electronic communication. It is also a federal crime for anyone to "access," without authorization, a facility providing electronic communication service and thereby obtain access to a wire or electronic communication while in storage. These laws give private citizens, including employees, the right to sue for civil damages when there has been an unlawful interception or access to a communication in electronic storage in violation of the statute.

Exemptions for Employers

One exemption under the ECPA is of primary importance to employers who engage in this type of electronic monitoring. This exemption is referred to as the "consent" exception. Essentially, an employer may obtain the consent or authorization of a user to intercept

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or access stored electronic communications. One method for obtaining this consent is to adopt and distribute a workplace policy permitting the employer to electronically monitor employee electronic communications in the workplace. Also, the employer could simply obtain individual consent in writing from employees. Either form of consent will work so long as the affected employee has actual notice of the potential for electronic monitoring.

How Courts Interpret the ECPA

The combined actions of Congress and the courts have effectively expanded the ability of employers to monitor electronic communications of employees without violating these laws. Recently, courts have held that Title I of the ECPA only covers interception of electronic communications in transit. Three federal courts, including the 3rd Circuit in *Fraser v. Nationwide Mutual Insurance*, have held that an “interception” of an electronic communication is only prohibited when it occurs contemporaneously with a transmission. If the e-mails are retrieved from storage, they are not in the process of being communicated to another and therefore couldn’t be intercepted. Recent court cases have also held that unauthorized access to stored electronic communications is only prohibited by federal law when the electronic communication is in temporary storage “prior to delivery” to the intended recipient – not to access of communications in storage after the communication has been delivered to the intended recipient and then stored.

Based on the caselaw, the ECPA does not appear to prohibit an employer from electronically monitoring employee electronic communications (including e-mail, voice mail, or Web communication) even without consent, as long as the employer does not intercept those messages while they are in transit or retrieve them from temporary storage or backup storage before the intended recipient has retrieved the message.

Monitoring an employee’s private communications, even at work, may violate federal laws. In *Fisher v. Mt. Olive Lutheran Church*, a youth minister was terminated and sued his employer, claiming the church violated the ECPA by eavesdropping on his personal telephone conversations at work. The court refused to dismiss the claim, after considering application of the ECPA’s business extension exception, which would permit the employer’s interception of the plaintiff’s telephone conversations as long as it was being used in the “ordinary course of its business.” The court held that the employer was required to cease listening to the

minister’s telephone call as soon as it determined that it was personal and the minister was not speaking to a minor. The employer did not have a workplace policy permitting the interception of employee telephone calls and other electronic communications, so the “consent” exception to the ECPA was not applicable.

The Patriot Act

As a result of the USA Patriot Act, employers should anticipate increased obligations to provide private information about employees to law enforcement. Employers may be required to comply with search warrants, including search warrants for e-mail or voicemail messages of employees. “Sneak and Peak” searches and seizures without notice to the subject, to obtain evidence of a criminal offense, are now lawful across the nation. Businesses and their employees, including U.S. citizens, may have their wire and electronic communications monitored by the government through the use of “pen register and trap and trace devices” under expanded rules.

Employers and other persons may be asked to provide access to business records and other tangible items to the FBI under the Foreign Intelligence Surveillance Act. As a result of these changes, employers may benefit from a “good faith reliance” defense available under the ECPA. This defense can be used when the employer responds to proper government requests to produce information, provide facilities, or provide assistance.

Check List for Employers: Minimizing Litigation Risk

1. Adopt a well drafted workplace electronic communications policy and review other policies. Make sure the policy covers all forms of communication, including e-mail, voice mail, etc.
2. Communicate the workplace electronic communications policy to all employees and obtain documentation that employees have received and reviewed the policy.
3. When in doubt of the employer’s legal right to monitor, obtain specific individual consent [*in writing*] from employees to monitor electronic communications.
4. Determine whether there is a business justification for monitoring and document the business justification for monitoring.



5. When electronic monitoring reveals “private” employee communications stop the monitoring and obtain legal advice before continuing to monitor.

