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Monitoring and Backing Up Work-Related Communications

A Potential Liability for Employers: Part 3 in a Three Part Series

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We have established the prevalence of integrating personal cell phones into work matters, but when and how did “bring your own device to work” lead to this cross-path?

In the first two parts of this series to inform employers about the risks introduced by employees using cell phones for work, we examined cell phone use outside of the workplace and highlighted critical effects it may impose on employers. Part one, Distracted Driving-A Potential Liability for Employers, emphasized that employers may be held liable for the negligent actions of an employee acting within the scope of his or her employment at the time of a motor vehicle accident. Part two, Cell Phone Use After Hours Could Require Overtime Compensation, shed light on potential employer penalties for wage theft related to the use of cell phones after work hours. This final series post outlines an employer’s obligation to monitor and back up approved forms of communication while adhering to the Electronic Communications Privacy Act of 1986.

Preserving Work-related Communications

Employers should address their legal obligations to preserve employees’ work-related text messages in a similar form to other e-communications such as email. There are numerous legitimate reasons that an employer may need to access an employee’s e-communications, including text messages. For example, an employer may perform a workplace investigation, or be required to respond to a subpoena or discovery request.

Additionally, employers should ensure that their employees’ approved forms of communication are being backed up in some format. If employees use mobile devices supplied by their employer, the employer should consider implementing a system that automatically backs up all work-related emails and text messages.

Bring Your Own Device Policy

Due to the prevalence of “Bring Your Own Device” policies, employees often opt to use their personal mobile devices at work. According to iconic computer company Dell “61 percent of millennial workers and 50 percent of workers over 30 think the tools they bring from their non-working life are more effective and productive than those that come from work.” [4] Under these circumstances, employers should request that their employees back up all work-related texts and e-communications to a server owned by the employer.

The Electronic Communications Privacy Act

The Electronic Communications Privacy Act of 1986 (ECPA) forbids an employer’s “unauthorized interception” of electronic communications without an employee’s consent. Therefore, employers need the permission of their employees to monitor work-related communications on a personal device. While employers may not require employees to permit access to personal devices, they may request that employees back up any work-related approved forms of communication.

Reasonable Expectation of Privacy at Work

Monitoring and backing up employer-approved forms of communication on company devices and accounts during work hours is considered a legitimate business interest by the ECPA. If an employee consents to his or her employer backing up work-related communications from a personal device, such action is also considered

legitimate. However, an employer should not monitor or store any employee communications considered personal. Additionally, the New Jersey Supreme Court held in *Stengart v. Loving Care Agency* (2010) that employees are entitled to a "reasonable expectation of privacy" at work. This standard is used by New Jersey courts when analyzing whether an employee's privacy has been invaded by an employer. In *Stengart*, the court found that a company's policies were the most useful source to measure an employee's reasonable expectation of privacy. **Thus, employers must implement clear policies about how, when, and what form of employee communications will be monitored.**

TAKEAWAY: Employers need to enforce clear, written policies regarding the use of personal devices in the workplace and the process for monitoring and storing all employer-approved forms of communication.

If you are an employer with questions regarding employee use of mobile devices and technology in and out of the workplace, please contact Tracy Armstrong or another member of the Wilentz Employment Law Team.

Resources:

[1] Employee Privacy-What Can Employers Monitor?
[2] Electronic Communications Privacy Act of 1986 (ECPA)
[3] Stengart v. Loving Care Agency, Inc.
[4] Consumerization: What is in Store for IT?

Attorney

- Tracy Armstrong

Practice

- Employment Law