



TELECOMMUNICATIONS

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E-MAIL PRIVACY AT THE OFFICE

Washington, DC: The introduction of new communications technologies into the workplace has created new privacy concerns for employers and employees. Should an employer have the right to view what an employee is doing on his or her computer while at work or while on company business? Should an employee have an expectation that personal e-mails or documents will be kept private from employers? These are questions that are in the process of being answered by the courts. However, there is still no clear precedent in determining a standard answer to these questions. So far, the courts have decided that employees are entitled to a “reasonable expectation of privacy” but this “reasonable expectation” all depends on the facts of a particular case.

The fact-based nature of the inquiry makes the establishment of clear guidelines difficult. For example, courts have concluded that employers can monitor employees’ e-mails on company computers. However, courts have also recognized a distinction between employees use of company, versus private, e-mail. On this basis, the federal District Court of Appeals in California ruled “that personal text messages sent on two-way pages provided to police officers in Ontario, California were protected from the department.”

In another case addressing the privacy issue, this same Circuit Court ruled that an employee has a reasonable expectation of privacy within the space of his private office. Therefore, “any search of that space and the items located therein must comply with the Fourth Amendment.”

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However, “had the company computer assigned to Ziegler [the employee] for his business-use only been physically located outside a private office, we might have had to consider whether Ziegler had reasonable expectation of privacy in the device itself, in the face of a corporate policy of monitoring the corporate computers.”

Significantly, while recognizing the greater expectation of privacy within a specific office, the courts have also been clear that employees “reasonable expectation of privacy” is overcome if a company has clearly stated a policy that it has the right to inspect all equipment (including laptops, filing cabinets, etc) that it has provided to its employees. Thus, “a public employee’s reasonable expectation of privacy may be reduced or eliminated by ‘legitimate regulations’ or by ‘office practices and procedures,’ such as how frequently coworkers and other individuals are permitted to enter the area that was searched.”

Along these same lines, the courts have found that an employee’s own conduct may limit his expectation of privacy and thus his privacy rights. For example, if an employee “knowingly exposes [materials] to the public, even in his own home or office, [those materials are] not a subject of Fourth Amendment protection.”

Because the expectation of privacy is such a fact specific issue, and because of the myriad of potential fact patterns and

applicable technologies, the line between the right to privacy and the employers right to access remains a blurry one. For example, where will the courts draw the line regarding Web-based e-mail which is not directly controlled by the employer, or, does an employer have the right to view correspondence between an employee and his/her doctor or lawyer if they occur on company provided equipment and email service even though such correspondence, if held face-to-face, would be considered strictly confidential? These kinds of issues are still being considered by the courts.

The lesson is that the legitimate interests of employers and employees are best met by the development and implementation of clear policies and practices regarding the use and monitoring of communications originating from a workplace. These policies must recognize both that employees do have a “reasonable expectation of privacy” but that employers also have a legitimate interest in ensuring that company email is utilized for its intended purpose.

At the end of the day, given the fragility of private information and the difficulty of repairing the damage that can be done by public disclosure, employees are well advised to keep personal e-mails, documents, or the like out of the office and off of company computers or technological devices.

Let us know what you think about these issues. Please join our interactive [blog](#) and share your thoughts!

If you have questions about this article, or if we may be of assistance to you, please contact us without hesitation.

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