6. Develop an action plan to respond appropriately to government/law enforcement requests and orders to monitor electronic communications by employees.

7. Review contracts with Internet Service Providers for privacy concerns and develop procedures and policies to protect confidential and proprietary information communicated over the internet. Be aware that Internet Service Providers have more latitude to access and disclose electronic communications over their internet services, including confidential or proprietary information about businesses. &

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Trends In The Law

Texas Supreme Court Caps Intentional Infliction of Emotional Distress Claim Connected to Sexual Discrimination lawsuit

On August 27, the Texas Supreme Court reduced the judgment in a sexual harassment case from \$9 million to \$300,000. In *Hoffman-La Roche, Inc. v. Joann Zeltwanger*, an employee sued her employer for damages due to sexual harassment of her supervisor. In this case, the employee had claims under the Texas Commission on Human Rights Act (TCHRA) and for intentional infliction of emotional distress.

Under the TCHRA, damages are statutorily capped at \$300,000, but generally other tort claims are not capped. Therefore, the jury awarded the employee \$835,000 for front and back pay, \$500,000 for mental anguish, and \$8 million in punitive damages on the intentional infliction of emotional distress claim. However, the Texas Supreme Court found, in contrast with the lower court decisions on this issue, that the TCHRA provides a remedy for those who believe they have been sexually harassed, and if the facts supporting the claim are essentially the same as the facts supporting the claim for intentional infliction of emotional distress, then the employee gets to sue only under the TCHRA.

Even though this case is a significant victory for employers facing employment-related litigation which often involves a claim of intentional infliction of emotional distress, employers still must be very careful in how

they discipline and discharge employees. Tort claims such as intentional infliction of emotional distress can be brought by employees even if they have another statutory claim where the employer disciplines or terminates the employee in an improper manner. Terminating the employee without a witness while you are upset, is a sure recipe for facing an intentional infliction of emotional distress claim.

Retaliation Claims by Employees

When an employee engages in protected conduct such as reporting an on-the-job injury, or asserts a claim such as age, race or gender discrimination, an employer is prohibited from retaliating with adverse employment actions against the employee. In *Ackel v. National Communications, Inc.*, four female plaintiffs brought sexual harassment claims against their former employer alleging that the President/General Manager sexually harassed them. After the employees raised this issue, they claim the employer retaliated against them. The Fifth Circuit Court held that the employment actions complained of by two of the plaintiffs— reprimand, poor evaluation, some assignments temporarily taken away and change from salary to hourly pay— did not rise to the level of adverse employment actions necessary to establish claims for retaliation. Also, the Court did not consider reprimand, poor evaluation, some assignments temporarily taken away and a change from salary to hourly pay to be a tangible employment action. This ruling is significant in that an employee is now being required to provide evidence of a high level of culpability by the employer before a court will entertain a retaliation claim.

Even though this case is yet another victory for employers, the most common employment-related claim handled by this office continues to be retaliation. This is particularly true when an employee is discharged within a relatively short period of time following the filing of the Workers' Compensation Claim or the reporting to management of such an injury. Because of the Enron disaster, courts and juries are sensitive to employees complaining that they have been harmed for engaging in conduct which they believe they have the right to engage in in the first place (i.e., reporting harassment, etc.). Employers should be extremely careful in how they manage and discharge employees after an employee has engaged in protected activity like reporting an injury or harassment. This is not to say that employees cannot be disciplined and discharged following protected activity; they may be discharged so long as there is evidence that other employees have also been discharged for the same conduct engaged in



by the employee in question but the other employees have not previously engaged in the protected activity.

Enforcement of Arbitration Agreements: Court Allows Employer to Recover Fees

In *Rasusson v. LBC PetroUnited, Inc.*, an employer prevailed in an arbitration proceeding against the employee and sought an award of attorney's fees incurred in bringing the case to arbitration. The trial court granted the attorney's fees to the employer. Upon appeal, the employee argued that the Texas Civil Practice and Remedies Code Section disallows a recovery of attorney's fees for compelling arbitration and that the underlying arbitration agreement required each party to bear their own costs. However, the Appeals Court upheld that the cost provision in the arbitration agreement only applied to costs associated with resolving the dispute in arbitration, and not to costs necessitated in bringing the case to arbitration. Therefore, the employer was able to maintain its award of attorney's fees. &

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For Your Information

Lawsuit Avoidance Can Also Boost Morale

Most employers consider lawsuit avoidance and boosting moral as two completely different fronts, but they may in fact be one and the same. Employer actions like documentation and appraisal also produce what employees want: open communication, fair and consistent treatment, and an atmosphere of dignity and respect. When employees are treated right, they become loyal, they stay, and they may not sue!

Often human resources actions and court proceedings are not rational, they are emotional. What happens is a response to a condition or a relationship. Supervisors and managers can control the conditions of the workplace and build successful relationships. You cannot eliminate all risk and liability, but you can manage risk by controlling certain elements of the workplace, which may reduce the likelihood of a lawsuit and boost employee morale.

Managers can control their own behavior, whom they hire, adherence to policies, consistency with which they treat employees, documentation, discipline, coaching, counseling, training, feedback and recognition. Here are some things that managers can

do to improve both lawsuit avoidance and boost morale: Hiring and initial relationship building are the front line when it comes to avoiding lawsuits and building loyalty and morale. Also, the most important management tool to avoid litigation and boost employee morale is communication. Follow written policies consistently; foster open communication; and use coaching-style discipline to help employees understand how they are performing. &

Question of the Month

Q. We have an employee on FMLA leave during the Christmas holidays. Should the employee receive holiday pay?

A. According to the U.S. Department of Labor, whether or not an employee receives holiday pay while on FMLA leave is dependent upon company policy. For example, if a company pays for a holiday while an employee is on paid leave (i.e., PTO, sick leave, vacation), the employee would be entitled to holiday pay when on leave for unpaid FMLA leave. However, if an employee is not allowed holiday pay by company policy in these other types of leave, he/she would not be entitled to holiday pay while on FMLA. Also, remember a week containing a holiday still counts as a full-week of FMLA leave whether the holiday is paid or not. On the other hand, if an employer shuts down the business during the holiday, or because business is slow, and the employees are generally not expected to report to work, then the week would not count against FMLA leave entitlement. &

- Lance C. Blankenship

UPCOMING SEMINARS

2-25-05 "Writing the Employee Handbook in Texas"
Sponsored by Lorman Education

5-19-05 "Personnel Law Update 2005"
Council on Education in Management



Be sure to check
our website at:
www.thorntonsummers.com
for the most recent
significant changes
in the law
that affect you.

The contents of this newsletter are presented as general information only and are not intended as legal advice. The reader is invited and advised to consult with an attorney for more specific information regarding the matters and materials addressed herein, or for advice based on the individual circumstances of his or her specific situation.

The employment law section of Thornton & Summers represents management in a wide variety of employment law matters. Because we have offices located in Austin, Corpus Christi and McAllen, Texas, we can offer exclusive and timely insight into handling particular employment matters in diversified areas of the state. Of course, our focus is still on claim avoidance through timely advice and counsel before events occur which can lead to lawsuits; however, our firm has extensive jury trial experience in a wide variety of employment law matters. Our expertise includes the following areas:

- management counseling;
- review and preparation of personnel policy and procedures including employee handbooks;
- representation in administrative matters before the Equal Employment Opportunity Commission, Texas Commission on Human Rights and Texas Workforce Commission;
- representation of management in state and federal court for employment related claims involving Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Polygraph Protection Act, Consolidated Omnibus Budget Reconciliation Act, Worker's Compensation Retaliation, Family Medical Leave Act, Fair Labor Standards Act, Texas Commission on Human Rights Act and a variety of state court claims such as intentional infliction of emotional distress, invasion of privacy, defamation and negligence;
- preparation of arbitration agreements and non-subscriber programs;
- Training and preventative seminars to comply with recent U.S. Supreme Court decisions; and
- Wage/hour audits; FLSA claims.

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*If you, or anyone in your office, would like a copy
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